An Introduction to Constitutional Rights to and in Education in the United States

Kristi L. Bowman
Associate Dean of Academic Affairs & Professor of Law
Michigan State University College of Law
kristi.bowman@law.msu.edu

Co.Co.A. eBook 2016

Co.Co.A. - Comparative Constitutional Adjudication:
A Research and Teaching Project

Constitutional adjudication is a necessary field of comparative legal research and of training in the legal profession. Constitutional adjudication has become a crucial instrument of safeguard, more in particular, of fundamental rights of individuals and groups.

Comparative legal research therefore is, currently and always more often than in the past, dealing with constitutional adjudication in individual states in Europe, in North America, in Latin America, in Africa, in Asia as well as with regard to supranational courts and regional international courts in Europe, in Latin America, in Africa, while in Asia the non-domestic focus is rather on an intergovernmental setting.

Comparing constitutional adjudication has also a direct impact on the judicial function, in a global system that is experiencing and to some extent even promoting – although at varying degrees – a growing practice of the use of the comparative method by courts. Not only members of courts but their staff – law clerks and assistants – are becoming more and more aware of the contribution of foreign, international and supranational case-law to the purpose of domestic adjudication.

An evolving interactive constitutional scenario – based on the development of an open network of sources of law and on forms of judicial dialogue as an instrument for managing its complexities – requires appropriate systematic comparative legal research.

The Co.Co.A. research and teaching project at the University of Trento is designed to contribute to furthering knowledge, awareness and understanding of the related phenomena and to promote professional training through the organisation of conferences, seminars and summer schools.

http://www.cocoaproject.eu/

© 2016 K. Bowman

Università degli Studi di Trento
Trento 2016
ISBN: 978-88-8443-659-7

Cover image: Matteo Boato, "Famiglia" (olio su tela, 2012)

TABLE OF CONTENTS

Comparative Constitutional Adjudication: A Research and Teaching Project……………………………………….i

Table of Contents………ii

I. Introduction

How to Use This Book..2
US Education System and Sources of US Education Law: An Overview...3
Relevant US Federal Constitutional Provisions………………………………………………………………………5
Sample State Constitutional Provisions….………………………………………………………………………………6

II. A Right to Education and the Duty to Educate

Introduction………9
San Antonio v. Rodriguez, 411 U.S. 1 (US Supreme Court 1973)……………………………………..……...11
Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Supreme Court of the state of Kentucky 1989)………………………………………………………………………..…………..90
Plyler v. Doe, 457 U.S. 202 (US Supreme Court 1982)…………………………………………………..……...141
Wisconsin v Yoder, 406 U.S. 205 (US Supreme Court 1972)…………………………………………………...175
Combs v. Homer-Center School District, 540 F.3d 231 (Federal Appeals Court, 3rd Circuit 2008)….………………………………………………………………………………………….201

III. Education and Privatization

Introduction………..236
Pierce v. Society of Sisters, 268 U.S. 510 (1925)…………………………………………………………………...239
Agostini v. Felton, 521 U.S. 203 (US Supreme Court 1997)…………………………………………………....244
Zelman v. Simmons-Harris, 536 U.S. 639 (US Supreme Court 2002)…………………………..…………...279
Caviness v. Horizon Community Learning Center, Inc., 590 F.3d 806 (Federal appeals court, 9th Circuit 2010)…………………………………………………………………….335
League of Women Voters of Washington v. State, 355 P.3d 1131 (Supreme Court of the state of Washington 2015) (en banc) ……..……………………………………………………..346

IV. The Extent of the State's Control in Schools

Introduction………..367
Stone v. Graham, 449 U.S. 39 (US Supreme Court 1980)……………………………………………………....369
Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707 (Federal trial court, Middle District of state of Pennsylvania 2005)……………………………………………………..374
Griswold v. Driscoll, 616 F.3d 53 (Federal appeals court, 1st Circuit 2010)……………………….……437
Evans-Marshall v. Board of Education, 624 F.3d 332 (Federal appeals court, 6th Circuit 2010)……………………………………………………………………...443
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (US Supreme Court 1969)……….…………………………………………………………………….…………454

Wynar v. Douglas County School District, 728 F.3d 1062
(Federal appeals court, 9th Circuit 2013)……………………………………………………………….....468
Santa Fe v. Doe, 530 U.S. 290 (US Supreme Court 2000)…………………………………………………..480

V. Constitutional Anti-Discrimination Protections

Introduction………..506
Brown v. Board of Education, 347 U.S. 483 (US Supreme Court 1954)………………………………...509
Parents Involved in Community Schools v. Seattle School District, 551 U.S. 701
(US Supreme Court 2007)…………………………………………………………………………………...517
Fitzgerald v. Barnstable, 555 U.S. 246 (2009)……………………………………………………………..622

I. Introduction

How to Use This Book

This eBook is intended to provide a general introduction to the legal regulation of elementary and secondary education in the United States with particular attention to issues of interest to European lawyers, judges, and scholars. A brief introduction at the beginning of each section attempts to summarize the significance of the judicial decisions included and thus ground these materials in the sociolegal tradition.

Given the purpose of this eBook and the possible difficulty of accessing these materials from a non-US location, I chose to leave the judicial opinions in their full form even though this means that most of them are quite lengthy. Fortunately, most of the decisions included here also include a brief summary titled the "syllabus." Accordingly, rather than attempt to read these materials cover to cover, I suggest reading:

- The brief "US Education System and Sources of US Education Law" narrative which starts on the following page;
- The introduction at the beginning of each section;
- The "syllabus" at the beginning of each judicial decision if available; and,
- Select decisions in their entirety as they intersect with your own work or research.

Two additional technical clarifications may be helpful to readers: First, throughout the judicial decisions, an asterisk or two is often present and followed by a number (e.g. *123, **4567); this indicates the page number in the official place(s) of publication. When there are two or more places of publication, parallel sets of page numbers will be present throughout the decision. Second, when the original sources contain footnotes, I have indented footnote material for readers' ease.

Admittedly, this eBook is not comprehensive, nor is it a substitute for a book in an Education Law class in a US law school. Constitutional issues not covered in these materials include procedural due process in student discipline and search and seizure of students. Individuals interested in those issues may benefit from reading the US Supreme Court's decisions in *Goss v. Lopez*, 419 U.S. 565 (1975); *Ingraham v. Wright*, 430 U.S. 651 (1977); *New Jersey v. TLO*, 469 U.S. 325 (1985); *Board of Education v. Earls*, 536 U.S. 822 (2002); and *Safford v. Redding*, 557 U.S. 364 (2009). Additionally, as discussed briefly in the introductory material for Section V, anti-discrimination protections in the United States are both constitutional and statutory; this eBook focuses on constitutional rights and thus do not include information about purely statutory anti-discrimination measures, such as protections for students with disabilities.

I hope these materials are useful to readers who seek to learn more about the US legal system and its regulation of education, especially from a comparative constitutional perspective. Those interested in further research will find a wealth of valuable secondary source material in US law journals.

Kristi Bowman
East Lansing, Michigan

US Education System and Sources of US Education Law: An Overview

In 2015, about 55 million children were enrolled in schools in the United States. The vast majority of these students were enrolled in public schools. Only 10% were enrolled in private schools and about 3% were home schooled.

Unlike in many other countries, education in the US historically has been a primary responsibility of state (provincial) and local governments, not of the federal government. States (provinces) make general decisions regulating schools and covering topics such as learning objectives, teacher certification requirements, and school funding. Local school districts are independent administrative units encompassing as little as one school and as many as dozens of schools; they make decisions about specific curricular and extracurricular offerings, which teachers will be hired and retained, and school rules and student discipline. Public schools are financed through a combination of state and local funding (on average, each contributing about 45% of a district's revenue), and federal funding (contributing roughly 10%).

Federal regulatory involvement in education began in the 1960s with the passage of the Elementary and Secondary Education Act (ESEA), which focused on providing additional funding to educate children in poverty. Until recently, ESEA was reauthorized about every six years; the last reauthorization occurred in 2001 (negotiations are underway as this eBook is going to press but whether those negotiations will actually result in reauthorization remains an open question). Often times, the Act was renamed each time it was reauthorized and today ESEA is best known by its most recent name, the No Child Left Behind Act. In addition to ESEA, federal legislation also has prohibited schools from discriminating on the basis of sex, race, and disability, with the disability anti-discrimination legislation being the most extensive. The federal executive branch enforces the anti-discrimination provisions through the US Department of Education's Office for Civil Rights; the also provisions can be the basis for litigation brought by a private party against a school district or the state.

Regulatory enforcement is often quiet but important; indeed, after the US Supreme Court decided *Brown v. Board of Education* in 1954, social resistance was deep and widespread—it was only when the federal government leaned heavily on districts about a decade later that substantial desegregation occurred. While acknowledging the significance of the executive branch's enforcement power, these materials focus on the judicial decisions that pave the way for change. Specifically, the materials focus on federal constitutional law, which has been the source of much education rights litigation in the US, with one exception mentioned below.

In the US, federal constitutional rights are negative rights. The federal rights most relevant to K-12 public education are focused on preventing the government from discriminating on the basis of race or sex, from advancing religious beliefs, and from quashing students' rights to speak freely, et cetera. US courts do not consider regional or global international law when adjudicating education rights cases.

By contrast, each of the 50 states has a constitution that guarantees a right to education as a positive right, although the strength of this guarantee varies dramatically from one state to another. The right

to education provisions have been litigated mainly via school finance litigation, with plaintiffs claiming that the state is not providing sufficient funding to make the right to education a reality.

At this point in time, some educational rights issues have been settled via litigation—for example, public schools may teach *about* religion, but they may not teach religion *as truth*—but many issues remain unsettled disputes. For example, current constitutional controversies with no clear answer involve:

- The ways in which and degree to which schools may assist historically and presently-disadvantaged groups;
- How schools should accommodate transgender students;
- Whether schools can discipline students for online, off-campus speech; and,
- How much schools can restrict students' speech advancing minority viewpoints about sensitive social or political issues.

For those interested in further statistical information about US public and private schools, the National Center for Education Statistics is a reliable source of extensive data about US public schools: nces.ed.gov; it is a branch of the federal Department of Education. Additionally, the website for a weekly newspaper about K-12 education issues, *Education Week*, www.edweek.org, provides an excellent overview of current education law and policy controversies across the country.

Relevant US Federal Constitutional Provisions

The First Amendment contains the provisions regarding religion and free speech. The Fourth Amendment contains the provisions regarding search and seizure. The Ninth Amendment and Tenth Amendment make education a function of the states, since it is not reserved to the federal government. The Fourteenth Amendment makes the first ten amendments applicable to the states, and also includes equal protection provisions; it was adopted soon after the US Civil War.

First Amendment (1789):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment (1789):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ninth Amendment (1789):

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment (1789):

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment, Sections 1 and 5 (1868):

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Sample State Constitutional Provisions

Although each of the 50 states has a unique constitutional provision regarding education, the provisions can be classified into some general categories. One way of classifying divides the provisions into three groups roughly equal in number, ranging from provisions that merely require the state to establish a system of public schools; to provisions that create some sort of standard defining the quality of education that should be provided; to provisions that appear to prioritize education even over other important government functions. (For more detail about this classification scheme, see William Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 Journal of Law & Politics 525, 539-40 (1998).) Examples of each type of provision follow:

Establishment Provision (low duty)
Tennessee Constitution, Article XI, § 12:

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.

Quality Standard Provision (mid-level duty)
Kentucky Constitution §§ 183,186

> (183) The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.
>
> (186) All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.

High Duty Provision
Michigan Constitution, Art. VIII, §§ 1–2 (1963).

> (1) Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.
>
> (2) The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, preelementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

II. A Right to Education and the Duty to Educate

Introduction

This section presents prominent judicial decisions that have defined the contours of students' right to education and, relatedly, the state's duty to educate.

In the late 1960s and early 1970s, a handful of cases across the country sought to establish a positive right to education. The first decision in this section, *San Antonio v. Rodriguez*, was issued in 1973 by the U.S. Supreme Court. It answered the question of whether there was a positive right to education in the federal constitution with a definitive "no." Before and after *Rodriguez*, federal law has been the source for students and teachers to argue that their negative (anti-discrimination) rights have been abridged, but after *Rodriguez*, all positive rights litigation has taken place in state courts.

Thus, the second decision in this section, *Rose v. Council for Better Education*, is the Kentucky Supreme Court's iconic 1989 decision that interpreted what the state constitutional requirement of creating an "efficient" system of schools meant, in the context of examining the state's system of school finance. Kentucky's constitutional provision is excerpted in the previous section; for more information about the political action and social mobilization that helped make the *Rose* litigation a short- and long-term success for plaintiffs, see Anne Newman's book *Realizing Educational Rights: Advancing School Reform Through Courts and Communities* (2013).

Next is a decision from the US Supreme Court about a school district's duty to educate undocumented immigrant children who are residents in their school district. This case, *Plyler v. Doe*, was decided in 1982 and holds that undocumented (illegally-present) students have a right to be educated on the same terms as citizens. Recently, *Plyler* has given rise to debate about whether undocumented immigrants should be able to enroll in states' public colleges and universities as "in state" students, paying the lower tuition available to state residents. Articles in the 2011 symposium in the Michigan State University Law Review contain more discussion of these higher education issues and individuals interested in *Plyler* are recommended to the work of Michael Olivas, among others.

The final two decisions in this section relate to home schooling. The first of these, *Wisconsin v. Yoder*, is a US Supreme Court decision from 1972 in which the Court examined the state's duty to educate children in the face of the request of members of the Old Order Amish religion to have their children excused from school after eighth grade. Interestingly, the language of the Court suggests that it would be reluctant to grant an exception to anyone other than the Amish. However, because states are free to permit children to be home schooled, today, requests such as Yoder's are most often accommodated under home schooling statutes. In fact, about 3% of American children are home schooled presently. *Yoder* is noteworthy for its focus on parents' rights, an issue generally absent from the US discussion about education rights.

The last case in this section, *Combs v. Homer-Center School District*, a federal appeals decision from 2008, engages the issue of home schooling directly, discussing the duties of both the state and parents, and also examining the ways in which parents' claims of religious freedom intersect with state oversight of home schooling. The Home School Legal Defense Association maintains a list of litigation involving home schooling issues at www.hslda.org/legal. Although many of the legal disputes about

home schooling today involve parents' claims of religious freedom, those interested in the topic also may benefit from reading an early home schooling case that focused more directly on balancing the duty of the state and rights of parents: *Care and Protection of Charles*, 504 N.E.2d 592 (Supreme Court of the State of Massachusetts, 1987).

San Antonio v. Rodriguez, 411 U.S. 1 (US Supreme Court 1973).

Syllabus[*]

> * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The financing of public elementary and secondary schools in Texas is a product of state and local participation. Almost half of the revenues are derived from a largely state-funded program designed to provide a basic minimum educational offering in every school. Each district supplements state aid through an ad valorem tax on property within its jurisdiction. Appellees brought this class action on behalf of schoolchildren said to be members of poor families who reside in school districts having a low property tax base, making the claim that the Texas system's reliance on local property taxation favors the more affluent and violates equal protection requirements because of substantial interdistrict disparities in per-pupil expenditures resulting primarily from differences in the value of assessable property among the districts. The District Court, finding that wealth is a 'suspect' classification and that education is a 'fundamental' right, concluded that the system could be upheld only upon a showing, which appellants failed to make, that there was a compelling state interest for the system. The court also concluded that appellants failed even to ***2** demonstrate a reasonable or rational basis for the State's system. Held:

1. This is not a proper case in which to examine a State's laws under standards of strict judicial scrutiny, since that test is reserved for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. Pp. 1288—1302.

(a) The Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of 'poor' people or to occasion discriminations depending on the relative wealth of the families in any district. And, insofar as the financing system disadvantages those who, disregarding their individual income characteristics, reside in comparatively poor school districts, the resulting class cannot be said to be suspect. Pp. 1288—1294.

(b) Nor does the Texas school-financing system impermissibly interfere with the exercise of a 'fundamental' right or liberty. Though education is one of the most important services performed by the State, it is not within the limited category of rights recognized by this Court as guaranteed by the Constitution. Even if some identifiable quantum of education is arguably entitled to constitutional protection to make meaningful the exercise of other constitutional rights, here there is no showing that the Texas system fails to provide the basic minimal skills necessary for that purpose. Pp. 1294—1300.

(c) Moreover, this is an inappropriate case in which to invoke strict scrutiny since it involves the most delicate and difficult questions of local taxation, fiscal planning, educational policy, and federalism, considerations counseling a more restrained form of review. Pp. 1300—1302.

2. The Texas system does not violate the Equal Protection Clause of the Fourteenth Amendment. Though concededly imperfect, the system bears a rational relationship to a legitimate state purpose. While assuring a basic education for every child in the State, it permits and encourages participation in and significant control of each district's schools at the local level. Pp. 1302—1307.

*****1282 *4*** Mr. Justice POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary****5*** schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas.[1] They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants[2] were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The complaint****6*** was filed in the summer of 1968 and a three-judge court was impaneled in January 1969.[3] In December 1971[4] the panel rendered its judgment in a per curiam opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[5] The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. 406 U.S. 966, 92 S.Ct. 2413, 32 L.Ed.2d 665 (1972). For the reasons stated in this opinion, we reverse the decision of the District Court.

> 1. Not all of the children of these complainants attend public school. One family's children are enrolled in private school 'because of the condition of the schools in the Edgewood Independent School District.' Third Amended Complaint, App. 14.
>
> 2. The San Antonio Independent School District, whose name this case still bears, was one of seven school districts in the San Antonio metropolitan area that were originally named as defendants. After a pretrial conference, the District Court issued an order dismissing the school districts from the case. Subsequently, the San Antonio Independent School District joined in the plaintiffs' challenge to the State's school finance system and filed an amicus curiae brief in support of that position in this Court.
>
> 3. A three-judge court was properly convened and there are no questions as to the District Court's jurisdiction or the direct appealability of its judgment. 28 U.S.C. §§ 2281, 1253.
>
> 4. The trial was delayed for two years to permit extensive pretrial discovery and to allow completion of a pending Texas legislative investigation concerning the need for reform of its public school finance system. 337 F.Supp. 280, 285 n. 11 (W.D.Tex.1971).
>
> 5. 337 F.Supp. 280. The District Court stayed its mandate for two years to provide Texas an opportunity to remedy the inequities found in its financing program. The court, however, retained jurisdiction to fashion its own remedial order if the State failed to offer an acceptable plan. Id., at 286.

I

The first Texas State Constitution, promulgated upon Texas' entry into the Union in 1845, provided for the establishment of a system of free schools. [6] Early in its history, Texas adopted a dual approach to the financing of its schools, relying on mutual participation by the local school districts and the State. As early as 1883, the state ***7** constitution was amended to provide for the creation of local school districts empowered to levy ad valorem taxes with the consent of local taxpayers for the 'erection . . . of school buildings' and for the 'further maintenance of public free schools.'[7] Such local funds as were raised were supplemented by funds distributed to each district from the State's Permanent and Available School Funds.[8] The Permanent****1283** School Fund, its predecessor established in 1854 with $2,000,000 realized from an annexation settlement,[9] was thereafter endowed with millions of acres of public land set aside to assure a continued source of income for school support.[10] The Available School Fund, which received income from the Permanent School Fund as well as from a state ad valorem property tax and other designated taxes,[11] served as the disbursing arm for most state educational funds throughout the late 1800's and first half of this century. Additionally, in 1918 an increase in state property taxes was used to finance a program providing free textbooks throughout the State.[12]

6. Tex. Const., Art. X, § 1 (1845):'A general diffusion of knowledge being essential to the preservation of the rights and liberties of the people, it shall be the duty of the legislature of this State to make suitable provision for the support and maintenance of public schools.' Id., 2:'The Legislature shall, as early as practicable, establish free schools throughout the State, and shall furnish means for their support by taxation on property . . ..'

7. Tex. Const. of 1876, Art. 7, § 3, as amended, Aug. 14, 1883, Vernon's Ann.Tex.St.

8. Id., Art. 7, §§ 3, 4, 5.

9. 3 Gammel's Laws of Texas 1847—1854, p. 1461. See Tex. Const. Art. 7, §§ 1, 2, 5 (interpretive commentaries); 1 Report of Governor's Committee on Public School Education, The Challenge and the Chance 27 (1969) (hereinafter Governor's Committee Report).

10. Tex. Const., Art. 7, § 5 (see also the interpretive commentary); 5 Governor's Committee Report 11—12.

11. The various sources of revenue for the Available School Fund are cataloged in A Report of the Adequacy of Texas Schools, prepared by Texas State Board of Education, 7—15 (1938) (hereinafter Texas State Bd. of Educ.).

12. Tex. Const., Art. 7, § 3, as amended, Nov. 5, 1918 (see interpretive commentary).

Until recent times, Texas was a predominantly rural State and its population and property wealth were spread ***8** relatively evenly across the State. [13] Sizable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced. [14] The location of commercial and industrial property began to play a significant role in determining the amount of tax resources available

to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.[15]

13. 1 Governor's Committee Report 35; Texas State Md. of Educ., supra, n. 11, at 5—7; J. Coons, W. Clune, & S. Sugarman, Private Wealth and Public Education 48—49 (1970); E. Cubberley, School Funds and Their Apportionment 21—27 (1905).

14. By 1940, one-half of the State's population was clustered in its metropolitan centers. 1 Governor's Committee Report 35.

15. Gilmer-Aikin Committee, To Have What We Must 13 (1948).

In due time it became apparent to those concerned with financing public education that contributions from the Available School Fund were not sufficient to ameliorate these disparities.[16] Prior to 1939, the Available School Fund contributed money to every school district at a rate of $17.50 per school-age child.[17] Although the amount was increased several times in the early 1940's,[18] ***9** the Fund was providing only $46 per student by 1945.[19]

16. Still, The Gilmer-Aikin Bills 11—13 (1950); Texas State Bd. of Educ., supra, n. 11.

17. R. Still, supra, n. 16, at 12. It should be noted that during this period the median per-pupil expenditure for all schools with an enrollment of more than 200 was approximately $50 per year. During this same period, a survey conducted by the State Board of Education concluded that ‘in Texas the best educational advantages offered by the State at present may be had for the median cost of $52.67 per year per pupil in average daily attendance.’ Texas State Bd. of Educ., supra, n. 11, at 56.

18. General Laws of Texas, 46th Legis., Reg.Sess.1939, c. 7, pp. 274—275 ($22.50 per student); General & Spec. Laws of Texas, 48th Legis., Reg.Sess.1943, c. 161, pp. 262—263 ($25 per student).

19. General & Spec. Laws of Texas, 49th Legis., Reg.Sess.1945, c. 52, pp. 74—75; Still, supra, n. 16, at 12.

Recognizing the need for increased state funding to help offset disparities in local spending and to meet Texas' changing educational requirements, the state legislature in the late 1940's undertook a thorough evaluation of public education*****1284** with an eye toward major reform. In 1947, an 18-member committee, composed of educators and legislators, was appointed to explore alternative systems in other States and to propose a funding scheme that would guarantee a minimum or basic educational offering to each child and that would help overcome interdistrict disparities in taxable resources. The Committee's efforts led to the passage of the Gilmer-Aikin bills, named for the Committee's co-chairmen, establishing the Texas Minimum Foundation School Program [20]. Today, this Program accounts for approximately half of the total educational expenditures in Texas.[21]

20. For a complete history of the adoption in Texas of a foundation program, see Still, supra, n. 16. See also 5 Governor's Committee Report 14; Texas Research League, Public School Finance Problems in Texas 9 (Interim Report 1972).

21. For the 1970—1971 school year this state aid program accounted for 48% of all public school funds. Local taxation contributed 41.1% and 10.9% was provided in federal funds. Texas Research League, supra, n. 20, at 9.

The Program calls for state and local contributions to a fund earmarked specifically for teacher salaries, operating expenses, and transportation costs. The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible—as a unit—for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts ***10** under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State.[22] Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county.[23] The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

22. 5 Governor's Committee Report 44—48.

23. At present, there are 1,161 school districts in Texas. Texas Research League, supra, n. 20, at 12.

The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children[24] but that would not by itself exhaust any district's resources.[25] Today every school district does impose a property tax from which it derives locally expendable ***11** funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program.

24. In 1948, the Gilmer-Aikin Committee found that some school districts were not levying any local tax to support education. Gilmer-Aikin Committee, supra, n. 15, at 16. The Texas State Board of Education Survey found that over 400 common and independent school districts were levying no local property tax in 1935—1936. Texas State Bd. of Educ., supra n. 11, at 39—42.

25. Gilmer-Aikin Committee, supra, n. 15, at 15.

In the years since this program went into operation in 1949, expenditures for education—from state as well as local sources—have increased steadily. Between 1949 and 1967, expenditures increased

approximately 500%.[26] In the ****1285*** last decade alone the total public school budget rose from $750 million to.$2.1 billion[27] and these increases have been reflected in consistently rising per pupil expenditures throughout the State.[28] Teacher salaries, by far the largest item in any school's budget, have increased dramatically—the state-supported minimum salary for teachers possessing college degrees has risen from $2,400 to $6,000 over the last 20 years.[29]

26. 1 Governor's Committee Report 51—53.

27. Texas Research League, supra, n. 20, at 2.

28. In the years between 1949 and 1967, the average per-pupil expenditure for all current operating expenses increased from $206 to $493. In that same period, capital expenditures increased from $44 to $102 per pupil. 1 Governor's Committee Report 53—54.

29. Acts 1949, 51st Legis., p. 625, c. 334, Art. 4, Tex. Educ. Code Ann. § 16.302 (1972); see generally 3 Governor's Committee Report 113—146; Berke, Carnevale, Morgan & White, The Texas School Finance Case: A Wrong in Search of a Remedy, 1 J. of L. & Educ. 659, 681—682 (1972).

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary ****12*** and secondary schools. The district is are enrolled in its 25 elementary situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is $5,960—the lowest in the metropolitan area—and the median family income ($4,686) is also the lowest.[30] At an equalized tax rate of $1.05 per $100 of assessed property—the highest in the metropolitan area—the district contributed $26 to the education of each child for the 1967—1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed $222 per pupil for a state-local total of $248.[31] Federal funds added another $108 for a total of $356 per pupil.[32]

30. The family income figures are based on 1960 census statistics.

31. The Available School Fund, technically, provides a second source of state money. That Fund has continued as in years past (see text accompanying nn. 16—19, supra) to distribute uniform per-pupil grants to every district in the State. In 1968, this Fund allotted $98 per pupil However, because the Available School Fund contribution is always subtracted from a district's entitlement under the Foundation Program, it plays no significant role in educational finance today.

32. While federal assistance has an ameliorating effect on the difference in school budgets between wealthy and poor districts, the District Court rejected an argument made by the State in that court that it should consider the effect of the federal grant in assessing the discrimination claim. 337 F.Supp., at 284. The State has not renewed that contention here.

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly 'Anglo,' having only 18% Mexican-Americans ***13** and less than 1% Negroes. The assessed property value per pupil exceeds $49,000,[33] and the median ****1286** family income is $8,001. In 1967—1968 the local tax rate of $.85 per $100 of valuation yielded $333 per pupil over and above its contribution to the Foundation Program. Coupled with the $225 provided from that Program, the district was able to supply $558 per student. Supplemented by a $36 per-pupil grant from federal sources, Alamo Heights spent $594 per pupil.

33. A map of Bexar County included in the record shows that Edgewood and Alamo Heights are among the smallest districts in the county and are of approximately equal size. Yet, as the figures above indicate, Edgewood's student population is more than four times that of Alamo Heights. This factor obviously accounts for a significant percentage of the differences between the two districts in per-pupil property values and expenditures. If Alamo Heights had as many students to educate as Edgewood does (22,000) its per pupil assessed property value would be approximately $11,100 rather than $49,000, and its per-pupil expenditures would therefore have been considerably lower.

Although the 1967—1968 school year figures provide the only complete statistical breakdown for each category of aid,[34] more recent partial statistics indicate that the previously noted trend of increasing state aid has been significant. For the 1970—1971 school year, the Foundation School Program allotment for Edgewood was $356 per pupil, a 62% increase over the 1967—68 school year. Indeed, state aid alone in 1970—1971 equaled Edgewood's entire 1967—1968 school budget from local, state, and federal sources. Alamo Heights enjoyed a similar increase under the Foundation Program, netting $491 per pupil in 1970—1971.[35] These recent figures ***14** also reveal the extent to which these two districts' allotments were funded from their own required contributions to the Local Fund Assignment. Alamo Heights, because of its relative wealth, was required to contribute out of its local property tax collections approximately $100 per pupil, or about 20% of its Foundation grant. Edgewood, on the other hand, paid only $8.46 per pupil, which is about 2.4% of its grant.[36] It appears then that, at least as to these two districts, the Local Fund Assignment does reflect a rough approximation of the relative taxpaying potential of each.[37]

34. The figures quoted above vary slightly from those utilized in the District Court opinion. 337 F.Supp., at 282. These trivial differences are apparently a product of that court's reliance on slightly different statistical data than we have relied upon.

35. Although the Foundation Program has made significantly greater contributions to both school districts over the last several years, it is apparent that Alamo Heights has enjoyed a

larger gain. The sizable difference between the Alamo Heights and Edgewood grants is due to the emphasis in the State's allocation formula on the guaranteed minimum salaries for teachers. Higher salaries are guaranteed to teachers having more years of experience and possessing more advanced degrees. Therefore, Alamo Heights, which has a greater percentage of experienced personnel with advanced degrees, receives more state support. In this regard, the Texas Program is not unlike that presently in existence in a number of other States. Coones, Clune, Sugarman, supra, n. 13, at 63—125. Because more dollars have been given to districts that already spend more per pupil, such Foundation formulas have been described as 'anti-equalizing.' Ibid. The formula, however, is anti-equalizing only if viewed in absolute terms. The percentage disparity between the two Texas districts is diminished substantially by state aid. Alamo Heights derived in 1967—1968 almost 13 times as much money from local taxes as Edgewood did. The state aid grants to each district in 1970—1971 lowered the ratio to approximately two to one, i.e., Alamo Heights had a little more than twice as much money to spend per pupil from its combined state and local resources.

36. Texas Research League, supra, n. 20, at 13.

37. The Economic Index, which determines each county's share of the total Local Fund Assignment, is based on a complex formula conceived in 1949 when the Foundation Program was instituted. See text, supra, at 1283—1284. It has frequently been suggested by Texas researchers that the formula be altered in several respects to provide a more accurate reflection of local taxpaying ability, especially of urban school districts. 5 Governor's Committee, Report 48; Texas Research League, Texas Public School Finance: A Majority of Exceptions 31—32 (2d Interim Report 1972); Berke, Carnevale, Morgan & White, supra, n. 29, at 680—681.

*****1287 *15*** Despite these recent increases, substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State[38] still exist. And it was ****16*** these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school financing violated the Equal Protection Clause. The District Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. 337 F.Supp., at 282. Finding that wealth is a 'suspect' classification and that education is a 'fundamental' interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest. Id., at 282—284. On this issue the court concluded that '(n)ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications.' Id., at 284.

38. The District Court relied on the findings presented in an affidavit submitted by Professor Berke of Syracuse University. His sampling of 110 Texas school districts demonstrated a direct correlation between the amount of a district's taxable property and its level of per-pupil expenditures. But this study found only a partial correlation between a district's median family income and per-pupil expenditures. The study also shows, in the relatively few districts at the extremes, an inverse correlation between percentage of minorities and expenditures.

Categorized by Equalized Property Values, Median Family Income, and State-Local Revenue

Market Value of Taxable Property Per Pupil	Median Family Income From 1960	Per Cent Minority Pupils	State & Local Revenues Per Pupil
Above $100,000 (10 districts)	$5,900	8%	$815
$100,000-$50,000 (26 districts)	$4,425	32%	$544
$50,000-$30,000 (30 districts)	$4,900	23%	$483
$30,000-$10,000 (40 districts)	$5,050	31%	$462
Below $10,000 (4 districts)	$3,325	79%	$305

Although the correlations with respect to family income and race appear only to exist at the extremes, and although the affiant's methodology has been questioned (see Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny, 120 U. Pa. L. Rev. 504, 523—525, nn. 67, 71 (1972)), insofar as any of these correlations is relevant to the constitutional thesis presented in this case we may accept its basic thrust. But see infra, at 1292—1293. For a defense of the reliability of the affidavit, see Berke, Carnevale, Morgan & White, supra, n. 29.

Texas virtually concedes that its historically rooted dual system of financing education could not withstanding the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights[39] or that involve suspect classifications.[40] If, as *****1288*** previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a ‘heavy burden of justification,’ that the State must ****17*** demonstrate that its educational system has been structured with ‘precision,’ and is ‘tailored’ narrowly to serve legitimate objectives and that it has selected the ‘less drastic means' for effectuating its objectives,[41] the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that '(n)o one familiar with the Texas system would contend that it has yet achieved perfection.'[42] Apart from its concession that educational financing in Texas has ‘defects'[43] and ‘imperfections,'[44] the State defends the system's rationality with vigor and disputes the District Court's finding that it lacks a ‘reasonable basis.’

39. E.g., Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

40. E.g., Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964).

41. See Dunn v. Blumstein, supra, 405 U.S., at 343, 92 S.Ct., at 1003, and the cases collected therein.

42. Brief for Appellants 11.

43. Ibid.

44. Tr. of Oral Arg. 3; Reply Brief for Appellants 2.

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

II

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to Texas' system of school financing. In concluding that strict judicial scrutiny was required, ***18** that court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes,[45] and on cases disapproving wealth restrictions on the right to vote.[46] Those cases, the District Court concluded, established wealth as a suspect classification. Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as controlling. It then reasoned, based on decisions of this Court affirming the undeniable importance of education, [47] that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand.

45. E.g., Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

46. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); McDonald v. Board of Election Com'rs, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); Goosby v. Osser, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973).

47. See cases cited in text, infra, at 1294—1295.

We are unable to agree that this case, which in significant aspects is sui generis, may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause. Indeed, for

the several reasons that follow, we find neither the suspect-classification not the fundamental-interest analysis persuasive.

A

The wealth discrimination discovered by the District Court in this *****1289*** case, and by several other courts that have recently struck down school-financing laws in other States,[48] is quite unlike any of the forms of wealth discrimination****19*** heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

> 48. Serrano v. Priest, 5 Cal.3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971); Van Dusartz v. Hatfield, 334 F.Supp. 870 (D.C.Minn.1971); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), rehearing granted, Jan. 1973.

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. Examination of the District Court's opinion and of appellees' complaint, briefs, and contentions at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. The Texas system of school financing might be regarded as discriminating (1) against 'poor' persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally 'indigent,'[49] or ****20*** (2) against those who are relatively poorer than others, [50] or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts. [51] Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting*****1290*** classification may be regarded as suspect.

> 49. In their complaint, appellees purported to represent a class composed of persons who are 'poor' and who reside in school districts having a 'low value of . . . property.' Third Amended Complaint App. 15. Yet appellees have not defined the term 'poor' with reference to any absolute or functional level of impecunity. See text, infra, at 1290—1291. See also Brief for Appellees 1, 3; Tr. of Oral Arg. 20—21.

> 50. Appellees' proof at trial focused on comparative differences in family incomes between residents of wealthy and poor districts. They endeavored, apparently, to show that there exists a direct correlation between personal family income and educational expenditures. See text, infra, at 1292—1293. The District Court may have been relying on this notion of relative discrimination based on family wealth. Citing appellees' statistical proof, the court emphasized

that ‘those districts most rich in property also have the highest median family income . . . while the poor property districts are poor in income . . ..’ 337 F.Supp., at 282.

51. At oral argument and in their brief, appellees suggest that description of the personal status of the residents in districts that spend less on education is not critical to their case. In their view, the Texas system is impermissibly discriminatory even if relatively poor districts do not contain poor people. Brief for Appellees 43—44; Tr. of Oral Arg. 20—21. There are indications in the District Court opinion that it adopted this theory of districts discrimination. The opinion repeatedly emphasizes the comparative financial status of districts and early in the opinion it describes appellees' class as being composed of ‘all . . . children throughout Texas who live in school districts with low property valuations.’ 337 F.Supp., at 281.

The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. In ***21** Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), and its progeny,[52] the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion de facto discrimination against those who, because of their indigency, were totally unable to pay for transcripts. And the Court in each case emphasized that no constitutional violation would have been shown if the State had provided some ‘adequate substitute’ for a full stenographic transcript. Britt v. North Carolina, 404 U.S. 226, 228, 92 S.Ct. 431, 434, 30 L.Ed.2d 400 (1971); Gardner v. California, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969); Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); Eskridge v. Washington State Board of Prisons, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958).

52. Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971); Williams v. Oklahoma City, 395 U.S. 458, 89 S.Ct. 1818, 23 L.Ed.2d 440 (1969); Gardner v. California, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969); Roberts v. LaVallee, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967); Long v. District Court of Iowa, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); Eskridge v. Washington State Board of Prisons, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958).

Likewise, in Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), a decision establishing an indigent defendant's right to court-appointed counsel on direct appeal, the Court dealt only with defendants who could not pay for counsel from their own resources and who had no other way of gaining representation. Douglas provides no relief for those on whom the burdens of paying for a criminal defense are relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.

Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), and Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), struck down criminal penalties that subjected indigents to incarceration simply because***22** of their inability to pay a fine. Again, the disadvantaged class was

composed only of persons who were totally unable to pay the demanded sum. Those cases do not touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. The Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.

Finally, in Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), the Court invalidated the Texas filing-fee requirement for primary elections. Both of the relevant classifying facts found in the previous cases were present there. The size of the fee, often running into the thousands of dollars and, *****1291*** in at least one case, as high as $8,900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided 'no reasonable alternative means of access to the ballot' (id., at 149, 92 S.Ct. at 859), inability to pay occasioned an absolute denial of a position on the primary ballot.

Only appellees' first possible basis for describing the class disadvantaged by the Texas school-financing system—discrimination against a class of definably 'poor' persons—might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the 'poor,' appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any ****23*** designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that '(i)t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts . . .. Thus, the major factual assumption of Serrano—that the educational financing system discriminates against the 'poor'—is simply false in Connecticut.'[53] Defining 'poor' families as those below the Bureau of the Census 'poverty level,'[54] the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts.[55] Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts.

53. Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L.J. 1303, 1328—1329 (1972).

54. Id., at 1324 and n. 102.

55. Id., at 1328.

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than

that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money ***24** expended for it,[56] a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.[57] Nor indeed, in view of ****1292** the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an 'adequate' education for all children in the State. By providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to 'guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education.“[58] The State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now assures 'every child in every school district an adequate education.'[59] No proof was offered at trial persuasively discrediting or refuting the State's assertion.

56. Each of appellees' possible theories of wealth discrimination is founded on the assumption that the quality of education varies directly with the amount of funds expended on it and that, therefore, the difference in quality between two schools can be determined simplistically by looking at the difference in per-pupil expenditures. This is a matter of considerable dispute among educators and commentators. See nn. 86 and 101, infra.

57. E.g., Bullock v. Carter, 405 U.S., at 137, 149, 92 S.Ct., at 852, 858; Mayer v. City of Chicago, 404 U.S., at 194, 92 S.Ct., at 414; Draper v. Washington, 372 U.S., at 495—496, 83 S.Ct., at 778—779; Douglas v. California, 372 U.S., at 357, 83 S.Ct., at 816.

58. Gilmer-Aikin Committee, supra, n. 15, at 13. Indeed, even though local funding has long been a significant aspect of educational funding, the State has always viewed providing an acceptable education as one of its primary functions. See Texas State Bd. of Educ., supra, n. 11, at 1, 7.

59. Brief for Appellants 35; Reply Brief for Appellants 1.

***25** For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.[60]

60. An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. After all, Texas has undertaken to do a good deal more than provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to

ameliorate by state funding and by the local assessment program the disparities in local tax resources.

As suggested above, appellees and the District Court may have embraced a second or third approach, the second of which might be characterized as a theory of relative or comparative discrimination based on family income. Appellees sought to prove that a direct correlation exists between the wealth of families within each district and the expenditures therein for education. That is, along a continuum, the poorer the family the lower the dollar amount of education received by the family's children.

The principal evidence adduced in support of this comparative-discrimination claim is an affidavit submitted by Professor Joele S. Berke of Syracuse University's Educational Finance Policy Institute. The District Court, relying in major part upon this affidavit and apparently accepting the substance of appellees' theory, ***26** noted, first, a positive correlation between the wealth of school districts, measured in terms of assessable property per pupil, and their levels of per-pupil expenditures. Second, the court found a similar correlation between district wealth and the personal wealth of its residents, measured in terms of median family income. 337 F.Supp., at 282 n. 3.

If, in fact, these correlations could be sustained, then it might be argued that expenditures on education—equated by appellees to the quality of education—are dependent on personal wealth. Appellees' comparative-discrimination theory would still face serious unanswered ****1293** questions, including whether a bare positive correlation or some higher degree of correlation[61] is necessary to provide a basis for concluding that the financing system is designed to operate to the peculiar disadvantage of the comparatively poor, [62] and whether a class of this size and diversity could ever claim the special protection accorded 'suspect' classes. These questions need not be addressed in this case, however, since appellees' proof fails to support their allegations or the District Court's conclusions.

61. Also, it should be recognized that median income statistics may not define with any precision the status of individual families within any given district. A more dependable showing of comparative wealth discrimination would also examine factors such as the average income, the mode, and the concentration of poor families in any district.

62. Cf. Jefferson v. Hackney, 406 U.S. 535, 547—549, 92 S.Ct. 1724, 1723—1733, 32 L.Ed.2d 285 (1972); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1258—1259 (1970); Simon, The School Finance Decisions: Collective Bargaining and Future Finance Systems, 82 Yale L.J. 409, 439—440 (1973).

Professor Berke's affidavit is based on a survey of approximately 10% of the school districts in Texas. His findings, previously set out in the margin, [63] show only ***27** that the wealthiest few districts in the sample have the highest median family incomes and spend the most on education, and that the several poorest districts have the lowest family incomes and devote the least amount of money to education. For the remainder of the districts—96 districts composing almost 90% of the sample—the correlation is inverted, i.e., the districts that spend next to the most money on education are populated by families having next to the lowest median family incomes while the districts spending the least have the highest

median family incomes. It is evident that, even if the conceptual questions were answered favorably to appellees, no factual basis exists upon which to found a claim of comparative wealth discrimination.[64]

63. Supra, at 1287 n. 38.

64. Studies in other States have also questioned the existence of any dependable correlation between a district's wealth measured in terms of assessable property and the collective wealth of families residing in the district measured in terms of median family income. Ridenour & Ridenour, Serrano v. Priest: Wealth and Kansas School Finance, 20 Kan. L. 213, 225 (1972) ('it can be argued that there exists in Kansas almost an inverse correlation: districts with highest income per pupil have low assessed value per pupil, and districts with high assessed value per pupil have low income per pupil'); Davis, Taxpaying Ability: A Study of the Relationship Between Wealth and Income in California Counties, in The Challenge of Change in School Finance, 10th Nat. Educational Assn. Conf. on School Finance 199 (1967). Note, 81 Yale L.J., supra, n. 53. See also Goldstein, supra, n. 38, at 522—527.

This brings us, then, to the third way in which the classification scheme might be defined—district wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. Assuming a perfect correlation between district property wealth and expenditures from top to bottom, the disadvantaged class might be ***28*** viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the *****1294*** most on education.[65] Alternatively, as suggested in Mr. Justice MARSHALL's dissenting opinion, post, at 1329, the class might be defined more restrictively to include children in districts with assessable property which falls below the statewide average, or median, or below some other artificially defined level.

65. Indeed, this is precisely how the plaintiffs in Serrano v. Priest defined the class they purported to represent: 'Plaintiff children claim to represent a class consisting of all public school pupils in California, 'except children in that school district . . . which . . . affords the greatest educational opportunity of all school districts within California. " 5 Cal.3d, at 589, 96 Cal. Rptr., at 604, 487 P.2d, at 1244. See also Van Dusartz v. Hatfield, 334 F.Supp., at 873.

However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.[66] The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

66. Appellees, however, have avoided describing the Texas system as one resulting merely in discrimination between districts per se since this Court has never questioned the State's power to draw reasonable distinctions between political subdivisions within its borders. Griffin v.

County School Board of Prince Edward County, 377 U.S. 218, 230—231, 84 S.Ct. 1226, 1232—1233, 12 L.Ed.2d 256 (1964); McGowan v. Maryland, 366 U.S. 420, 427, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961); Salsburg v. Maryland, 346 U.S. 545, 552, 74 S.Ct. 280, 284, 98 L.Ed. 281 (1954).

We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. ***29** But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention.[67] They also assert that the State's system impermissibly interferes with the exercise of a 'fundamental' right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. Graham v. Richardson, 403 U.S. 365, 375—376, 91 S.Ct. 1848, 1853—1854, 29 L.Ed.2d 534 (1971); Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years.[68]

67. E.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973). See Mr. Justice MARSHALL'S dissenting opinion, post, at 1342.

68. See Serrano v. Priest, supra; Van Dusartz v. Hatfield, supra; Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187, (1972); Coons, Clune & Sugarman, supra, n. 13, at 339—393; Goldstein, supra, n. 38, at 534—541; Vieira, Unequal Educational Expenditures: Some Minority Views on Serrano v. Priest, 37 Mo. L. Rev. 617, 618—624 (1972); Comment, Educational Financing, Equal Protection of the Laws, and the Supreme Court, 70 Mich. L. Rev. 1324, 1335—1342 (1972); Note, The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination, 14 Ariz. L. Rev. 88, 120—124 (1972).

****1295** B

In Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), a unanimous Court recognized that 'education is perhaps the most important function of state and local governments.' Id., at 493, 74 S.Ct., at 691. What was said there in the context of racial discrimination has lost none of its vitality with the passage of time:

> 'Compulsory school attendance laws and the great expenditures for education both demonstrate our ***30** recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' Ibid.

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after Brown was decided. Wisconsin v. Yoder, 406 U.S. 205, 213, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 234 (Burger, C.J.), 237, 238—239, 92 S.Ct. 1544—1545 (White, J.), (1972); Abington School Dist. v. Schempp, 374 U.S. 203, 230, 83 S.Ct. 1560, 1575, 10 L.Ed.2d 844 (1963) (Brennan, J.); People of State of Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 212, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948) (Frankfurter, J.); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Interstate Consolidated Street R. Co. v. Massachusetts, 207 U.S. 79, 28 S.Ct. 26, 52 L.Ed. 111 (1907).

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that 'the grave significance of education both to the individual and to our society' cannot be doubted. [69] But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. Mr. Justice ***31** Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that '(v)irtually every state statute affects important rights.' Shapiro v. Thompson, 394 U.S., at 655, 661, 89 S.Ct., at 1342, 1345. In his view, if the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone 'far toward making this Court a 'super-legislature." Ibid. We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence. But Mr. Justice Stewart's response in Shapiro to Mr. Justice Harlan's concern correctly articulates the limits of the fundamental-rights rationale employed in the Court's equal protection decisions:

> 'The Court today does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . ..' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.' Id., at 642, 89 S.Ct., at 1335. (Emphasis in original.)

69. 337 F.Supp., at 283.

*****1296*** Mr. Justice Stewart's statement serves to underline what the opinion of the Court in Shapiro makes clear. In subjecting to strict judicial scrutiny state welfare eligibility statutes that imposed a one-year durational residency requirement as a precondition to receiving AFDC benefits, the Court explained:

> '(I)n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.' Id., at 634, 89 S.Ct., at 1331. (Emphasis in original.)

***32** The right to interstate travel had long been recognized as a right of constitutional significance,[70]

and the Court's decision, therefore, did not require an ad hoc determination as to the social or economic importance of that right.[71]

> 70. E.g., United States v. Guest, 383 U.S. 745, 757—759, 86 S.Ct. 1170, 1177—1179, 16 L.Ed.2d 239 (1966); Oregon v. Mitchell, 400 U.S. 112, 229, 237—238, 91 S.Ct. 260, 317, 321—322, 27 L.Ed.2d 272 (1970) (opinion of Brennan, White, and Marshall, JJ.).

> 71. After Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), there could be no lingering question about the constitutional foundation for the Court's holding in Shapiro. In Dandridge, the Court applied the rational-basis test in reviewing Maryland's maximum family grant provision under its AFDC program. A federal district court held the provision unconstitutional, applying a stricter standard of review. In the course of reversing the lower court, the Court distinguished Shapiro properly on the ground that in that case 'the Court found state interference with the constitutionally protected freedom of interstate travel.' Id., at 484 n. 16, 90 S.Ct., at 1161.

Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), decided only last Term, firmly reiterates that social importance is not the critical determinant for subjecting state legislation to strict scrutiny. The complainants in that case, involving a challenge to the procedural limitations imposed on tenants in suits brought by landlords under Oregon's Forcible Entry and Wrongful Detainer Law, urged the Court to examine the operation of the statute under 'a more stringent standard than mere rationality.' Id., at 73, 92 S.Ct., at 874. The tenants argued that the statutory limitations implicated 'fundamental interests which are particularly important to the poor,' such as the "need for decent shelter" and the "right to retain peaceful possession of one's home." Ibid. Mr. Justice White's analysis, in his opinion for the Court is instructive:

> 'We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access ***33** to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent . . .. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.' Id., at 74, 92 S.Ct., at 874. (Emphasis supplied.)

Similarly, in Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), the Court's explicit recognition of the fact that the 'administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings,' id., at 485, 90 S.Ct., at 1162, [72] provided no basis for departing from the settled mode of constitutional analysis of legislative classifications involving questions of economic and social policy. As in the *****1297*** case of housing, the central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some compelling state interest. See also Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972); Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

72. The Court refused to apply the strict-scrutiny test despite its contemporaneous recognition in Goldberg v. Kelly, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970) that 'welfare provides the means to obtain essential food, clothing, housing, and medical care.'

The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.***34** Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972);[73] Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972);[74] Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); [75] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). [76]

73. In Eisenstadt, the Court struck down a Massachusetts statute that prohibited the distribution of contraceptive devices, finding that the law failed 'to satisfy even the more lenient equal protection standard.' 405 U.S., at 447 n. 7, 92 S.Ct., at 1035. Nevertheless, in dictum, the Court recited the correct form of equal protection analysis: '(I)f we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold (v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)), the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest.' Ibid. (emphasis in original).

74. Dunn fully canvasses this Court's voting rights cases and explains that 'this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.' 405 U.S., at 336, 92 S.Ct., at 1000 (emphasis supplied). The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though, as the Court noted in Harper v. Virginia Bd. of Elections, 383 U.S., at 665, 86 S.Ct., at 1080, 'the right to vote in state elections is nowhere expressly mentioned.' See Oregon v. Mitchell, 400 U.S., at 135, 138—144, 91 S.Ct., at 270, 271—275 (Douglas, J.) 229, 241—242, 91 S.Ct. 317, 323—324 (Brennan, White, and Marshall, JJ.); Bullock v. Carter, 405 U.S., at 140—144, 92 S.Ct., at 854—856; Kramer v. Union Free School District, 395 U.S. 621, 625—630, 89 S.Ct. 1886, 1888—1889, 23 L.Ed.2d 583 (1969); Williams v. Rhodes, 393 U.S. 23, 29, 30—31, 89 S.Ct. 5, 9, 10—11, 21 L.Ed.2d 24 (1968); Reynolds v. Sims, 377 U.S. 533, 554—562, 84 S.Ct. 1362, 1377—1382, 12 L.Ed.2d 506 (1964); Gray v. Sanders, 372 U.S. 368, 379—381, 83 S.Ct. 801, 807—809, 9 L.Ed.2d 821 (1963).

75. In Mosley, the Court struck down a Chicago anti-picketing ordinance that exempted labor picketing from its prohibitions. The ordinance was held invalid under the Equal Protection Clause after subjecting it to careful scrutiny and finding that the ordinance was not narrowly drawn. The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests.' 408 U.S., at 101, 92 S.Ct., at 2293.

76. Skinner applied the standard of close scrutiny to a state law permitting forced sterilization of 'habitual criminals.' Implicit in the Court's opinion is the recognition that the right of procreation is among the rights of personal privacy protected under the Constitution. See Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973).

***35** Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic ****1298** legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The 'marketplace of ideas' is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information[77] becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

77. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389—390, 89 S.Ct. 1794, 1806—1807, 23 L.Ed.2d 371 (1969); Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); Lamont v. Postmaster General, 381 U.S. 301, 306—307, 85 S.Ct. 1493, 1496—1497, 14 L.Ed.2d 398 (1965).

A similar line of reasoning is pursued with respect to the right to vote. [78] Exercise of the franchise, it is contended, cannot be divorced from the educational foundation***36** of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

78. Since the right to vote, per se, is not a constitutionally protected right, we assume that appellees' references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population. See n. 74, supra.

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted.[79] These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental

interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.

> 79. The States have often pursued their entirely legitimate interest in assuring ‘intelligent exercise of the franchise,’ Katzenbach v. Morgan, 384 U.S. 641, 655, 86 S.Ct. 1717, 1726, 16 L.Ed.2d 828 (1966), through such devices as literacy tests and age restrictions on the right to vote. See ibid.; Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). And, where those restrictions have been found to promote intelligent use of the ballot without discriminating against those racial and ethnic minorities previously deprived of an equal educational opportunity, this Court has upheld their use. Compare Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959), with Oregon v. Mitchell, supra, 400 U.S., at 133, 91 S.Ct., at 269 (Black, J.), 135, 144—147, 91 S.Ct. 270, 274—276 (Douglas, J.), 152, 216—217, 91 S.Ct. 279, 310—311 (Harlan, j.), 229, 231—236, 91 S.Ct. 317, 318—321 (Brennan, White, and Marshall, JJ.), 281, 282—284, 91 S.Ct. 343—344 (Stewart, J.), and Gaston County v. United States, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309 (1969).

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures****1299 *37*** in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.[80] If so, appellees' thesis would cast serious doubt on the authority of Dandridge v. Williams, supra and Lindsey v. Normer, supra.

> 80. See Schoettle, The Equal Protection Clause in Public Education, 71 Col. L. Rev. 1355, 1389—1390 (1971); Vieira, supra, n. 68, at 622—623; Comment, Tenant Interest Representation: Proposal for a National Tenants' Association, 47 Tex. L. Rev. 1160, 1172—1173, n. 61 (1969).

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has ****38*** applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which ‘deprived,’ ‘infringed,’ or ‘interfered’ with the free exercise of some such fundamental personal right or liberty.

See Skinner v. Oklahoma, ex rel. Williamson, supra, 316 U.S. at 536, 62 S.Ct. at 1111; Shapiro v. Thompson, supra, 394 U.S. at 634, 89 S.Ct. at 1331; Dunn v. Blumstein, supra, 405 U.S. at 338—343, 92 S.Ct. at 1001—1004. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. Mr. Justice Brennan, writing for the Court in Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), expresses well the salient point:[81]

> 'This is not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected (to others similarly situated) . . ..
>
> '(The federal law in question) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. . . . We need only decide whether the challenged limitation on the relief effected . . . was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights *****1300*** . . . is ****39*** inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' . . . that a legislature need not 'strike at all evils at the same time,' . . . and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . ..'' Id., at 656—657, 86 S.Ct., at 1727. (Emphasis in original.)
>
> 81. Katzenbach v. Morgan involved a challenge by registered voters in New York City to a provision of the Voting Rights Act of 1965 that prohibited enforcement of a state law calling for English literacy tests for voting. The law was suspended as to residents from Puerto Rico who had completed at least six years of education at an 'American-flag' school in that country even though the language of instruction was other than English. This Court upheld the questioned provision of the 1965 Act over the claim that it discriminated against those with a sixth-grade education obtained in non-English-speaking schools other than the ones designated by the federal legislation.

The Texas system of school financing is not unlike the federal legislation involved in Katzenbach in this regard. Every step leading to the establishment of the system Texas utilizes today—including the decisions permitting localities to tax and expend locally, and creating and continuously expanding the state aid—was implemented in an effort to extend public education and to improve its quality.[82] Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.[83]

> 82. Cf. Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Hargrave v. Kirk, 313 F.Supp. 944

(M.D.Fla.1970), vacated, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971).

83. See Schilb v. Kuebel, 404 U.S. 357, 92 S.Ct. 479, 30 L.Ed.2d 502 (1971); McDonald v. Board of Election Com'rs, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969).

***40** C

It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.

We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.[84] This Court has often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause:

> 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . (T)he passage ****1301*** of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies.***41** . . . It has . . . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . .' Madden v. Kentucky, 309 U.S. 83, 87—88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940).

See also Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973); Wisconsin v. J. C. Penney Co., 311 U.S. 435, 445, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940).

84. See, e.g., Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 10 S.Ct. 533, 33 L.Ed. 892 (1890); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 508—509, 57 S.Ct. 868, 871—872, 81 L.Ed. 1245 (1937); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959).

Thus, we stand on familiar grounds when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise

decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause. [85]

> 85. Those who urge that the present system be invalidated offer little guidance as to what type of school financing should replace it. The most likely result of rejection of the existing system would be state-wide financing of all public education with funds derived from taxation of property or from the adoption or expansion of sales and income taxes. See Simon, supra, n. 62. The authors of Private Wealth and Public Education, supra, n. 13, at 201—242, suggest an alternative scheme, known as 'district power equalizing.' In simplest terms, the State would guarantee that at any particular rate of property taxation the district would receive a stated number of dollars regardless of the district's tax base. To finance the subsidies to 'poorer' districts, funds would be taken away from the 'wealthier' districts that, because of their higher property values, collect more than the stated amount at any given rate. This is not the place to weigh the arguments for an against 'district power equalizing,' beyond noting that commentators are in disagreement as to whether it is feasible, how it would work, and indeed whether it would violate the equal protection theory underlying appellees' case. President's Commission on School Finance, Schools, People, & Money 32—33 (1972); Bateman & Brown. Some Reflections on Serrano v. Priest, 49 J. Urban L. 701, 706—708 (1972); Brest, Book Review, 23 Stan. L. Rev. 591, 594—596 (1971); Goldstein, supra, n. 38, at 542—543; Wise, School Finance Equalization Lawsuits: A Model Legislative Response, 2 Yale Rev. of L. & Soc. Action 123, 125 (1971); Silard & White, Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause, 1970 Wis. L. Rev. 7, 29—30.

42 In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.' Dandridge v. Williams, 397 U.S., at 487, 90 S.Ct. at 1163. The very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be *****1302*** entitled to respect. Jefferson v. Hackney, 406 U.S., at 546—547, 92 S.Ct., at 1731. On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major ***43*** sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education[86]—an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education.[87] And the question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities

and degrees of control, is now undergoing searching re-examination. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

86. The quality-cost controversy has received considerable attention. Among the notable authorities on both sides are the following: C. Jencks, Inequality (1972); C. Silberman, Crisis in the Classroom (1970); U.S. Office of Education, Equality of Educational Opportunity (1966) (the Coleman Report); On Equality of Educational Opportunity (F. Mosteller & D. Moynihan eds. 1972); J. Guthrie, G. Kleindorfer, H. Levin & R. Stout, Schools and Inequality; President's Commission on School Finance, supra, n. 85; Swanson, The Cost-Quality Relationship, in The Challenge of Change in School Finance, 10th Nat. Educational Assn. Conf. on School Finance 151 (1967).

87. See the results of the Texas Governor's Committee's statewide survey on the goals of education in that State. 1 Governor's Committee Report 59—68. See also Goldstein, supra, n. 38, at 519—522; Schoettle, supra, n. 80; authorities cited in n. 86, supra.

***44** It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While '(t)he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,'[88] it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

88. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530, 532, 79 S.Ct. 437, 442, 444, 3 L.Ed.2d 480 (1959) (Brennan, J., concurring); Katzenbach v. Morgan, 384 U.S., at 659, 661, 86 S.Ct., at 1731, 1732 (Harlan, J., dissenting).

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

III

The basic contours of the Texas school finance system have been traced at the outset of this opinion. We will now describe in more detail that system and how it operates, as these facts bear directly ***1303** upon the demands of the Equal Protection Clause.

Apart from federal assistance, each Texas school receives its funds from the State and from its local school ***45*** district. On a statewide average, a roughly comparable amount of funds is derived from each source.[89] The State's contribution, under the Minimum Foundation Program, was designed to provide an adequate minimum educational offering in every school in the State. Funds are distributed to assure that there will be one teacher—compensated at the state supported minimum salary—for every 25 students.[90] Each school district's other supportive personnel are provided for: one principal for every 30 teachers;[91] one 'special service' teacher—librarian, nurse, doctor, etc.—for every 20 teachers;[92] superintendents, vocational instructors, counselors, and educators for exceptional children are also provided.[93] Additional funds are earmarked for current operating expenses, for student transportation,[94] and for free textbooks. [95]

89. In 1970 Texas expended approximately $2.1 billion for education and a little over one billion came from the Minimum Foundation Program. Texas Research League, supra, n. 20, at 2.

90. Tex. Educ. Code Ann. § 16.13 (1972) V.T.C.A.

91. Id., § 16.18.

92. Id., § 16.15.

93. Id., §§ 16.16, 16.17, 16.19.

94. Id., §§ 16.45, 16.51—16.63.

95. Id., §§ 12.01—12.04.

The program is administered by the State Board of Education and by the Central Education Agency, which also have responsibility for school accreditation [96] and for monitoring the statutory teacher-qualification standards. [97] As reflected by the 62% increase in funds allotted to the Edgewood School District over the last three years,[98] the State's financial contribution to education is steadily increasing. None of Texas' school districts, however,***46*** has been content to rely alone on funds from the Foundation Program.

96. Id., § 11.26(a)(5).

97. Id., § 16.301 et seq.

98. See supra, at 1286.

By virtue of the obligation to fulfill its Local Fund Assignment, every district must impose an ad valorem tax on property located within its borders. The Fund Assignment was designed to remain sufficiently low to assure that each district would have some ability to provide a more enriched educational program.[99] Every district supplements its Foundation grant in this manner. In some districts, the local property tax contribution is insubstantial, as in Edgewood where the supplement was only $26 per

pupil in 1967. In other districts, the local share may far exceed even the total Foundation grant. In part, local differences are attributable to differences in the rates of taxation or in the degree to which the market value for any category of property varies from its assessed value.[100] The greatest interdistrict disparities, however, are attributable to differences in the amount of assessable property available within any district. Those districts that have more property, or more valuable property, have a greater capability for supplementing state funds. In large measure, these additional local revenues are devoted to paying higher salaries to more teachers. Therefore, the primary distinguishing attributes of schools in property-affluent districts are lower pupil-teacher ratios and higher salary schedules.[101]

99. Gilmer-Aikin Committee, supra, n. 15, at 15.

100. There is no uniform statewide assessment practice in Texas. Commercial property, for example, might be assessed at 30% of market value in one county and at 50% in another. 5 Governor's Committee Report 25—26; Berke, Carnevale, Morgan & White, supra, n. 29, at 666—667, n. 16.

101. Texas Research League, supra, n. 20, at 18. Texas, in this regard, is not unlike most other States. One commentator has observed that 'disparities in expenditures appear to be largely explained by variations in teacher salaries.' Simon, supra, n. 62, at 413.As previously noted, see text accompanying n. 86, supra, the extent to which the quality of education varies with expenditure per pupil is debated inconclusively by the most thoughtful students of public education. While all would agree that there is a correlation up to the point of providing the recognized essentials in facilities and academic opportunities, the issues of greatest disagreement include the effect on the quality of education of pupil-teacher ratios and of higher teacher salary schedules. E.g., Office of Education, supra, n. 86, at 316—319. The state funding in Texas is designed to assure, on the average, one teacher for every 25 students, which is considered to be a favorable ratio by most standards. Whether the minimum salary of $6,000 per year is sufficient in Texas to attract qualified teachers may be more debatable, depending in major part upon the location of the school district. But there appear to be few empirical data that support the advantage of any particular pupil-teacher ratio or that document the existence of a dependable correlation between the level of public school teachers' salaries and the quality of their classroom instruction. An intractable problem in dealing with teachers' salaries is the absence, up to this time, of satisfactory techniques for judging their ability or performance. Relatively few school systems have merit plans of any kind, with the result that teachers' salaries are usually increased across the board in a way which tends to reward the least deserving on the same basis as the most deserving. Salaries are usually raised automatically on the basis of length of service and according to predetermined 'steps,' extending over 10- to 12-year periods.

*****1304 *47*** This, then, is the basic outline of the Texas school financing structure. Because of differences in expenditure levels occasioned by disparities in property tax income, appellees claim that children in less affluent districts have been made the subject of invidious discrimination. The District Court found that the State had failed even 'to establish a reasonable basis' for a system that results in different levels of per-pupil expenditure. 337 F.Supp., at 284. We disagree.

In its reliance on state as well as local resources, the Texas system is comparable to the systems employed ***48*** in virtually every other State. [102] The power to tax local property for educational purposes has been recognized in Texas at least since 1883.[103] When the growth of commercial and industrial centers and accompanying shifts in population began to create disparities in local resources, Texas undertook a program calling for a considerable investment of state funds.

102. President's Commission on School Finance, supra, n. 85, at 9. Until recently, Hawaii was the only State that maintained a purely state-funded educational program. In 1968, however, that State amended its educational finance statute to permit counties to collect additional funds locally and spend those amounts on its schools. The rationale for that recent legislative choice is instructive on the question before the Court today: ‘Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they so desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the State's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums to provide for their people encourages the best features of democratic government.’ Haw. Sess. Laws, 1968, Act 38, § 1.

103. See text accompanying n. 7, supra.

The ‘foundation grant’ theory upon which Texas legislators and educators based the Gilmer-Aikin bills, was a product of the pioneering work of two New York educational reformers in the 1920's, George D. Strayer and Robert M. Haig. [104] Their efforts were devoted to establishing a means of guaranteeing a minimum statewide educational program without sacrificing the vital element of local participation. The Strayer-Haig thesis ***49*** represented an accommodation between*****1305*** these two competing forces. As articulated by Professor Coleman:

‘The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children.'[105]

104. G. Strayer & R. Haig, The Financing of Education in the State of New York (1923). For a thorough analysis of the contribution of these reformers and of the prior and subsequent history of educational finance, see Coons, Clune & Sugarman, supra, n. 13, at 39—95.

105. J. Coleman, Forward to Strayer & Haig, supra, at vii.

The Texas system of school finance is responsive to these two forces. While assuring a basis education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in Wright v. Council of the City of Emporia, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972).

Mr. Justice Stewart stated there that '(d)irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.' Id., at 469, 92 S.Ct., at 2206. The Chief Justice, in his dissent, agreed that '(l)ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.' Id., at 478, 92 S.Ct., at 2211.

The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity ***50** it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.'[106] No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

106. New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311, 52 S.Ct. 371, 375, 387, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because, in their view, it does not provide the same level of local control and fiscal flexibility in all districts. Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in education expenditures. While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others,[107] ***51** the existence of 'some inequality'****1306** in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. McGowan v. Maryland, 366 U.S. 420, 425—426, 81 S.Ct. 1101, 1104—1105, 6 L.Ed.2d 393 (1961). It may not be condemned simply because it imperfectly effectuates the State's goals. Dandridge v. Williams, 397 U.S., at 485, 90 S.Ct. at 1161. Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion 'less drastic' disparities in expenditures, might be conceived. Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative. Cf. Dunn v. Blumstein, 405 U.S., at 343, 92 S.Ct. at 1003; Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). It is also well to remember that even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools. [108] The people of Texas may be ***52** justified in believing that other systems of school financing, ****1307** which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe ***53** that along with increased control of the purse strings at the state level will go increased control over local policies.[109]

107. Mr. Justice WHITE suggests in his dissent that the Texas system violates the Equal Protection Clause because the means it has selected to effectuate its interest in local autonomy fail to guarantee complete freedom of choice to every district. He places special emphasis on the statutory provision that establishes a maximum rate of $1.50 per $100 valuation at which a local school district may tax for school maintenance. Tex. Educ. Code Ann. § 20.04(d) (1972). The maintenance rate in Edgewood when this case was litigated in the District Court was $.55 per $100, barely one-third of the allowable rate. (The tax rate of $1.05 per $100, see supra, at 1285, is the equalized rate for maintenance and for the retirement of bonds.) Appellees do not claim that the ceiling presently bars desired tax increases in Edgewood or in any other Texas district. Therefore, the constitutionality of that statutory provision is not before us and must await litigation in a case in which it is properly presented. Cf. Hargrave v. Kirk, 313 F.Supp. 944 (M.D.Fla.1970), vacated, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971).

108. Mr. Justice MARSHALL states in his dissenting opinion that the State's asserted interest in local control is a 'mere sham,' post, at 1346, and that it has been offered, not as a legitimate justification, but 'as an excuse . . . for interdistrict inequality.' Id., at 1345. In addition to asserting that local control would be preserved and possibly better served under other systems—a consideration that we find irrelevant for the purpose of deciding whether the system may be said to be supported by a legitimate and reasonable basis—the dissent suggests that Texas' lack of good faith may be demonstrated by examining the extent to which the State already maintains considerable control. The State, we are told, regulates 'the most minute details of local public education,' ibid., including textbook selection, teacher qualifications, and the length of the school day. This assertion, that genuine local control does not exist in Texas, simply cannot be supported. It is abundantly refuted by the elaborate statutory division of responsibilities set out in the Texas Education Code. Although policy decision-making and supervision in certain areas are reserved to the State, the day-to-day authority over the 'management and control' of all public elementary and secondary schools is squarely placed on the local school boards. Tex. Educ. Code Ann. §§ 17.01, 23.26 (1972). Among the innumerable specific powers of the local school authorities are the following: the power of eminent domain to acquire land for the construction of school facilities, id., §§ 17.26, 23.26; the power to hire and terminate teachers and other personnel, id., §§ 13.101—13.103; the power to designate conditions of teacher employment and to establish certain standards of educational policy, id., § 13.901; the power to maintain order and discipline, id., § 21.305, including the prerogative to suspend students for disciplinary reasons, id., § 21.301; the power to decide whether to offer a kindergarten program, id., §§ 21.131—21.135, or a vocational training program, id., § 21.111, or a program of special education for the handicapped, id., § 11.16; the power to control the assignment and transfer of students, id., §§ 21.074—21.080; and the power to operate and maintain a school bus program, id., § 16.52. See also Pervis v. LaMarque Ind. School Dist., 328 F.Supp. 638, 642—643 S.D. Tex. 1971), reversed, 466 F.2d 1054 (CA5 1972); Nichols v. Aldine Ind. School Dist., 356 S.W.2d 182 (Tex .Civ. App. 1962). Local school boards also determine attendance zones, location of new schools, closing of old ones, school attendance hours (within limits), grading and promotion policies subject to general guidelines, recreational and athletic policies, and a myriad of other matters in the routine of school administration. It cannot be

seriously doubted that in Texas education remains largely a local function, and that the preponderating bulk of all decisions affecting the schools is made and executed at the local level, guaranteeing the greatest participation by those most directly concerned.

109. This theme—that greater state control over funding will lead to greater state power with respect to local educational programs and policies—is a recurrent one in the literature on financing public education. Professor Simon, in his thoughtful analysis of the political ramifications of this case, states that one of the most likely consequences of the District Court's decision would be an increase in the centralization of school finance and an increase in the extent of collective bargaining by teacher unions at the state level. He suggests that the subjects for bargaining may include many 'non-salary' items, such as teaching loads, class size, curricular and program choices, questions of student discipline, and selection of administrative personnel—matters traditionally decided heretofore at the local level. Simon, supra, n. 62, at 434—436. See, e.g., Coleman, The Struggle for Control of Education, in Education and Social Policy: Local Control of Education 64, 77—79 (C. Bowers, I. Housego & D. Dyke eds. 1970); J Conant, The Child, The Parent, and The State 27 (1959) ('Unless a local community, through its school board, has some control over the purse, there can be little real feeling in the community that the schools are in fact local schools . . .'); Howe, Anatomy of a Revolution, in Saturday Review 84, 88 (Nov. 20, 1971) ('It is an axiom of American politics that control and power follow money . . .'); R. Hutchinson, State-Administered Locally-Shared Taxes 21 (1931) ('(S)tate administration of taxation is the first step toward state control of the functions supported by these taxes . . .'). Irrespective of whether one regards such prospects as detrimental, or whether he agrees that the consequence is inevitable, it certainly cannot be doubted that there is a rational basis for this concern on the part of parents, educators, and legislators.

Appellees further urge that the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on 'happenstance.' They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of ***54** local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others.[110] Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions—public and private.

110. This Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any per se rule of 'territorial uniformity.' McGowan v. Maryland, 366 U.S., at 427, 81 S.Ct., at 1105. See also Griffin v. County School Board of Prince Edward County, 377 U.S., at 230—231, 84 S.Ct., at 1232—1233; Salsburg v. Maryland, 346 U.S. 545, 74 S.Ct. 280, 98 L.Ed. 281 (1954). Cf. Board of Education of, etc., Muskogee v. Oklahoma, 409 F.2d 665, 668 (CA10 1969).

Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens ****1308*** or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children ***55*** who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. Texas has acknowledged its shortcomings and has persistently endeavored—not without some success—to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911), it is important to remember that at every stage of its development it has constituted a 'rough accommodation' of interests in an effort to arrive at practical and workable solutions. Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69—70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913). One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. McGinnis v. Royster, 410 U.S. 263, 270, 93 S.Ct. 1055, 1059, 35 L.Ed.2d 282 (1973). We hold that the Texas plan abundantly satisfies this standard.

56 IV

In light of the considerable attention that has focused on the District Court opinion in this case and on its California predecessor, Serrano v. Priest, 5 Cal.3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971), a cautionary postscript seems appropriate. It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. Some commentators have concluded that, whatever the contours of the alternative financing programs that might be devised and approved, the result could not avoid being a beneficial one. But, just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers and their scholarship reflects no such unqualified confidence in the desirability

of completely uprooting the existing system.

The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in over-burdened core-city school districts would be benefited by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable *****1309*** question [111]—these groups stand to ****57*** realize gains in terms of increased per-pupil expenditures only if they reside in districts that presently spend at relatively low levels, i.e., in those districts that would benefit from the redistribution of existing resources. Yet, recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts.[112] Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts.[113] Additionally, ****58*** several research projects have concluded that any financing alternative designed to achieve a greater equality of expenditures is likely to lead to higher taxation and lower educational expenditures in the major urban centers,[114] a result that would exacerbate rather than ameliorate existing conditions in those areas.

111. Any alternative that calls for significant increases in expenditures for education, whether financed through increases in property taxation or through other sources of tax dollars, such as income and sales taxes, is certain to encounter political barriers. At a time when nearly every State and locality is suffering from fiscal undernourishment, and with demands for services of all kinds burgeoning and with weary taxpayers already resisting tax increases, there is considerable reason to question whether a decision of this Court nullifying present state taxing systems would result in a marked increase in the financial commitment to education. See Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., Toward Equal Educational Opportunity 339—345 (Comm. Print 1972); Berke & Callahan, Serrano v. Priest: Milestone or Millstone for School Finance, 21 J. Pub. L. 23, 25—26 (1972); Simon, supra, n. 62, at 420—421. In Texas, it has been calculated that $2.4 billion of additional school funds would be required to bring all schools in that State up to the present level of expenditure of all but the wealthiest districts—an amount more than double that currently being spent on education. Texas Research League, supra, n. 20, at 16—18. An amicus curiae brief filed on behalf of almost 30 States, focusing on these practical consequences, claims with some justification that 'each of the undersigned states . . . would suffer severe financial stringency.' Brief of Amici Curiae in Support of Appellants 2 (filed by Montgomery county, Md., et al.).

112. See Note, supra, n. 53. See also authorities cited n. 114, infra.

113. See Goldstein, supra, n. 38, at 526; Jencks, supra, n. 86, at 27; U.S. Comm'n on Civil Rights, Inequality in School Financing: The Role of the Law 37 (1972). Coons, Clune & Sugarman, supra, n. 13, at 356—357, n. 47, have noted that in California, for example, (f)ifty-nine percent . . . of minority students live in districts above the median (average valuation per pupil.)' In Bexar County, the largest district by far—the San Antonio Independent School District—is above the local average in both the amount of taxable wealth per pupil and in median family income. Yet 72% of its students are Mexican-Americans. And, in 1967—1968 it spent only a very few dollars

less per pupil than the North East and North Side Independent School Districts, which have only 7% and 18% Mexican—American enrollment respectively. Berke, Carnevale, Morgan & White, supra, n. 29, at 673.

114. See Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., Issues in School Finance 129 (Comm. Print 1972) (monograph entitled Inequities in School Finance prepared by Professors Berke and Callhan); U.S. Office of Education, Finances of Large-City School Systems: A Comparative Analysis (1972) (HEW publication); U.S. Comm'n on Civil Rights, supra, n. 113, at 33—36; Simon, supra, n. 62, at 410—411, 418.

These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which *****1310*** may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already ****59*** have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

Reversed.

Mr. Justice STEWART, concurring.

The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust.[1] It does not follow, however, and I cannot find, that this system violates the Constitution of the United States. I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment. The unchartered directions of such a departure are suggested, I think, by the imaginative dissenting opinion my Brother MARSHALL has filed today.

1. See New York Times, Mar. 11, 1973, p. 1, col. 1.
Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties.[2] The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws.

2. There is one notable exception to the above statement: It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, e.g., Reynolds v.

Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583; Dunn v. Blumstein, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274. But there is no constitutional right to vote, as such. Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627. If there were such a right, both the Fifteenth Amendment and the Nineteenth Amendment would have been wholly unnecessary.

60 There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes.[3] And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious. See, e.g., Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577. This settled principle of constitutional law was compendiously stated in Mr. Chief Justice Warren's opinion for the Court in McGowan v. Maryland, 366 U.S. 420, 425—426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, in the following words:

3. But see Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92.

'Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'

****1311*** This doctrine is no more than a specific application of one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law. See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

61 Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently 'suspect.' Because of the historic purpose of the Fourteenth Amendment, the prime example of such a 'suspect' classification is one that is based upon race. See, e.g., Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222. But there are other classifications that, at least in some settings, are also 'suspect'—for example, those based upon national origin, [4] alienage,[5] indigency,[6] or illegitimacy.[7]

4. See Oyama v. California, 332 U.S. 633, 644—646, 68 S.Ct. 269, 274—275, 92 L.Ed. 249.

5. See Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534.

6. See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891. 'Indigency' means actual or functional indigency; it does not mean comparative poverty vis-a-vis comparative affluence. See

James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678.

7. See Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768.

Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. For example, a law that provided that newspapers could be published only by people who had resided in the State for five years could be superficially viewed as invidiously discriminating against an identifiable class in violation of the Equal Protection Clause. But, more basically, such a law would be invalid simply because it abridged the freedom of the press. Numerous cases in this Court illustrate this principle.[8]

8. See. e.g., Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (free speech); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (freedom of interstate travel); Williams v Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (freedom of association); Skinner v. Oklahoma, ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 ('liberty' conditionally protected by Due Process Clause of Fourteenth Amendment).

***62** In refusing to invalidate the Texas system of financing its public schools, the Court today applies with thoughtfulness and understanding the basic principles I have so sketchily summarized. First, as the Court points out, the Texas system has hardly created the kind of objectively identifiable classes that are cognizable under the Equal Protection Clause.[9] Second, even assuming the existence of such discernible categories, the classifications are in no sense based upon constitutionally 'suspect' criteria. Third, the Texas system does not rest 'on grounds wholly irrelevant to the achievement of the State's objective.' Finally, the Texas system impinges upon no substantive constitutional rights or liberties. It follows, therefore, under the established principle reaffirmed in Mr. Chief Justice Warren's opinion for the Court in McGowan v. Maryland, supra, that the judgment of the District Court must be reversed.

9. See Katzenbach v. Morgan, 384 U.S. 641, 660, 86 S.Ct. 1731, 1732, 16 L.Ed.2d 828 (Harlan, J., dissenting).

Mr. Justice BRENNAN, dissenting.

Although I agree with my Brother WHITE that the Texas statutory scheme ****1312** is devoid of any rational basis, and for that reason is violative of the Equal Protection Clause, I also record my disagreement with the Court's rather distressing assertion that a right may be deemed 'fundamental' for the purposes of equal protection analysis only if it is 'explicitly or implicitly guaranteed by the Constitution.' Ante, at 1297. As my Brother MARSHALL convincingly demonstrates, our prior cases stand for the proposition that 'fundamentality' is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, '(a)s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional***63** interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.'

Post, at 1332.

Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. See post, at 1336—1339. This being so, any classification affecting education must be subjected to strict judicial scrutiny, and since even the State concedes that the statutory scheme now before us cannot pass constitutional muster under this stricter standard of review, I can only conclude that the Texas school-financing scheme is constitutionally invalid.

Mr. Justice WHITE, with whom Mr. Justice DOUGLAS and Mr. Justice BRENNAN join, dissenting.

The Texas public schools are financed through a combination of state funding, local property tax revenue, and some federal funds.[1] Concededly, the system yields wide disparity in per-pupil revenue among the various districts. In a typical year, for example, the Alamo Heights district had total revenues of $594 per pupil, while the Edgewood district had only $356 per pupil. [2] The majority and the State concede, as they must, the existence ***64** of major disparities in spendable funds. But the State contends that the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed 'to provide an adequate education for all, with local autonomy to go beyond that as individual school districts desire and are able . . .. It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much.'[3] The majority advances this rationalization: 'While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level.'

> 1. The heart of the Texas system is embodied in an intricate series of statutory provisions which make up Chapter 16 of the Texas Education Code, Tex. Educ. Code Ann. § 16.01 et seq. See also Tex. Educ. Code Ann. § 15.01 et seq., and § 20.10 et seq.
>
> 2. The figures discussed are from Plaintiffs' Exhibits 7, 8, and 12. The figures are from the 1967—1968 school year. Because the various exhibits relied upon different attendance totals, the per-pupil results do not precisely correspond to the gross figures quoted. The disparity between districts, rather than the actual figures, is the important factor.
>
> 3. Brief for Appellants 11—13, 35.

I cannot disagree with the proposition that local control and local decisionmaking play an important part in our democratic system of government. Cf. James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971). Much may be left to local option, and this case would be quite different if it were true that the Texas system, while insuring minimum educational expenditures in every district through state funding, extended a meaningful option to all local districts to increase their per-pupil expenditures ****1313** and so to improve their children's education to the extent that increased funding would achieve that goal. The system would then arguably provide a rational and sensible method of achieving the stated aim of preserving an area for local initiative and decision.

The difficulty with the Texas system, however, is that it provides a meaningful option to Alamo Heights and like school districts but almost none to Edgewood and those other districts with a low per-pupil real estate tax base. In these latter districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the ***65** real estate property tax. In these districts, the Texas system utterly fails to extend a realistic choice to parents because the property tax, which is the only revenue-raising mechanism extended to school districts, is practically and legally unavailable. That this is the situation may be readily demonstrated.

Local school districts in Texas raise their portion of the Foundation School Program—the Local Fund Assignment—by levying ad valorem taxes on the property located within their boundaries. In addition, the districts are authorized, by the state constitution and by statute, to levy ad valorem property taxes in order to raise revenues to support educational spending over and above the expenditure of Foundation School Program funds.

Both the Edgewood and Alamo Heights districts are located in Bexar County, Texas. Student enrollment in Alamo Heights is 5,432, in Edgewood 22,862. The per-pupil market value of the taxable property in Alamo Heights is $49,078, in Edgewood $5,960. In a typical relevant year, Alamo Heights had a maintenance tax rate of $1.20 and a debt service (bond) tax rate of 20¢ per $100 assessed evaluation, while Edgewood had a maintenance rate of 52¢ and a bond rate of 67¢. These rates, when applied to the respective tax bases, yielded Alamo Heights $1,433,473 in maintenance dollars and $236,074 in bond dollars, and Edgewood $223,034 in maintenance dollars and $279,023 in bond dollars. As is readily apparent, because of the variance in tax bases between the districts, results, in terms of revenues, do not correlate with effort, in terms of tax rate. Thus, Alamo Heights, with a tax base approximately twice the size of Edgewood's base, realized approximately six times as many maintenance dollars as Edgewood by using a tax rate only approximately two and one-half times larger. Similarly, Alamo Heights realized slightly fewer bond ***66** dollars by using a bond tax rate less than one-third of that used by Edgewood.

Nor is Edgewood's revenue-raising potential only deficient when compared with Alamo Heights. North East District has taxable property with a per-pupil market value of approximately $31,000, but total taxable property approximately four and one-half times that of Edgewood. Applying a maintenance rate of $1, North East yielded $2,818,148. Thus, because of its superior tax base, North East was able to apply a tax rate slightly less than twice that applied by Edgewood and yield more than 10 times the maintenance dollars. Similarly, North East, with a bond rate of 45¢, yielded $1,249,159—more than four times Edgewood's yield with two-thirds the rate.

Plainly, were Alamo Heights or North East to apply the Edgewood tax rate to its tax base, it would yield far greater revenues than Edgewood is able to yield applying those same rates to its base. Conversely, were Edgewood to apply the Alamo Heights or North East rates to its base, the yield would be far smaller than the Alamo Heights or North East yields. The disparity is, therefore, currently operative and its impact on Edgewood is undeniably serious. It is evident from statistics in the record that show that, applying an equalized tax rate of 85¢ per $100 assessed valuation, Alamo Heights was able to provide approximately $330 per pupil in local revenues****1314** over and above the Local Fund Assignment. In Edgewood, on the other hand, with an equalized tax rate of $1.05 per $100 of assessed valuation, $26

per pupil was raised beyond the Local Fund Assignment.[4] As previously noted in Alamo Heights, ***67** total per-pupil revenues from local, state, and federal funds was $594 per pupil, in Edgewood $356.[5]

> 4. Variable assessment practices are also revealed in this record. Appellants do not, however, contend that this factor accounts, even to a small extent, for the interdistrict disparities.
> 5. The per-pupil funds received from state, federal, and other sources, while not precisely equal, do not account for the large differential and are not directly attacked in the present case. In order to equal the highest yield in any other Bexar County district, Alamo Heights would be required to tax at the rate of 68¢ per $100 of assessed valuation. Edgewood would be required to tax at the prohibitive rate of $5.76 per $100. But state law places a $1.50 per $100 ceiling on the maintenance tax rate, a limit that would surely be reached long before Edgewood attained an equal yield. Edgewood is thus precluded in law, as well as in fact, from achieving a yield even close to that of some other districts.

The Equal Protection Clause permits discriminations between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. It is not enough that the Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved. As the Court stated just last Term in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172, 92 S.Ct. 1400, 1405, 31 L.Ed.2d 768 (1972):

> 'The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957); Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); Gulf Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666 (1897); Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).'

***68** Neither Texas nor the majority heeds this rule. If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture.[6] In my view, ****1315** the parents and children in Edgewood, and in like districts, suffer from an invidious discrimination violative of the Equal Protection Clause.

> 6. The State of Texas appears to concede that the choice of whether or not to go beyond the state-provided minimum 'is easier for some districts than for others. Those districts with large amounts of taxable property can produce more revenue at a lower tax rate and will provide their children with a more expensive education.' Brief for Appellants 35. The State nevertheless insists that districts have a choice and that the people in each district have exercised that choice by providing some real property tax money over and above the minimum funds

> guaranteed by the State. Like the majority, however, the State fails to explain why the Equal Protection Clause is not violated, or how its goal of providing local government with realistic choices as to how much money should be expended on education is implemented, where the system makes it much more difficult for some than for others to provide additional educational funds and where, as a practical and legal matter, it is impossible for some districts to provide the educational budgets that other districts can make available from real property tax revenues.

This does not, of course, mean that local control may not be a legitimate goal of a school-financing system. Nor does it mean that the State must guarantee each district an equal per-pupil revenue from the state school-financing system. Nor does it mean, as the majority appears to believe, that, by affirming the decision below, ***69** this Court would be 'imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.' On the contrary, it would merely mean that the State must fashion a financing scheme which provides a rational basis for the maximization of local control, if local control is to remain a goal of the system, and not a scheme with 'different treatment be(ing) accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.' Reed v. Reed, 404 U.S. 71, 75—76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971).

Perhaps the majority believes that the major disparity in revenues provided and permitted by the Texas system is inconsequential. I cannot agree, however, that the difference of the magnitude appearing in this case can sensibly be ignored, particularly since the State itself considers it so important to provide opportunities to exceed the minimum state educational expenditures.

There is no difficulty in identifying the class that is subject to the alleged discrimination and that is entitled to the benefits of the Equal Protection Clause. I need go no further than the parents and children in the Edgewood district, who are plaintiffs here and who assert that they are entitled to the same choice as Alamo Heights to augment local expenditures for schools but are denied that choice by state law. This group constitutes a class sufficiently definite to invoke the protection of the Constitution. They are as entitled to the protection of the Equal Protection Clause as were the voters in allegedly underrepresented counties in the reapportionment cases. See, e.g., Baker v. Carr, 369 U.S. 186, 204—208, 82 S.Ct. 691, 703—705, 7 L.Ed.2d 663 (1962); Gray v. Sanders, 372 U.S. 368, 375, 83 S.Ct. 801, 805, 9 L.Ed.2d 821 (1963); Reynolds v. Sims, 377 U.S. 533, 554—556, 84 S.Ct. 1362, 1377—1379, 12 L.Ed. 506 (1964). And in Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), where a challenge to the ***70** Texas candidate filing fee on equal protection grounds was upheld, we noted that the victims of alleged discrimination wrought by the filing fee 'cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause,' but concluded that 'we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.' Id., at 144, 92 S.Ct., at 856. Similarly, in the present case we would blink reality to ignore the fact that school districts, and students in the end, are differentially affected by the Texas school-financing scheme with respect to their capability to supplement the Minimum Foundation School Program. At the very least, the law discriminates against those children and their parents who

live in districts where the per-pupil tax base is sufficiently low to make impossible the provision of comparable school revenues by resort to the real property tax which is the only device the State extends for this purpose.

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the *****1316*** amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth.[1] More unfortunately, though, the ****71*** majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

> 1. See Van Dusartz v. Hatfield, 334 F.Supp. 870, (D.C.Minn.1971); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), rehearing granted, Jan. 1973; Serrano v. Priest, 5 Cal.3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187, 119 N.J. Super. 40, 289 A.2d 569 (1972); Hollins v. Shofstall, Civil No. C—253652 (Super. Ct. Maricopa County, Ariz., July 7, 1972). See also Sweetwater County Planning Com. for the Organization of School Districts v. Hinkle, 491 P.2d 1234 (Wyo. 1971), juris. relinquished, 493 P.2d 1050 (Wyo. 1972).

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination.[2] I, for one, am unsatisfied with the hope of an ultimate 'political' solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that may affect their hearts ****72*** and minds in a way unlikely ever to be undone.' Brown v. Board of Education, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954). I must therefore respectfully dissent.

> 2. The District Court in this case postponed decision for some two years in the hope that the Texas Legislature would remedy the gross disparities in treatment inherent in the Texas financing scheme. It was only after the legislature failed to act in its 1971 Regular Session that the District Court, apparently recognizing the lack of hope for self-initiated legislative reform, rendered its decision. See Texas Research League, Public School Finance Problems in Texas 13 (Interim Report 1972). The strong vested interest of property-rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in educational financing. See N.Y. Times, Dec. 19, 1972, p. 1, col. 1.

I

The Court acknowledges that 'substantial interdistrict disparities in school expenditures' exist in Texas, ante, at 1287, and that these disparities are 'largely attributable to differences in the amounts of money collected through local property taxation,' ante, at 1287. But instead of closely examining the seriousness of these disparities and the invidiousness of the Texas financing scheme, the Court undertakes an elaborate exploration of the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding. Yet, however praiseworthy Texas' equalizing efforts, the issue in this case is not whether Texas is doing its best to ameliorate the worst features of a discriminatory scheme but, rather, whether the scheme itself is in fact unconstitutionally discriminatory in the face of the Fourteenth Amendment's guarantee of equal protection of the laws. When the Texas financing scheme is taken as a whole, I do not think it can be doubted that it produces a discriminatory impact on ***1317** substantial numbers of the school age children of the State of Texas.

A

Funds to support public education in Texas are derived from three sources: local ad valorem property taxes; the Federal Government; and the state government.[3] It is enlightening to consider these in order.

3. Texas provides its school districts with extensive bonding authority to obtain capital both for the acquisition of school sites and 'the construction and equipment of school buildings,' Tex. Educ. Code Ann. § 20.01 (1972), and for the acquisition, construction, and maintenance of 'gymnasia, stadia, or other recreational facilities,' id., §§ 20.21—20.22. While such private capital provides a fourth source of revenue, it is, of course, only temporary in nature since the principal and interest of all bonds must ultimately be paid out of the receipts of the local ad valorem property tax, see id., §§ 20.01, 20.04, except to the extent that outside revenues derived from the operation of certain facilities, such as gymnasia, are employed to repay the bonds issued thereon, see id., §§ 20.22, 20.25.

***73** Under Texas law, the only mechanism provided the local school district for raising new, unencumbered revenues is the power to tax property located within its boundaries.[4] At the same time, the Texas financing scheme effectively restricts the use of monies raised by local property taxation to the support of public education within the boundaries of the district in which they are raised, since any such taxes must be approved by a majority of the property-taxpaying voters of the district.[5]

4. See Tex. Const., Art. 7, § 3; Tex. Educ. Code Ann. §§ 20.01—20.02. As a part of the property tax scheme, bonding authority is conferred upon the local school districts, see n. 3, supra.

5. See Tex. Educ. Code Ann. § 20.04.

The significance of the local property tax element of the Texas financing scheme is apparent from the fact that it provides the funds to meet some 40% of the cost of public education for Texas as a whole.[6] Yet the amount of revenue that any particular Texas district can raise is dependent on two factors—its tax rate and its amount of taxable property. The first factor is determined by the property-taxpaying

voters of the district.[7] But, regardless of the enthusiasm of the local voters for public ***74** education, the second factor—the taxable property wealth of the district—necessarily restricts the district's ability to raise funds to support public education. [8] Thus, even though the voters of two Texas districts may be willing to make the same tax effort, the results for the districts will be substantially different if one is property rich while the other is property poor. The necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones.

6. For the 1970—1971 school year, the precise figure was 41.1%. See Texas Research League, supra, n. 2, at 9.

7. See Tex. Educ. Code Ann. § 20.04. Theoretically, Texas law limits the tax rate for public school maintenance, see id., § 20.02, to $1.50 per $100 valuation, see id., § 20.04(d). However, it does not appear that any Texas district presently taxes itself at the highest rate allowable, although some poor districts are approaching it, see App. 174.

8. Under Texas law local districts are allowed to employ differing bases of assessment—a fact that introduces a third variable into the local funding. See Tex. Educ. Code Ann. § 20.03. But neither party has suggested that this factor is responsible for the disparities in revenues available to the various districts. Consequently, I believe we must deal with this case on the assumption that differences in local methods of assessment do not meaningfully affect the revenue-raising power of local districts relative to one another. The Court apparently admits as much. See ante, at 1303. It should be noted, moreover, that the main set of data introduced before the District Court to establish the disparities at issue here was based upon 'equalized taxable property' values which had been adjusted to correct for differing methods of assessment. See App. C to Affidavit of Professor Joel S. Berke.

The seriously disparate consequences of the Texas local property tax, when ****1318** that tax is considered alone, are amply illustrated by data presented to the District Court by appellees. These data included a detailed study of a sample of 110 Texas school districts[9] for the 1967—1968 school year conducted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. Among other things, this study revealed that the 10 richest districts examined, each of which had more than $100,000 in taxable property per pupil, raised through local effort an average of $610 per pupil, whereas the four poorest districts studied, each of which had less than $10,000 in taxable property per pupil, were able ***75** to raise only an average of $63 per pupil.[10] And, as the Court effectively recognizes, ante, at 1293, this correlation between the amount of taxable property per pupil and the amount of local revenues per pupil holds true for the 96 districts in between the richest and poorest districts.[11]

9. Texas has approximately 1,200 school districts.

10. See Appendix I, post, p. 1348.

11. See Ibid. Indeed, appellants acknowledge that the relevant data from Professor Berke's affidavit show ' a very positive correlation, 0.973, between market value of taxable property

per pupil and state and local revenues per pupil.' Reply Brief for Appellants 6 n. 9.While the Court takes issue with much of Professor Berke's data and conclusions, ante, at 1287, n. 38 and 1292—1293, I do not understand its criticisms to run to the basic finding of a correlation between taxable district property per pupil and local revenues per pupil. The critique of Professor Berke's methodology upon which the Court relies, see Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny, 120 U. Pa. L. Rev. 504, 523—525, nn. 67, 71 (1972), is directed only at the suggested correlations between family income and taxable district wealth and between race and taxable district wealth. Obviously, the appellants do not question the relationship in Texas between taxable district wealth and per-pupil expenditures; and there is no basis for the Court to do so, whatever the criticisms that may be leveled at other aspects of Professor Berke's study, see infra, n. 55.

It is clear, moreover, that the disparity of per-pupil revenues cannot be dismissed as the result of lack of local effort—that is, lower tax rates—by property-poor districts. To the contrary, the data presented below indicate that the poorest districts tend to have the highest tax rates and the richest districts tend to have the lowest tax rates.[12] Yet, despite the apparent extra effort being made by the poorest districts, they are unable even to begin to match the richest districts in terms of the production of local revenues. For example, the 10 richest districts studied by Professor Berke were able to produce $585 per pupil with an equalized tax rate of 31¢ ***76*** on $100 of equalized valuation, but the four poorest districts studied, with an equalized rate of 70¢ on $100 of equalized valuation, were able to produce only $60 per pupil. [13] Without more, this state-imposed system of educational funding presents a serious picture of widely varying treatment of Texas school districts, and thereby of Texas schoolchildren, in terms of the amount of funds available for public education.

12. See Appendix II, post, p. 1348.

13. See ibid.

Nor are these funding variations corrected by the other aspects of the Texas financing scheme. The Federal Government provides funds sufficient to cover only some 10% of the total cost of public education in Texas.[14] Furthermore, while these federal funds are not distributed in Texas solely on a per-pupil basis, appellants do not here contend that they are used in such a way as to ameliorate significantly the widely varying consequences for Texas school districts and schoolchildren of the local ****1319*** property tax element of the state financing scheme.[15]

14. For the 1970—1971 school year, the precise figure was 10.9%. See Texas Research League, supra, n. 2, at 9.

15. Appellants made such a contention before the District Court but apparently have abandoned it in this Court. Indeed, data introduced in the District Court simply belie the argument that federal funds have a significant equalizing effect. See Appendix I, post, p. 1348. And, as the District Court observed, it does not follow that remedial action by the Federal Government would excuse any unconstitutional discrimination effected by the state financing

scheme. 337 F.Supp. 280, 284.

State funds provide the remaining some 50% of the monies spent on public education in Texas.[16] Technically, they are distributed under two programs. The first is the Available School Fund, for which provision is made in the Texas Constitution.[17] The Available ***77** School Fund is composed of revenues obtained from a number of sources, including receipts from the state ad valorem property tax, one-fourth of all monies collected by the occupation tax, annual contributions by the legislature from general revenues, and the revenues derived from the Permanent School Fund.[18] For the 1970—1971 school year the Available School Fund contained $296,000,000. The Texas Constitution requires that this money be distributed annually on a per capita basis[19] to the local school districts. Obviously, such a flat grant could not alone eradicate the funding differentials attributable to the local property tax. Moreover, today the Available School Fund is in reality simply one facet of the second state financing program, the Minimum Foundation School Program,[20] since each district's annual share of the Fund is deducted from the sum to which the district is entitled under the Foundation Program.[21]

16. For the 1970—1971 school year, the precise figure was 48%. See Texas Research League, supra, n. 2, at 9.

17. See Tex. Const., Art. 7, § 5 (Supp.1972). See also Tex. Educ. Code Ann. § 15.01(b).

18. See Tex. Educ. Code Ann. § 15.01(b). The Permanent School Fund is, in essence, a public trust initially endowed with vast quantities of public land, the sale of which has provided an enormous corpus that in turn produces substantial annual revenues which are devoted exclusively to public education. See Tex. Const., Art. 7, § 5 (Supp.1972). See also 5 Report of Governor's Committee on Public School Education, The Challenge and the Chance 11 (1969) (hereinafter Governor's Committee Report).

19. This is determined from the average daily attendance within each district for the preceding year. Tex. Educ. Code Ann. § 15.01(c).

20. See id., §§ 16.01—16.975.

21. See id., §§ 16.71(2), 16.79.

The Minimum Foundation School Program provides funds for three specific purposes: professional salaries, current operating expenses, and transportation expenses.[22] The State pays, on an overall basis, for approximately 80% of the cost of the Program; the remaining 20% is distributed among the local school districts under the ***78** Local Fund Assignment.[23] Each district's share of the Local Fund Assignment is determined by a complex ‘economic index’ which is designed to allocate a larger share of the costs to property-rich districts than to property-poor districts.[24] Each district pays its share with revenues derived from local property taxation.

22. See id., §§ 16.301—16.316, 16.45, 16.51—16.63.

23. See id., §§ 16.72—16.73, 16.76—16.77.

24. See id., §§ 16.74—19.76. The formula for calculating each district's share is described in 5 Governor's Committee Report 44—48.

The stated purpose of the Minimum Foundation School Program is to provide certain basic funding for each local Texas school district.[25] At the same time, the Program was apparently intended to improve, to some degree, the financial position of property-poor districts relative to property-rich districts, since—through the use of the economic index—an effort is made to charge a *****1320*** disproportionate share of the costs of the Program to rich districts. [26] It bears noting, however, that substantial criticism has been leveled at the practical effectiveness of the economic index system of local cost allocation.[27] In theory, the index is designed to ascertain the relative ability of each district to contribute to the Local Fund Assignment from local property taxes. Yet the index is not developed simply on the basis of each district's taxable wealth. It also takes into account the district's relative income from manufacturing, mining, and agriculture, its payrolls, and its scholastic population.[28] ****79*** It is difficult to discern precisely how these latter factors are predictive of a district's relative ability to raise revenues through local property taxes. Thus, in 1966, one of the consultants who originally participated in the development of the Texas economic index adopted in 1949 told the Governor's Committee on Public School Education: 'The Economic Index approach to evaluating local ability offers a little better measure than sheer chance, but not much.'[29]

25. See Tex. Educ. Code Ann. § 16.01.

26. See 5 Governor's Committee Report 40—41.

27. See id., at 45—67; Texas Research League, Texas Public Schools Under the Minimum Foundation Program—An Evaluation: 1949—4954, pp. 67—68 (1954).

28. Technically, the economic index involves a two-step calculation. First, on the basis of the factors mentioned above, each Texas county's share of the Local Fund Assignment is determined. Then each county's share is divided among its school districts on the basis of their relative shares of the county's assessable wealth. See Tex. Educ. Code Ann. §§ 16.74—16.76; 5 Governor's Committee Report 43—44; Texas Research League, Texas Public School Finance: A Majority of Exceptions 6—8 (2d Interim Report 1972).

29. 5 Governor's Committee Report 48, quoting statement of Dr. Edgar Morphet.

Moreover, even putting aside these criticisms of the economic index as a device for achieving meaningful district wealth equalization through cost allocation, poor districts still do not necessarily receive more state aid than property-rich districts. For the standards which currently determine the amount received from the Foundation School Program by any particular district [30] favor property-rich districts.[31] Thus, focusing on the same ****80*** Edgewood Independent and Alamo Heights School Districts which the majority uses for purposes of illustration, we find that in 1967—1968 property-rich Alamo Heights,[32] which raised $333 per *****1321*** pupil on an equalized tax rate of 85¢ per $100 valuation,

received $225 per pupil from the Foundation School Program, while property-poor Edgewood,[33] which raised only $26 per pupil with an equalized tax rate of $1.05 per $100 valuation, received only $222 per pupil from the Foundation School Program. [34] And, more recent data, which indicate that for the 1970—1971 school year Alamo Heights received $491 per pupil from ***81** the Program while Edgewood received only $356 per pupil, hardly suggest that the wealth gap between the districts is being narrowed by the State Program. To the contrary, whereas in 1967—1968 Alamo Heights received only $3 per pupil, or about 1%, more than Edgewood in state aid, by 1970—1971 the gap had widened to a difference of $135 per pupil, or about 38%.[35] It was data of this character that prompted the District Court to observe that 'the current (state aid) system tends to subsidize the rich at the expense of the poor, rather than the other way around.'[36] 337 F.Supp. 280, 282. And even the appellants go no further here than to venture that the Minimum Foundation School Program has 'a mildly equalizing effect.'[37]

30. The extraordinarily complex standards are summarized in 5 Governor's Committee Report 41—43.

31. The key element of the Minimum Foundation School Program is the provision of funds for professional salaries—more particularly, for teacher salaries. The Program provides each district with funds to pay its professional payroll as determined by certain state standards. See Tex. Educ. Code Ann. §§ 16.301—16.316. If the district fails to pay its teachers at the levels determined by the state standards it receives nothing from the Program. See id., § 16.301(c). At the same time, districts are free to pay their teachers salaries in excess of the level set by the state standards, using local revenues—that is, property tax revenue—to make up the difference, see id., § 16.301(a).The state salary standards focus upon two factors: the educational level and the experience of the district's teachers. See id., §§ 16.301—16.316. The higher these two factors are, the more funds the district will receive from the Foundation Program for professional salaries. It should be apparent that the net effect of this scheme is to provide more assistance to property-rich districts than to property-poor ones. For rich districts are able to pay their teachers, out of local funds, salary increments above the state minimum levels. Thus, the rich districts are able to attract the teachers with the best education and the most experience. To complete the circle, this then means, given the state standards, that the rich districts receive more from the Foundation Program for professional salaries than do poor districts. A portion of Professor Berke's study vividly illustrates the impact of the State's standards on districts of varying wealth. See Appendix III, post, p. 1349.

32. In 1967—1968, Alamo Heights School District had $49,478 in taxable property per pupil. See Berke Affidavit, Table VII, App. 216.

33. In 1967—1968, Edgewood Independent School District had $5,960 in taxable property per pupil. Ibid.

34. I fail to understand the relevance for this case of the Court's suggestion that if Alamo Heights School District, which is approximately the same physical size as Edgewood Independent School District but which has only one-fourth as many students, had the same number of students as Edgewood, the former's per-pupil expenditure would be considerably

closer to the latter's. Ante, at 1285, n. 33. Obviously, this is true, but it does not alter the simple fact that Edgewood does have four times as many students but not four times as much taxable property wealth. From the perspective of Edgewood's school children then—the perspective that ultimately counts here—Edgewood is clearly a much poorer district than Alamo Heights. The question here is not whether districts have equal taxable property wealth in absolute terms, but whether districts have differing taxable wealth given their respective school-age populations.

35. In the face of these gross disparities in treatment which experience with the Texas financing scheme has revealed, I cannot accept the Court's suggestion that we are dealing here with a remedial scheme to which we should accord substantial deference because of its accomplishments rather than criticize it for its failures. Ante, at 1299—1300. Moreover, Texas' financing scheme is hardly remedial legislation of the type for which we have previously shown substantial tolerance. Such legislation may in fact extend the vote to 'persons who otherwise would be denied it by state law,' Katzenbach v. Morgan, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d 828 (1966), or it may eliminate the evils of the private bail bondsman, Schilb v. Kuebel, 404 U.S. 357, 92 S.Ct. 479, 30 L.Ed.2d 502 (1971). But those are instances in which a legislative body has sought to remedy problems for which it cannot be said to have been directly responsible. By contrast, public education is the function of the State in Texas, and the responsibility for any defect in the financing scheme must ultimately rest with the State. It is the State's own scheme which has caused the funding problem, and, thus viewed, that scheme can hardly be deemed remedial.

36. Cf. Appendix I, post, p. 1348.

37. Brief for Appellants 3.

Despite these facts, the majority continually emphasized how much state aid has, in recent years, been given ***82** to property-poor Texas school districts. What the Court fails to emphasize is the cruel irony of how much more state aid is being given to property-rich Texas school districts on top of their already substantial local property tax revenues.[38] Under any view, then, it is apparent that the state aid provided by the Foundation School Program fails to compensate for the large funding variations attributable to the local property tax element of the Texas financing scheme. ****1322** And it is these stark differences in the treatment of Texas school districts and school children inherent in the Texas financing scheme, not the absolute amount of state aid provided to any particular school district, that are the crux of this case. There can, moreover, be no escaping the conclusion that the local property tax which is dependent upon taxable district property wealth is an essential feature of the Texas scheme for financing public education.[39]

38. Thus, in 1967—1968, Edgewood had a total of $248 per pupil in state and local funds compared with a total of $558 per pupil for Alamo Heights. See Berke Affidavit, Table X, App. 219. For 1970—1971, the respective totals were $418 and $913. See Texas Research League, supra, n. 2, at 14.

39. Not only does the local property tax provide approximately 40% of the funds expended on public education, but it is the only source of funds for such essential aspects of educational financing as the payment of school bonds, see n. 3, supra, and the payment of the district's share of the Local Fund Assignment, as well as for nearly all expenditures above the minimums established by the Foundation School Program.

B

The appellants do not deny the disparities in educational funding caused by variations in taxable district property wealth. They do contend, however, that whatever the differences in per-pupil spending among Texas districts, there are no discriminatory consequences for the children of the disadvantaged districts. They recognize that what is at stake in this case is the quality of the ***83** public education provided Texas children in the districts in which they live. But appellants reject the suggestion that the quality of education in any particular district is determined by money—beyond some minimal level of funding which they believe to be assured every Texas district by the Minimum Foundation School Program. In their view, there is simply no denial of equal educational opportunity to any Texas school children as a result of the widely varying per-pupil spending power provided districts under the current financing scheme.

In my view, though, even an unadorned restatement of this contention is sufficient to reveal its absurdity. Authorities concerned with educational quality no doubt disagree as to the significance of variations in per-pupil spending.[40] Indeed, conflicting expert testimony was presented to the District Court in this case concerning the effect of spending variations on educational achievement.[41] We sit, however, not to resolve disputes over educational theory but to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the ***84** former will have greater choice in educational planning than will the latter. In this regard, I believe the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds—and thus with greater choice in educational planning—may nevertheless excel is to the credit of the child, not the ****1323** State, cf. Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 349, 59 S.Ct. 232, 236, 86 L.Ed. 208 (1938). Indeed, who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.

40. Compare, e.g., J. Coleman et al., Equality of Educational Opportunity 290—330 (1966); Jencks, The Coleman Report and the Conventional Wisdom, in On Equality of Educational Opportunity 69, 91—104 (F. Mosteller & D. Moynihan eds. 1972), with, e.g., Guthrie, G. Kleindorfer, H. Levin & R. Stout, Schools and inequality 79—90 (1971); Kiesling, Measuring a Local Government Service: A Study of School Districts in New York State, 49 Rev. Econ. & Statistics, 356 (1967).

41. Compare Berke Answers to Interrogatories 10 (‘Dollar expenditures are probably the best way of measuring the quality of education afforded students . . .’), with Graham Deposition 39

('(I)t is not just necessarily the money, no. It is how wisely you spend it'). It warrants noting that even appellants' witness, Mr. Graham, qualified the importance of money only by the requirement of wise expenditure. Quite obviously, a district which is property poor is powerless to match the education provided by a property-rich district, assuming each district allocates its funds with equal wisdom.

Hence, even before this Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause. As a basis for striking down state-enforced segregation of a law school, the Court in Sweatt v. Painter, 339 U.S. 629, 633—634, 70 S.Ct. 848, 850, 94 L.Ed. 1114 (1950), stated:

'(W)e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the (whites only) Law School is superior. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close.'

***85** See also McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950). Likewise, it is difficult to believe that if the children of Texas had a free choice, they would choose to be educated in districts with fewer resources, and hence with more antiquated plants, less experienced teachers, and a less diversified curriculum. In fact, if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court.[42]

42. See Brief of amici curiae, inter alia, San Marino Unified School District; Beverly Hills Unified School District; Brief of amici curiae, inter alia, Bloomfield Hills, Michigan, School District; Dearborn City, Michigan School District; Grosse Pointe, Michigan, Public School System.

The consequences, in terms of objective educational input, of the variations in district funding caused by the Texas financing scheme are apparent from the data introduced before the District Court. For example, in 1968—1969, 100% of the teachers in the property-rich Alamo Heights School District had college degrees.[43] By contrast, during the same school year only 80.02% of the teachers had college degrees in the property poor Edgewood Independent School District.[44] Also, in 1968—1969, approximately 47% of the teachers in the Edgewood District were on emergency teaching permits, whereas only 11% of the teachers in Alamo Heights were on such permits.[45] This is undoubtedly a reflection of the fact that the top of Edgewood's teacher salary scale was ***86** approximately 80% of Alamo Heights.[46] And, not surprisingly, the teacher-student ratio varies significantly between the two districts.[47] In other words, as might be expected, a difference in the funds available to districts results in a difference in ****1324** educational inputs available for a child's public education in Texas. For constitutional purposes, I believe this situation, which is directly attributable to the Texas financing scheme, raises a grave question of state-created discrimination in the provision of public education. Cf. Gaston County v. United States, 395 U.S. 285, 293—294, 89 S.Ct. 1720,

1724—1725, 23 L.Ed.2d 309 (1969).

43. Answers to Plaintiffs' Interrogatories, App. 115.

44. Ibid. Moreover, during the same period, 37.17% of the teachers in Alamo Heights had advanced degrees, while only 14.98% of Edgewood's faculty had such degrees. See id., at 116.

45. Id., at 117.

46. Id., at 118.

47. In the 1967—1968 school year, Edgewood had 22,862 students and 864 teachers, a ratio of 26.5 to 1. See id., at 110, 114. In Alamo Heights, for the same school year, there were 5,432 students and 265 teachers for a ratio of 20.5 to 1. Ibid.

At the very least, in view of the substantial interdistrict disparities in funding and in resulting educational inputs shown by appellees to exist under the Texas financing scheme, the burden of proving that these disparities do not in fact affect the quality of children's education must fall upon the appellants. Cf. Hobson v. Hansen, 327 F.Supp. 844, 860—861 (D.C.D.C.1971). Yet appellants made no effort in the District Court to demonstrate that educational quality is not affected by variations in funding and in resulting inputs. And, in this Court, they have argued no more than that the relationship is ambiguous. This is hardly sufficient to overcome appellees' prima facie showing of state-created discrimination between the schoolchildren of Texas with respect to objective educational opportunity.

Nor can I accept the appellants' apparent suggestion that the Texas Minimum Foundation School Program effectively eradicates any discriminatory effects otherwise resulting from the local property tax element of the ***87** Texas financing scheme. Appellants assert that, despite its imperfections, the Program 'does guarantee an adequate education to every child.'[48] The majority, in considering the constitutionality of the Texas financing scheme, seems to find substantial merit in this contention, for it tells us that the Foundation Program 'was designed to provide an adequate minimum educational offering in every school in the State,' ante, at 1303, and that the Program 'assur(es) a basic education for every child,' ante, at 1305. But I fail to understand how the constitutional problems inherent in the financing scheme are eased by the Foundation Program. Indeed, the precise thrust of the appellants' and the Court's remarks are not altogether clear to me.

48. Reply Brief for Appellants 17. See also, id., at 5, 15—16.

The suggestion may be that the state aid received via the Foundation Program sufficiently improves the position of property-poor districts vis-a-vis property-rich districts—in terms of educational funds—to eliminate any claim of interdistrict discrimination in available educational resources which might otherwise exist if educational funding were dependent solely upon local property taxation. Certainly the Court has recognized that to demand precise equality of treatment is normally unrealistic, and thus minor differences inherent in any practical context usually will not make out a substantial equal protection claim. See, e.g., Mayer v. City of Chicago, 404 U.S. 189, 194—195, 92 S.Ct. 410, 414—415,

30 L.Ed.2d 372 (1971); Draper v. Washington, 372 U.S. 487, 495—496, 83 S.Ct. 774, 778—779, 9 L.Ed.2d 899 (1963); Bain Peanut Co. v. Pinson, 282 U.S. 499, 501, 51 S.Ct. 228, 229, 75 L.Ed. 482 (1931). But, as has already been seen, we are hardly presented here with some de minimis claim of discrimination resulting from the play necessary in any functioning system; to the contrary, it is clear that the Foundation Program utterly fails to ***88** ameliorate the seriously discriminatory effects of the local property tax. [49]

> 49. Indeed, even apart from the differential treatment inherent in the local property tax, the significant interdistrict disparities in state aid received under the Minimum Foundation School Program would seem to raise substantial equal protection questions.

Alternatively, the appellants and the majority may believe that the Equal Protection Clause cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education ****1325** which evidently is 'enough.' [50] The basis for such a novel view is far from clear. It is, of course, true that the Constitution does not require precise equality in the treatment of all persons. As Mr. Justice Frankfurter explained:

> 50. I find particularly strong intimations of such a view in the majority's efforts to denigrate the constitutional significance of children in property-poor districts 'receiving a poorer quality education than that available to children in districts having more assessable wealth' with the assertion 'that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.' Ante, at 1291. The Court, to be sure, restricts its remark to 'wealth' discrimination. But the logical basis for such a restriction is not explained by the Court, nor is it otherwise apparent, see infra, at 1340—1341 and n. 77.

'The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws', and laws are not abstract propositions. . . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' Tigner v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940).

See also Douglas v. California, 372 U.S. 353, 357, 83 S.Ct. 814, 816, 9 L.Ed.2d 811 (1963); Goesaert v. Cleary, 335 U.S. 464, 466, 69 S.Ct. 198, 199, 93 L.Ed. 163 (1948). ***89** But this Court has never suggested that because some 'adequate' level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that 'all persons similarly circumstanced shall be treated alike.' F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed. 989 (1920).

Even if the Equal Protection Clause encompassed some theory of constitutional adequacy, discrimination in the provision of educational opportunity would certainly seem to be a poor candidate for its application. Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is 'enough' to excuse constitutional discrimination. One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is

constitutionally sufficient. Indeed, the majority's apparent reliance upon the adequacy of the educational opportunity assured by the Texas Minimum Foundation School Program seems fundamentally inconsistent with its own recognition that educational authorities are unable to agree upon what makes for educational quality, see ante, at 1301—1302, 1303 and n. 86 and at 1303 n. 101. If, as the majority stresses, such authorities are uncertain as to the impact of various levels of funding on educational quality, I fail to see where it finds the expertise to divine that the particular levels of funding provided by the Program assure an adequate educational opportunity—much less an education substantially equivalent in quality to that which a higher level of funding might provide. Certainly appellants' mere assertion before this Court of the adequacy of the education guaranteed by the Minimum ***90** Foundation School Program cannot obscure the constitutional implications of the discrimination in educational funding and objective educational inputs resulting from the local property tax—particularly since the appellees offered substantial uncontroverted evidence before the District Court impugning the now much touted 'adequacy' of the education guaranteed by the Foundation Program.[51]

> 51. See Answers to Interrogatories by Dr. Joel S. Berke, Ans. 17, p. 9; Ans. 48—51, pp. 22—24; Ans. 88—89, pp. 41—42; Deposition of Dr. Daniel C. Morgan, Jr., at 52—55; Affidavit of Dr. Daniel C. Morgan, Jr., App. 242—243.

****1326** In my view, then, it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle. Here, appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the schoolchildren of Texas. This discrimination is, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient showing to raise a substantial question of discriminatory state action in violation of the Equal Protection Clause.[52]

> 52. It is true that in two previous cases this Court has summarily affirmed district court dismissals of constitutional attacks upon other state educational financing schemes. See McInnis v. Shapiro, 293 F.Supp. 327 (N.D.Ill.1968), aff'd per curiam, sub nom. McInnis v. Ogilvie, 394 U.S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308 (1969); Burruss v. Wilkerson, 310 F.Supp. 572 (W.D.Va.1969), aff'd per curiam, 397 U.S. 44, 90 S.Ct. 812, 25 L.Ed.2d 37 (1970). But those decisions cannot be considered dispositive of this action, for the thrust of those suits differed materially from that of the present case. In McInnis, the plaintiffs asserted that 'only a financing system which apportions public funds according to the educational needs of the students satisfies the Fourteenth Amendment.' 293 F.Supp., at 331. The District Court concluded that '(1) the Fourteenth Amendment does not require that public school expenditures be made only on the basis of pupils' educational needs, and (2) the lack of judicially manageable standards makes this controversy nonjusticiable.' Id., at 329. The Burruss District Court dismissed that suit essentially in reliance on McInnis which it found to be 'scarcely distinguishable.' 310 F.Supp. at 574. This suit involves no effort to obtain an allocation of school funds that considers only educational need. The District Court rules only that the State must remedy the discrimination resulting from the distribution of taxable local district wealth which has heretofore prevented many districts from truly exercising local fiscal control. Furthermore, the limited holding of the

District Court presents none of the problems of judicial management which would exist if the federal courts were to attempt to ensure the distribution of educational funds solely on the basis of educational need, see infra, at 1346—1347.

***91** C

Despite the evident discriminatory effect of the Texas financing scheme, both the appellants and the majority raise substantial questions concerning the precise character of the disadvantaged class in this case. The District Court concluded that the Texas financing scheme draws 'distinction between groups of citizens depending upon the wealth of the district in which they live' and thus creates a disadvantaged class composed of persons living in property-poor districts. See 337 F.Supp., at 282. See also id., at 281. In light of the data introduced before the District Court, the conclusion that the schoolchildren of property-poor districts constitute a sufficient class for our purposes seems indisputable to me.

Appellants contend, however, that in constitutional terms this case involves nothing more than discrimination against local school districts, not against individuals, since on its face the state scheme is concerned only with the provision of funds to local districts. The result of the Texas financing scheme, appellants suggest, is merely that some local districts have more available revenues for education; others have less. In that respect, ***92** they point out, the States have broad discretion in drawing reasonable distinctions between their political subdivisions. See Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 231, 84 S.Ct. 1226, 1233, 12 L.Ed.2d 256 (1964); McGowan v. Maryland, 366 U.S. 420, 427, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961); Salsburg v. Maryland, 346 U.S. 545, 550—554, 74 S.Ct. 280, 282—285, 98 L.Ed. 281 (1954).

But this Court has consistently recognized that where there is in fact discrimination*****1327** against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location. See Gordon v. Lance, 403 U.S. 1, 4, 91 S.Ct. 1889, 1891, 29 L.Ed.2d 273 (1971); Reynolds v. Sims, 377 U.S. 533, 565—566, 84 S.Ct. 1362, 1383—1384, 12 L.Ed.2d 506 (1964); Gray v. Sanders, 372 U.S. 368, 379, 83 S.Ct. 801, 807, 9 L.Ed.2d 821 (1963). Texas has chosen to provide free public education for all its citizens, and it has embodied that decision in its constitution. [53] Yet, having established public education for its citizens, the State, as a direct consequence of the variations in local property wealth endemic to Texas' financing scheme, has provided some Texas schoolchildren with substantially less resources for their education than others. Thus, while on its face the Texas scheme may merely discriminate between local districts, the impact of that discrimination falls directly upon the children whose educational opportunity is dependent upon where they happen to live. Consequently, the District Court correctly concluded that the Texas financing scheme discriminates, from a constitutional perspective, between school children on the basis of the amount of taxable property located within their local districts.

53. Tex. Const., Art. 7, § 1.

In my Brother STEWART's view, however, such a description of the discrimination inherent in this case is apparently not sufficient, for it fails to define the 'kind of objectively identifiable classes' that he

evidently perceives ***93** to be necessary for a claim to be 'cognizable under the Equal Protection Clause,' ante, at 1311. He asserts that this is also the view of the majority, but he is unable to cite, nor have I been able to find, any portion of the Court's opinion which remotely suggests that there is no objectively identifiable or definable class in this case. In any event, if he means to suggest that an essential predicate to equal protection analysis is the precise identification of the particular individuals who compose the disadvantaged class, I fail to find the source from which he derives such a requirement. Certainly such precision is not analytically necessary. So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination—whatever the standard of equal protection analysis employed.[54] This is clear from our decision only last Term in Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), where the Court, in striking down Texas' primary filing fees as violative of equal protection, found no impediment to equal protection analysis in the fact that the members of the disadvantaged class could not be readily identified. The Court recognized that the filing-fee system tended 'to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor.' Id., at 144, 92 S.Ct., at 856. The ***94** Court also recognized that '(t)his disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause . . ..' Ibid. Nevertheless, it ****1328** concluded that 'we would ignore reality were we not to recognize that this system falls with unequal weight on voters . . . according to their economic status.' Ibid. The nature of the classification in Bullock was clear, although the precise membership of the disadvantaged class was not. This was enough in Bullock for purposes of equal protection analysis. It is enough here.

> 54. Problems of remedy may be another matter. If provision of the relief sought in a particular case required identification of each member of the affected class, as in the case of monetary relief, the need for clarity in defining the class is apparent. But this involves the procedural problems inherent in class action litigation, not the character of the elements essential to equal protection analysis. We are concerned here only with the latter. Moreover, it is evident that in cases such as this, provision of appropriate relief, which takes the injunctive form, is not a serious problem since it is enough to direct the action of appropriate officials. Cf. Potts v. Flax, 313 F.2d 284, 288—290 (CA5 1963).

It may be, though, that my Brother STEWART is not in fact demanding precise identification of the membership of the disadvantaged class for purposes of equal protection analysis, but is merely unable to discern with sufficient clarity the nature of the discrimination charged in this case. Indeed, the Court itself displays some uncertainty as to the exact nature of the discrimination and the resulting disadvantaged class alleged to exist in this case. See ante, at 1289—1290. It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue. In fact, the absence of such a clear, articulable understanding of the nature of alleged discrimination in a particular instance may well suggest the absence of any real discrimination. But such is hardly the case here.

A number of theories of discrimination have, to be sure, been considered in the course of this litigation. Thus, the District Court found that in Texas the poor and minority group members tend to

live in property-poor districts, suggesting discrimination on the basis of both personal wealth and race. See 337 F.Supp., at 282 and n. 3. The Court goes to great lengths to discredit the data upon which the District Court relied, and thereby its conclusion that poor people live in property-poor dis***94** tricts.***95** [55] Although I have serious doubts as to the correctness of the Court's analysis in rejecting the data submitted below,[56] I ****1329** have no need to join issue on these factual disputes.

55. I assume the Court would lodge the same criticism against the validity of the finding of a correlation between poor districts and racial minorities.

56. The Court rejects the District Court's finding of a correlation between poor people and poor districts with the assertion that ‘there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts' in Texas. Ante, at 1291. In support of its conclusion the Court offers absolutely no data—which it cannot on this record—concerning the distribution of poor people in Texas to refute the data introduced below by appellees; it relies instead on a recent law review note concerned solely with the State of Connecticut, Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L.J. 1303 (1972). Common sense suggests that the basis for drawing a demographic conclusion with respect to a geographically large, urban-rural, industrial-agricultural State such as Texas from a geographically small, densely populated, highly industrialized State such an Connecticut is doubtful at best. Furthermore, the article upon which the Court relies to discredit the statistical procedures employed by Professor Berke to establish the correlation between poor people and poor districts, see n. 11, supra, based its criticism primarily on the fact that only four of the 110 districts studied were in the lowest of the five categories, which were determined by relative taxable property per pupil, and most districts clustered in the middle three groups. See Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny, 120 U. Pa. L. Rev. 504, 524 n. 67 (1972). See also ante, at 1292—1293. But the Court fails to note that the four poorest districts in the sample had over 50,000 students which constituted 10% of the students in the entire sample. It appears, moreover, that even when the richest and the poorest categories are enlarged to include in each category 20% of the students in the sample, the correlation between district and individual wealth holds true. See Brief for the Governors of Minnesota, Maine, South Dakota, Wisconsin, and Michigan as amici curiae 17 n. 21.Finally, it cannot be ignored that the data introduced by appellees went unchallenged in the District Court. The majority's willingness to permit appellants to litigate the correctness of those data for the first time before this tribunal—where effective response by appellees is impossible—is both unfair and judicially unsound.

***96** I believe it is sufficient that the overarching form of discrimination in this case is between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live. To understand both the precise nature of this discrimination and the parameters of the disadvantaged class it is sufficient to consider the constitutional principle which appellees contend is controlling in the context of educational financing. In their complaint appellees asserted that the Constitution does not permit local district wealth to be determinative of educational opportunity.[57] This is simply another way of saying, as the District Court concluded, that consistent with the

guarantee of equal protection of the laws, 'the quality of public education may not be a function of wealth, other than the wealth of the state as a whole.' 337 F.Supp., at 284. Under such a principle, the children of a district are excessively advantaged if that district has more taxable property per pupil than the average amount of taxable property per pupil considering the State as a whole. By contrast, the children of a district are disadvantaged if that district has less taxable property per pupil than the state average. The majority attempts to disparage such a definition of the disadvantaged class as the product of an 'artificially defined level' of district wealth. Ante, at 1294. But such is clearly not the case, for this is the ***97** definition unmistakably dictated by the constitutional principle for which appellees have argued throughout the course of this litigation. And I do not believe that a clearer definition of either the disadvantaged class of Texas schoolchildren or the allegedly unconstitutional discrimination suffered by the members of that class under the present Texas financing scheme could be asked for, much less needed.[58] Whether this discrimination, against the schoolchildren of property-poor districts, inherent in the Texas financing scheme, is violative of the Equal Protection Clause is the question to which the must now turn.

> 57. Third Amended Complaint App. 23. Consistent with this theory, appellees purported to represent, among others, a class composed of 'all . . . school children in independent school districts . . . who . . . have been deprived of the equal protection of the law under the Fourteenth Amendment with regard to public school education because of the low value of the property lying within the independent school districts in which they reside.' Id., at 15.

> 58. The degree of judicial scrutiny that this particular classification demands is a distinct issue which I consider in Part II, C, infra.

II

To avoid having the Texas financing scheme struck down because of the interdistrict variations in taxable property wealth, the District Court determined that it was insufficient for appellants to show merely that the State's scheme was rationally related to some legitimate state purpose; rather, the discrimination inherent in the scheme had to be shown necessary to promote a 'compelling state interest' in order to withstand constitutional scrutiny. The basis for this determination was twofold: first, the financing scheme divides citizens on a wealth basis, a classification which the District Court viewed as highly suspect; and second, the discriminatory scheme directly affects what it considered to be a 'fundamental interest,' namely, education.

This Court has repeatedly held that state discrimination which either adversely affects a 'fundamental interest,' see, e.g., Dunn v. Blumstein, 405 U.S. 330, 336—342, 92 S.Ct. 995, 999—1003, 31 L.Ed.2d 274 (1972); Shapiro v. Thompson, 394 U.S. 618, 629—631, 89 S.Ct. 1322, 1328—1330, 22 L.Ed.2d 600 (1969), or is based on a distinction of a suspect character, see, e.g., ***98** Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971); ****1330** McLaughlin v. Florida, 379 U.S. 184, 191—192, 85 S.Ct. 283, 287—289, 13 L.Ed.2d 222 (1964), must be carefully scrutinized to ensure that the scheme is necessary to promote a substantial, legitimate state interest. See, e.g., Dunn v. Blumstein, supra, 405 U.S., at 342—343, 92 S.Ct., at 1003—1004; Shapiro v. Thompson, supra, 394 U.S., at 634, 89 S.Ct., at 1331. The majority today concludes, however, that the Texas scheme is not subject to such a strict standard of review under the Equal Protection Clause. Instead, in its view, the Texas scheme must

be tested by nothing more than that lenient standard of rationality which we have traditionally applied to discriminatory state action in the context of economic and commercial matters. See, e.g., McGowan v. Maryland, 366 U.S., at 425—426, 81 S.Ct., at 1104—1105; Morey v. Doud, 354 U.S. 457, 465—466, 77 S.Ct. 1344, 1349—1351, 1 L.Ed.2d 1485 (1957); F. S. Royster Guano Co. v. Virginia, 253 U.S., at 415, 40 S.Ct., at 561; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78—79, 31 S.Ct. 337, 340—341, 55 L.Ed. 369 (1911). By so doing, the Court avoids the telling task of searching for a substantial state interest which the Texas financing scheme, with its variations in taxable district property wealth, is necessary to further. I cannot accept such an emasculation of the Equal Protection Clause in the context of this case.

A

To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. See Dandridge v. Williams, 397 U.S. 471, 519—521, 90 S.Ct. 1153, 1178—1180, 25 L.Ed.2d 491 (1970) (dissenting opinion); Richardson v. Belcher, 404 U.S. 78, 90, 92 S.Ct. 254, 261, 30 L.Ed.2d 231 (1971) (dissenting opinion). The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection***99** Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which 'concentration (is) placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.' Dandridge v. Williams, supra, 397 U.S., at 520—521, 90 S.Ct., at 1180 (dissenting opinion).

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. See Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Further, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right 'was conceived from the beginning to be a necessary concomitant of the stronger *****1331*** Union the Constitution created.' United States v. Guest, 383 U.S. 745, 758, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239 (1966). See also Crandall v. Nevada, 6 Wall. 35, 48, 18 L.Ed. 744 (1868). Consequently, the Court has required that a state classification affecting the constitutionally ****100*** protected right to travel must be 'shown to be necessary to promote a compelling governmental interest.' Shapiro v. Thompson, 394 U.S., at 634, 89 S.Ct., at 1331. But it will

not do to suggest that the 'answer' to whether an interest is fundamental for purposes of equal protection analysis is always determined by whether that interest 'is a right . . . explicitly or implicitly guaranteed by the Constitution,' ante, at 1297.[59]

> 59. Indeed, the Court's theory would render the established concept of fundamental interests in the context of equal protection analysis superfluous, for the substantive constitutional right itself requires that this Court strictly scrutinize any asserted state interest for restricting or denying access to any particular guaranteed right, see, e.g., United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); Cox v. Louisiana, 379 U.S. 536, 545—551, 85 S.Ct. 453, 459—463, 13 L.Ed.2d 471 (1965).

I would like to know where the Constitution guarantees the right to procreate, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), or the right to vote in state elections, e.g., Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), or the right to an appeal from a criminal conviction, e.g., Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full blown constitutional protection.

Thus, in Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), the Court refused to recognize a substantive constitutional guarantee of the right to procreate. Nevertheless, in Skinner v. Oklahoma ex rel. Williamson, supra, 316 U.S., at 541, 62 S.Ct., at 1113, the Court, without impugning the continuing validity of Buck v. Bell, held that 'strict scrutiny' of state discrimination affecting procreation 'is essential' for '(m)arriage and procreation are fundamental to the very existence and survival of the race.' Recently, in Roe v. Wade, 410 U.S. 113, 152—154, 93 S.Ct. 705, 726—727, 35 L.Ed.2d 147 (1973), ***101** the importance of procreation has indeed been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any 'right' to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in Buck v. Bell. See Roe v. Wade, supra, at 154, 93 S.Ct., at 727.

Similarly, the right to vote in state elections has been recognized as a 'fundamental political right,' because the Court concluded very early that it is 'preservative of all rights.' Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886); see, e.g., Reynolds v. Sims, supra, 377 U.S., at 561—562, 84 S.Ct. at 1381—1382. For this reason, 'this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.' Dunn v. Blumstein, 405 U.S., at 336, 92 S.Ct., at 1000 (emphasis added). The final source of such protection from inequality in the provision of the state franchise is, of course, the Equal Protection Clause. Yet it is clear that whatever degree of importance has been attached to the state electoral process when unequally distributed, the right to vote in state elections has itself never been accorded the statute of an independent constitutional guarantee. [60] See ****1332** Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); Kramer v. Union Free School District No. 15, 395 U.S. 621, 626—629, 89 S.Ct. 1886, 1889—1891, 23 L.Ed.2d 583 (1969); Harper v. Virginia Board of Elections, 383 U.S. 663, 665, 86 S.Ct. 1079, 1080, 16 L.Ed.2d 169 (1966).

60. It is interesting that in its effort to reconcile the state voting rights cases with its theory of fundamentality the majority can muster nothing more than the contention that '(t)he constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted . . ..' Ante, at 1297 n. 74 (emphasis added). If, by this, the Court intends to recognize a substantive constitutional 'right to equal treatment in the voting process' independent of the Equal Protection Clause, the source of such a right is certainly a mystery to me.

***102** Finally, it is likewise 'true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.' Griffin v. Illinois, 351 U.S., at 18, 76 S.Ct., at 590. Nevertheless, discrimination adversely affecting access to an appellate process which a State has chosen to provide has been considered to require close judicial scrutiny. See, e.g., Griffin v. Illinois, supra; Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).[61]

61. It is true that Griffin and Douglas also involved discrimination against indigents, that is, wealth discrimination. But, as the majority points out, ante, at 1294, the Court has never deemed wealth discrimination alone to be sufficient to require strict judicial scrutiny; rather, such review of wealth classifications has been applied only where the discrimination affects an important individual interest, see, e.g., Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). Thus, I believe Griffin and Douglas can only be understood as premised on a recognition of the fundamental importance of the criminal appellate process.

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective 'picking-and-choosing' between various interests or that it must involve this Court in creating 'substantive constitutional rights in the name of guaranteeing equal protection of the laws,' ante, at 1297. Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes ***103** more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. And access to criminal appellate processes enhances the integrity of the range of rights[62] implicit in the Fourteenth Amendment guarantee of due process of ****1333** law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself.

This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.

> 62. See, e.g., Duncan v. Louisiana, 391 U.S., 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (right to jury trial); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (right to compulsory process); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (right to confront one's accusers).

The effect of the interaction of individual interests with established constitutional guarantees upon the degree of care exercised by this Court in reviewing state discrimination affecting such interests is amply illustrated by our decision last Term in Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). In Baird, the Court struck down as violative of the Equal Protection Clause a state statute which denied unmarried persons access to contraceptive devices on the same basis as married persons. The Court ***104** purported to test the statute under its traditional standard whether there is some rational basis for the discrimination effected. Id., at 446—447, 92 S.Ct. at 1034—1035. In the context of commercial regulation, the Court has indicated that the Equal Protection Clause 'is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.' See, e.g., McGowan v. Maryland, 366 U.S., at 425, 81 S.Ct., at 1105; Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 557, 67 S.Ct. 910, 912, 91 L.Ed. 1093 (1947). And this lenient standard is further weighted in the State's favor by the fact that '(a) statutory discrimination will not be set aside if any state of facts reasonably may be conceived (by the Court) to justify it.' McGowan v. Maryland, supra, 366 U.S., at 426, 81 S.Ct. at 1105. But in Baird the Court clearly did not adhere to these highly tolerant standards of traditional rational review. For although there were conceivable state interests intended to be advanced by the statute—e.g., deterrence of premarital sexual activity and regulation of the dissemination of potentially dangerous articles—the Court was not prepared to accept these interests on their face, but instead proceeded to test their substantiality by independent analysis. See 405 U.S., at 449—454, 92 S.Ct., at 1036—1039. Such close scrutiny of the State's interests was hardly characteristic of the deference shown state classifications in the context of economic interests. See, e.g., Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948); Kotch v. Board of River Port Pilot Comm'rs, supra. Yet I think the Court's action was entirely appropriate, for access to and use of contraceptives bears a close relationship to the individual's constitutional right of privacy. See 405 U.S., at 453—454; id., at 463—464, 92 S.Ct. 1038—1039; Id., at 1043—1044 (White, J., concurring in result). See also Roe v. Wade, 410 U.S., at 152—153, 93 S.Ct., at 726—727.

A similar process of analysis with respect to the invidiousness of the basis on which a particular classification is drawn has also influenced the Court as to the ***105** appropriate degree of scrutiny to be accorded any particular case. The highly suspect character of classifications based on race,[63] nationality,[64] or alienage[65] is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as 'discrete and insular minorities' who are relatively powerless to protect their interests in the political process. See Graham v. Richardson, 403 U.S., at 372, 91 S.Ct., at 1852; ****1334** United States v. Carolene Products Co., 304 U.S. 144, 152—153, n. 4, 58 S.Ct. 778, 783—784, 82 L.Ed. 1234 (1938). Moreover, race, nationality, or alienage is "in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774.'

McLaughlin v. Florida, 379 U.S., at 192, 85 S.Ct., at 288. Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality. It may be that all of these considerations, which make for particular judicial solicitude in the face of discrimination on the basis of race, nationality, or alienage, do not coalesce—or at least not to the same degree—in other forms of discrimination. Nevertheless, these considerations have undoubtedly influenced the care with which the Court has scrutinized other forms of discrimination.

> 63. See, e.g., McLaughlin v. Florida, 379 U.S. 184, 191—192, 85 S.Ct. 283, 287—289, 13 L.Ed.2d 222 (1964); Loving v. Virginia, 388 U.S. 1, 9, 87 S.Ct. 1817, 1822, 18 L.Ed.2d 1010 (1967).

> 64. See Oyama v. California, 332 U.S. 633, 644—646, 68 S.Ct. 269, 274—275, 92 L.Ed. 249 (1948); Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944).

> 65. See Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971).

In James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972), the Court held unconstitutional a state statute which provided for recoupment from indigent convicts of legal defense fees paid by the State. The Court found that the statute impermissibly differentiated between indigent criminals in debt to the State and civil judgment debtors, since criminal debtors were denied various protective exemptions ***106** afforded civil judgment debtors. [66] The Court suggested that in reviewing the statute under the Equal Protection Clause, it was merely applying the traditional requirement that there be "some rationality" in the line drawn between the different types of debtors. Id., at 140, 92 S.Ct., at 2034. Yet it then proceeded to scrutinize the statute with less than traditional deference and restraint. Thus, the Court recognized 'that state recoupment statutes may betoken legitimate state interests' in recovering expenses and discouraging fraud. Nevertheless, Mr. Justice Powell, speaking for the Court, concluded that

> 'these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors to whom the statute itself repeatedly makes reference. State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self sufficiency and self respect.' Id., at 141—142, 92 S.Ct., at 2034.

> 66. The Court noted that the challenged 'provision strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor's personal clothing, books and tools of trade.' 407 U.S., at 135, 92 S.Ct., at 2031

The Court, in short, clearly did not consider the problems of fraud and collection that the state legislature might have concluded were peculiar to indigent criminal defendants to be either sufficiently important or at least sufficiently substantiated to justify denial of the protective exemptions afforded to all civil judgment debtors, to a class composed exclusively of indigent criminal debtors.

Similarly, in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), the Court, in striking down a state statute which gave men ***107** preference over women when persons of equal entitlement apply for assignment as an administrator of a particular estate, resorted to a more stringent standard of equal protecting review than that employed in cases involving commercial matters. The Court indicated that it was testing the claim of sex discrimination by nothing more than whether the line drawn bore 'a rational relationship to a state objective,' which it recognized as a legitimate effort to reduce the work of probate courts in choosing between competing applications for letters of administration. Id., at 76, 92 S.Ct., at 254. Accepting such a purpose, the Idaho Supreme*****1335** Court had thought the classification to be sustainable on the basis that the legislature might have reasonably concluded that, as a rule, men have more experience than women in business matters relevant to the administration of an estate. 93 Idaho 511, 514, 465 P.2d 635, 638 (1970). This Court, however, concluded that '(t)o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . ..' 404 U.S., at 76, 92 S.Ct., at 254. This Court, in other words, was unwilling to consider a theoretical and unsubstantiated basis for distinction—however reasonable it might appear—sufficient to sustain a statute discriminating on the basis of sex.

James and Reed can only be understood as instances in which the particularly invidious character of the classification caused the Court to pause and scrutinize with more than traditional care the rationality of state discrimination. Discrimination on the basis of past criminality and on the basis of sex posed for the Court the spector of forms of discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences. Still, ***108** the Court's sensitivity to the invidiousness of the basis for discrimination is perhaps most apparent in its decisions protecting the interests of children born out of wedlock from discriminatory state action. See Weber v. Aetna Casualty & Surety Co., 406 U.S., 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968).

In Weber, the Court struck down a portion of a state workmen's compensation statute that relegated unacknowledged illegitimate children of the deceased to a lesser status with respect to benefits than that occupied by legitimate children of the deceased. The Court acknowledged the true nature of its inquiry in cases such as these: 'What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?' Id., 406 U.S. at 173, 92 S.Ct., at 1405. Embarking upon a determination of the relative substantiality of the State's justifications for the classification, the Court rejected the contention that the classifications reflected what might be presumed to have been the deceased's preference of beneficiaries as 'not compelling . . . where dependency on the deceased is a prerequisite to anyone's recovery . . ..' Ibid. Likewise, it deemed the relationship between the State's interest in encouraging legitimate family relationships and the burden placed on the illegitimates too tenuous to permit the classification to stand. Ibid. A clear insight into the basis of the Court's action is provided by its conclusion:

> '(I)mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.

Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection ***109** Clause does enable us to strike down discriminatory laws relating to status of birth . . ..' Id., at 175—176, 92 S.Ct., at 1407 (footnote omitted).

Status of birth, like the color of one's skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations. Yet illegitimacy has long been stigmatized by our society. Hence, discrimination on the basis of birth—particularly when it affects innocent children—warrants special judicial consideration.

In summary, it seems to me inescapably clear that this Court has consistently ****1336** adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. Moreover, '(t)he extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls.' Dandridge v. Williams, 397 U.S., at 520, 90 S.Ct., at 1179 (dissenting opinion). But the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a 'super-legislature.' Ante, at 1295. I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document. In truth, ***110** the Court itself will be open to the criticism raised by the majority so long as it continues on its present course of effectively selecting in private which cases will be afforded special consideration without acknowledging the true basis of its action.[67]

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

Opinions such as those in Reed and James seem drawn more as efforts to shield rather than to reveal the true basis of the Court's decisions. Such obfuscated action may be appropriate to a political body such as a legislature, but it is not appropriate to this Court. Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process.

Nevertheless, the majority today attempts to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests. By so doing, the majority singles this case out for analytic treatment at odds with what seems to me to be the clear trend of recent decisions in this Court, and thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than the lenient scrutiny of the Texas financing scheme which the majority pursues. Yet if the

discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification present in this case, the unconstitutionality of that scheme is unmistakable.

B

Since the Court now suggests that only interests guaranteed by the Constitution are fundamental for purposes of equal protection analysis, and since it rejects ***111** the contention that public education is fundamental, it follows that the Court concludes that public education is not constitutionally guaranteed. It is true that this Court has never deemed the provision of free public education to be required by the Constitution. Indeed, it has on occasion suggested that state-supported education is a privilege bestowed by a State on its citizens. See Missouri ex rel. Gaines v. Canada, 305 U.S., at 349, 59 S.Ct., at 236. Nevertheless, the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between*****1337*** education and some of our most basic constitutional values.

The special concern of this Court with the educational process of our country is a matter of common knowledge. Undoubtedly, this Court's most famous statement on the subject is that contained in Brown v. Board of Education, 347 U.S., at 493, 74 S.Ct., at 691:

> 'Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . .'

Only last Term, the Court recognized that '(p)roviding public schools ranks at the very apex of the function of a State.' Wisconsin v. Yoder, 406 U.S. 205, 213, 92 S.Ct., 1526, 1532, 32 L.Ed.2d 15 (1972). This is clearly borne out by the fact that in 48 ***112** of our 50 States the provision of public education is mandated by the state constitution.[68] No other state function is so uniformly recognized[69] as an essential element of our society's well-being. In large measure, the explanation for the special importance attached to education must rest, as the Court recognized in Yoder, id., at 221, 92 S.Ct., at 1536, on the facts that 'some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . .,' and that 'education prepares individuals to be self-reliant and self-sufficient participants in society.' Both facets of this observation are suggestive of the substantial relationship which education bears to guarantees of our Constitution.

> 68. See Brief of the National Education Association et al. as amici curiae App. A. All 48 of the 50 States which mandate public education also have compulsory-attendance laws which require school attendance for eight years or more. Id., at 20—21.

> 69. Prior to this Court's decision in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), every State had a constitutional provision directing the establishment of a system of public schools. But after Brown, South Carolina repealed its constitutional provision,

and Mississippi made its constitutional provision discretionary with the state legislature.

Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life. This Court's decision in Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1212, 1 L.Ed.2d 1311 (1957), speaks of the right of students 'to inquire, to study and to evaluate, to gain new maturity and understanding . . .' Thus, we have not casually described the classroom as the "marketplace of ideas." Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967). The opportunity for formal education may not necessarily be the essential determinant of an individual's ability to enjoy throughout his life the rights of free speech and association ***113** guaranteed to him by the First Amendment. But such an opportunity may enhance the individual's enjoyment of those rights, not only during but also following school attendance. Thus, in the final analysis, 'the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable.'[70]

70. Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1129 (1969).

****1338** Of particular importance is the relationship between education and the political process. 'Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.' School District of Abington Township v. Schempp, 374 U.S. 203, 230, 83 S.Ct. 1560, 1576, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring). Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. [71] Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation.[72] A system of '(c)ompetition in ideas and governmental ***114** policies is at the core of our electoral process and of the First Amendment freedoms.' Williams v. Rhodes, 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968). But of most immediate and direct concern must be the demonstrated effect of education on the exercise of the franchise by the electorate. The right to vote in federal elections is conferred by Art. I, § 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is 'preservative of other basic civil and political rights,' Reynolds v. Sims, 377 U.S., at 562, 84 S.Ct., at 1381. Data from the Presidential Election of 1968 clearly demonstrate a direct relationship between participation in the electoral process and level of educational attainment;[73] and, as this Court recognized in Gaston County v. United States, 395 U.S. 285, 296, 89 S.Ct. 1720, 1725, 23 L.Ed.2d 309 (1969), the quality of education offered may ***115** influence a child's decision to 'enter or remain in school.' It is this very sort of intimate relationship between a particular personal interest and specific constitutional guarantees that has heretofore caused the Court to attach special significance, for purposes of equal protection analysis, to individual****1339** interests such as procreation and the exercise of the state franchise.[74]

71. The President's Commission on School Finance, Schools, People, Money: The Need for Educational Reform 11 (1972), concluded that '(l)iterally, we cannot survive as a nation or as individuals without (education).' It further observed that:'(I)n a democratic society, public understanding of public issues is necessary for public support. Schools generally include in their

courses of instruction a wide variety of subjects related to the history, structure and principles of American government at all levels. In so doing, schools provide students with a background of knowledge which is deemed an absolute necessity for responsible citizenship.' Id., at 13—14.

72. See J. Guthrie, G. Kleindorfer, H. Levin, & R. Stout, Schools and Inequality 103—105 (1971); R. Hess & J. Torney, The Development of Political Attitudes in Children 217—218 (1967); Campbell, The Passive Citizen, in 6 Acta Sociologica, Nos. 1—2, p. 9, at 20—21 (1962).That education is the dominant factor in influencing political participation and awareness is sufficient, I believe, to dispose of the Court's suggestion that, in all events, there is no indication that Texas is not providing all of its children with a sufficient education to enjoy the right of free speech and to participate fully in the political process. Ante, at 1298—1299. There is, in short, no limit on the amount of free speech or political participation that the Constitution guarantees. Moreover, it should be obvious that the political process, like most other aspects of social intercourse, is to some degree competitive. It is thus of little benefit to an individual from a property-poor district to have 'enough' education if those around him have more than 'enough.' Cf. Sweatt v. Painter, 339 U.S. 629, 633—634, 70 S.Ct. 848, 849, 850, 94 L.Ed. 1114 (1950).

73. See United States Department of Commerce, Bureau of the Census, Voting and Registration in the Election of November 1968, Current Population Reports, Series P—20, No. 192, Table 4, p. 17. See also Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., Levin, The Costs to the Nation of Inadequate Education 46—47 (Comm. Print 1972).

74. I believe that the close nexus between education and our established constitutional values with respect to freedom of speech and participation in the political process makes this a different case from our prior decisions concerning discrimination affecting public welfare, see, e.g., Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), or housing, see, e.g., Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). There can be no question that, as the majority suggests, constitutional rights may be less meaningful for someone without enough to eat or without decent housing. Ante, at 1299. But the crucial difference lies in the closeness of the relationship. Whatever the severity of the impact of insufficient food or inadequate housing on a person's life, they have never been considered to bear the same direct and immediate relationship to constitutional concerns for free speech and for our political processes as education has long been recognized to bear. Perhaps, the best evidence of this fact is the unique status which has been accorded public education as the single public service nearly unanimously guaranteed in the constitutions of our States, see supra, at 1336—1337 and n. 68. Education, in terms of constitutional values, is much more analogous in my judgment, to the right to vote in state elections than to public welfare or public housing. Indeed, it is not without significance that we have long recognized education as an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency.

While ultimately disputing little of this, the majority seeks refuge in the fact that the Court has 'never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective

speech or the most informed electoral choice.' Ante at 1298. This serves only to blur what is in fact at stake. With due respect, the issue is neither provision of the most effective speech nor of the most informed vote. Appellees ***116** do not now seek the best education Texas might provide. They do seek, however, an end to state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. The issue is, in other words, one of discrimination that affects the quality of the education which Texas has chosen to provide its children; and, the precise question here is what importance should attach to education for purposes of equal protection analysis of that discrimination. As this Court held in Brown v. Board of Education, 347 U.S., at 493, 74 S.Ct., at 691, the opportunity of education, 'where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' The factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts[75]—a conclusion ***117** which is ****1340** only strengthened when we consider the character of the classification in this case.

75. The majority's reliance on this Court's traditional deference to legislative bodies in matters of taxation falls wide of the mark in the context of this particular case. See ante, at 1300—1301. The decisions on which the Court relies were simply taxpayer suits challenging the constitutionality of a tax burden in the face of exemptions or differential taxation afforded to others. See, e.g., Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959); Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937); Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 10 S.Ct. 533, 33 L.Ed. 892 (1890). There is no question that, from the perspective of the taxpayer, the Equal Protection Clause 'imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products.' Allied Stores of Ohio, Inc. v. Bowers, supra, 358 U.S., at 526—527, 79 S.Ct., at 440—441. But in this case we are presented with a claim of discrimination of an entirely different nature—a claim that the revenue-producing mechanism directly discriminates against the interests of some of the intended beneficiaries; and, in contrast to the taxpayer suits, the interest adversely affected is of substantial constitutional and societal importance. Hence, a different standard of equal protection review than has been employed in the taxpayer suits is appropriate here. It is true that affirmance of the District Court decision would to some extent intrude upon the State's taxing power insofar as it would be necessary for the State to at least equalize taxable district wealth. But contrary to the suggestions of the majority, affirmance would not impose a strait jacket upon the revenue-raising powers of the State, and would certainly not spell the end of the local property tax. See infra, at 1347.

C

The District Court found that in discriminating between Texas schoolchildren on the basis of the amount of taxable property wealth located in the district in which they live, the Texas financing

scheme created a form of wealth discrimination. This Court has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny. See, e.g., Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802, 807, 89 S.Ct. 1404, 1407, 22 L.Ed.2d 739 (1969). The majority, however, considers any wealth classification in this case to lack certain essential characteristics which it contends are common to the instances of wealth discrimination that this Court has heretofore recognized. We are told that in every prior case involving a wealth classification, the members of the disadvantaged class have 'shared two distinguishing characteristics: because ***118** of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.' Ante, at 1290. I cannot agree. The Court's distinctions may be sufficient to explain the decisions in Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970); Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971); and even Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). But they are not in fact consistent with the decisions in Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), or Griffin v. Illinois, supra, or Douglas v. California, supra.

In Harper, the Court struck down as violative of the Equal Protection Clause an annual Virginia poll tax of $1.50, payment of which by persons over the age of 21 was a prerequisite to voting in Virginia elections. In part, the Court relied on the fact that the poll tax interfered with a fundamental interest—the exercise of the state franchise. In addition, though, the Court emphasized that '(l)ines drawn on the basis of wealth or property . . . are traditionally disfavored.' 383 U.S., at 668, 86 S.Ct., at 1082. Under the first part of the theory announced by the majority, the disadvantaged class in Harper, in terms of a wealth analysis, should have consisted only of those too poor to afford the $1.50 necessary to vote. But the Harper Court did not see it that way. In its view, the Equal Protection Clause 'bars a system which excludes (from the franchise) those unable to pay a fee to vote or who fail to pay.' Ibid. (Emphasis added.) So far as the Court was concerned, the 'degree of the discrimination (was) irrelevant.' Ibid. Thus, the Court struck down the poll tax in toto; it did not order merely that those too poor to pay the tax be exempted; complete impecunity clearly was not determinative of the limits of the disadvantaged class, nor was it essential to make an equal protection claim.

*****1341 *119** Similarly, Griffin and Douglas refute the majority's contention that we have in the past required an absolute deprivation before subjecting wealth classifications to strict scrutiny. The Court characterizes Griffin as a case concerned simply with the denial of a transcript or an adequate substitute therefor, and Douglas as involving the denial counsel. But in both cases the question was in fact whether 'a State that (grants) appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.' Griffin v. Illinois, supra, 351 U.S., at 18, 76 S.Ct., at 590 (emphasis added). In that regard, the Court concluded that inability to purchase a transcript denies 'the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance,' ibid. (emphasis added), and that 'the type of an appeal a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel,' Douglas v. California, supra, 372 U.S., at 355—356, 83 S.Ct., at 816 (emphasis added). The right of appeal itself was not absolutely denied to those too poor to pay; but because of the cost of a transcript and of counsel, the appeal was a substantially less meaningful right for the poor than for the rich.[76] It was on these terms that the Court

a denial of equal protection, and those terms clearly encompassed degrees of discrimination on the ***120** basis of wealth which do not amount to outright denial of the affected right or interest.[77]

76. This does not mean that the Court has demanded precise equality in the treatment of the indigent and the person of means in the criminal process. We have never suggested, for instance, that the Equal Protection Clause requires the best lawyer money can buy for the indigent. We are hardly equipped with the objective standards which such a judgment would require. But we have pursued the goal of substantial equality of treatment in the face of clear disparities in the nature of the appellate process afforded rich versus poor. See, e.g., Draper v. Washington, 372 U.S. 487, 495—496, 83 S.Ct. 774, 778—779, 9 L.Ed.2d 899 (1963); cf. Coppedge v. United States, 369 U.S. 438, 447, 82 S.Ct. 917, 922, 8 L.Ed.2d 21 (1962).

77. Even if I put side the Court's misreading of Griffin and Douglas, the Court fails to offer any reasoned constitutional basis for restricting cases involving wealth discrimination to instances in which there is an absolute deprivation of the interest affected. As I have already discussed, see supra at 1324—1325, the Equal Protection Clause guarantees equality of treatment of those persons who are similarly situated; it does not merely bar some form of excessive discrimination between such persons. Outside the context of wealth discrimination, the Court's reapportionment decisions clearly indicate that relative discrimination is within the purview of the Equal Protection Clause. Thus, in Reynolds v. Sims, 377 U.S. 533, 562—563, 84 S.Ct. 1362, 1382, 12 L.Ed.2d 506 (1964), the Court recognized: 'It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. . . . Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. . . . One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'' See also Gray v. Sanders, 372 U.S. 368, 380—381, 83 S.Ct. 801, 808—809, 9 L.Ed.2d 821 (1963). The Court gives no explanation why a case involving wealth discrimination should be treated any differently.

This is not to say that the form of wealth classification in this case does not differ significantly from those recognized in the previous decisions of this Court. Our prior cases have dealt essentially with discrimination on the basis of personal wealth.[78] Here, by contrast,****1342** the ***121** children of the disadvantaged Texas school districts are being discriminated against not necessarily because of their personal wealth or the wealth of their families, but because of the taxable property wealth of the residents of the district in which they happen to live. The appropriate question, then, is whether the same degree of judicial solicitude and scrutiny that has previously been afforded wealth classifications is warranted here.

78. But cf. Bullock v. Carter, 405 U.S. 134, 144, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972), where prospective candidates' threatened exclusion from a primary ballot because of their inability to

pay a filing fee was seen as discrimination against both the impecunious candidates and the 'less affluent segment of the community' that supported such candidates but was also too poor as a group to contribute enough for the filing fees.

As the Court points out, ante, at 1294, no previous decision has deemed the presence of just a wealth classification to be sufficient basis to call forth rigorous judicial scrutiny of allegedly discriminatory state action. Compare, e.g., Harper v. Virginia Board of Elections, supra, with, e.g., James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971). That wealth classifications alone have not necessarily been considered to bear the same high degree of suspectness as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The 'poor' may not be seen as politically powerless as certain discrete and insular minority groups. [79] Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups.[80] But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have. While the 'poor' have frequently been a ***122** legally disadvantaged group,[81] it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. Thus, we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests. See Harper v. Virginia Board of Elections, supra.

79. But cf. M. Harrington, The Other America 13—17 (Penguin ed. 1963).

80. See E. Banfield, The Unheavenly City 63, 75—76 (1970); cf. R. Lynd & H. Lynd, Middletown in Transition 450 (1937).

81. Cf. City of New York v. Miln, 11 Pet. 102, 142, 9 L.Ed. 648 (1837).

When evaluated with these considerations in mind, it seems to me that discrimination on the basis of group wealth in this case likewise calls for careful judicial scrutiny. First, it must be recognized that while local district wealth may serve other interests,[82] it bears no relationship whatsoever to the interest of Texas schoolchildren in the educational opportunity afforded them by the State of Texas. Given the importance of that interest, we must be particularly sensitive to the invidious characteristics of any form of discrimination that is not clearly intended to serve it, as opposed to some other distinct state interest. Discrimination on the basis of group wealth may not, to be sure, reflect the social stigma frequently attached to personal poverty. Nevertheless, insofar as group wealth discrimination involves wealth over which the disadvantaged individual has no significant control,[83] it represents in fact a more serious basis of discrimination than does personal ****1343** wealth. For such discrimination ***123** is no reflection of the individual's characteristics or his abilities. And thus—particularly in the context of a disadvantaged class composed of children—we have previously treated discrimination on a basis which the individual cannot control as constitutionally disfavored. Cf. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968).

82. Theoretically, at least, it may provide a mechanism for implementing Texas' asserted

interest in local educational control, see infra, at 1344.

83. True, a family may move to escape a property-poor school district, assuming it has the means to do so. But such a view would itself raise a serious constitutional question concerning an impermissible burdening of the right to travel, or, more precisely, the concomitant right to remain where one is. Cf. Shapiro v. Thompson, 394 U.S. 618, 629—631, 89 S.Ct. 1322, 1328—1330, 22 L.Ed.2d 600 (1969).

The disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests. Here legislative reallocation of the State's property wealth must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo, a problem not completely dissimilar to that faced by underrepresented districts prior to the Court's intervention in the process of reapportionment,[84] see Baker v. Carr, 369 U.S. 186, 191—192, 82 S.Ct. 691, 695—697, 7 L.Ed.2d 663 (1962).

84. Indeed, the political difficulties that seriously disadvantaged districts face in securing legislative redress are augmented by the fact that little support is likely to be secured from only mildly disadvantaged districts. Cf. Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). See also n. 2, supra.

Nor can we ignore the extent to which, in contrast to our prior decisions, the State is responsible for the wealth discrimination in this instance. Griffin, Douglas, Williams, Tate, and our other prior cases have dealt with discrimination on the basis of indigency which was attributable to the operation of the private sector. But we have no such simple de facto wealth discrimination here. The means for financing public education in Texas are selected and specified by the State. It is the State that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth. At the same time, governmentally ***124** imposed land use controls have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or commercial use,[85] and thus determined each district's amount of taxable property wealth. In short, this case, in contrast to the Court's previous wealth discrimination decisions, can only be seen as ‘unusual in the extent to which governmental action is the cause of the wealth classifications.’ [86]

85. See Tex. Cities, Towns and Villages Code, Civ. Stat. Ann. §§ 1011a—1011j (1963 and Supp.1972—1973). See also, e.g., Skinner v. Reed, 265 S.W.2d 850 (Tex.Civ.App.1954); City of Corpus Christi v. Jones, 144 S.W.2d 388 (Tex.Civ.App.1940).

86. Serrano v. Priest, 5 Cal.3d, at 603, 96 Cal. Rptr., at 614, 487 P.2d, at 1254. See also Van Dusartz v. Hatfield, 334 F.Supp., at 875—876.

In the final analysis, then The invidious characteristics of the group wealth classification present in this case merely serve to emphasize the need for careful judicial scrutiny of the State's justifications for the resulting interdistrict discrimination in the educational opportunity afforded to the schoolchildren of

Texas.

D

The nature of our inquiry into the justifications for state discrimination is essentially the same in all equal protection cases: We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests. See Police Dept. of City of Chicago v. Mosley, 408 U.S., at 95, 92 S.Ct., at 2289. Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake and the invidiousness of the particular classification. In terms of the asserted state interests, the Court has indicated that it will require, for instance,*****1344*** a 'compelling,' Shapiro v. Thompson, 394 U.S., at 634, 89 S.Ct., at 1331, or a 'substantial' ****125*** or 'important,' Dunn v. Blumstein, 405 U.S., at 343, 92 S.Ct., at 1003, state interest to justify discrimination affecting individual interests of constitutional significance. Whatever the differences, if any, in these descriptions of the character of the state interest necessary to sustain such discrimination, basic to each is, I believe, a concern with the legitimacy and the reality of the asserted state interests. Thus, when interests of constitutional importance are at stake, the Court does not stand ready to credit the State's classification with any conceivable legitimate purpose,[87] but demands a clear showing that there are legitimate state interests which the classification was in fact intended to serve. Beyond the question of the adequacy of the State's purpose for the classification, the Court traditionally has become increasingly sensitive to the means by which a State chooses at act as its action affects more directly interests of constitutional significance. See, e.g., United States v. Robel, 389 U.S. 258, 265, 88 S.Ct. 419, 424, 19 L.Ed.2d 508 (1967); Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1961). Thus, by now, 'less restrictive alternatives' analysis is firmly established in equal protection jurisprudence. See Dunn v. Blumstein, supra, 405 U.S., at 343, 92 S.Ct., at 1003; Kramer v. Union Free School District No. 15, 395 U.S., at 627, 89 S.Ct., at 1889. It seems to me that the range of choice we are willing to accord the State in selecting the means by which it will act, and the care with which we scrutinize the effectiveness of the means which the State selects, also must reflect the constitutional importance of the interest affected and the invidiousness of the particular classification. Here, both the nature of the interest and the classification dictate close judicial scrutiny of the purposes which Texas seeks to serve with its present educational financing ****126*** scheme and of the means it has selected to serve that purpose.

> 87. Cf., e.g., Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961); McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948).

The only justification offered by appellants to sustain the discrimination in educational opportunity caused by the Texas financing scheme is local educational control. Presented with this justification, the District Court concluded that '(n)ot only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications.' 337 F.Supp., at 284. I must agree with this conclusion.

At the outset, I do not question that local control of public education, as an abstract matter, constitutes a very substantial state interest. We observed only last Term that '(d)irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.'

Wright v. Council of the City of Emporia, 407 U.S. 451, 469, 92 S.Ct. 2196, 2206, 33 L.Ed.2d 51 (1972). See also id., at 477—478, 92 S.Ct., at 2210—2211 (Burger, C.J., dissenting). The State's interest in local educational control—which certainly includes questions of educational funding—has deep roots in the inherent benefits of community support for public education. Consequently, true state dedication to local control would present, I think, a substantial justification to weigh against simply interdistrict variations in the treatment of a State's schoolchildren. But I need not now decide how I might ultimately strike the balance were we confronted with a situation where the State's sincere concern for local control inevitably produced educational inequality. For, on this record, it is apparent that the State's purported concern with *****1345*** local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.

In Texas, statewide laws regulate in fact the most minute details of local public education. For example, ****127*** the State prescribes required courses. [88] All textbooks must be submitted for state approval,[89] and only approved textbooks may be used.[90] The State has established the qualifications necessary for teaching in Texas public schools and the procedures for obtaining certification.[91] The State has even legislated on the length of the school day.[92] Texas' own courts have said:

> 'As a result of the acts of the Legislature our school system is not of mere local concern but it is statewide. While a school district is local in territorial limits, it is an integral part of the vast school system which is coextensive with the confines of the State of Texas.' Treadaway v. Whitney Independent School District, 205 S.W.2d 97, 99 (Tex.Civ.App.1947).

See also El Dorado Independent School District v. Tisdale, 3 S.W.2d 420, 422 (Tex. Com. App. 1928).

88. Tex. Educ. Code Ann. §§ 21.101—21.117. Criminal penalties are provided for failure to teach certain required courses. Id., §§ 4.15—4.16.

89. Id., §§ 12.11—12.35.

90. Id., § 12.62.

91. Id., §§ 13.031—13.046.

92. Id., § 21.004.

Moreover, even if we accept Texas' general dedication to local control in educational matters, it is difficult to find any evidence of such dedication with respect to fiscal matters. It ignores reality to suggest—as the Court does, ante, at 1305—that the local property tax element of the Texas financing scheme reflects a conscious legislative effort to provide school districts with local fiscal control. If Texas had a system truly dedicated to local fiscal control, one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as ****128*** to the level of sacrifice they wish to make for public education. In fact, the Texas scheme produces precisely the opposite result. Local school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by

any particular district is largely determined by the amount of taxable property located in the district—a factor over which local voters can exercise no control.

The study introduced in the District Court showed a direct inverse relationship between equalized taxable district property wealth and district tax effort with the result that the property-poor districts making the highest tax effort obtained the lowest per-pupil yield.[93] The implications of this situation for local choice are illustrated by again comparing the Edgewood and Alamo Heights School Districts. In 1967—1968, Edgewood, after contributing its share to the Local Fund Assignment, raised only $26 per pupil through its local property tax, whereas Alamo Heights was able to raise $333 per pupil. Since the funds received through the Minimum Foundation School Program are to be used only for minimum professional salaries, transportation costs, and operating expenses, it is not hard to see the lack of local choice—with respect to higher teacher salaries to attract more and better teachers, physical facilities, library books, and facilities, special courses, or participation in special state and federal matching funds programs—under which a property-poor district such as Edgewood is forced to labor.[94] In fact, because of the difference in taxable*****1346*** local property wealth, Edgewood would have to tax itself almost nine times as heavily to obtain the same ****129*** yield as Alamo Heights.[95] At present, then, local control is a myth for many of the local school districts in Texas. As one district court has observed, 'rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes).' Van Dusartz v. Hatfield, 334 F.Supp. 870, 876 (D.C.Minn.1971).

93. See Appendix II, infra.

94. See Affidavit of Dr. Jose Cardenas, Superintendent of Schools, Edgewood Independent School District, App. 234—238.

95. See Appendix IV, infra.

In my judgment, any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local fiscal control.[96] At the same time, appellees have pointed out a variety of alternative financing schemes which may serve the State's purported interest in local control as well as, if not better than, the present scheme without the current impairment of the educational opportunity of vast numbers of Texas schoolchildren.[97] I see no need, however, to explore the practical or constitutional merits of those suggested alternatives at this time for, whatever their positive or negative features, experience ****130*** with the present financing scheme impugns any suggestion that it constitutes a serious effort to provide local fiscal control. If for the sake of local education control, this Court is to sustain interdistrict discrimination in the educational opportunity afforded Texas school children, it should require that the State present something more than the mere sham now before us.

96. My Brother WHITE, in concluding that the Texas financing scheme runs afoul of the Equal Protection Clause, likewise finds on analysis that the means chosen by Texas—local property taxation dependent upon local taxable wealth—is completely unsuited in its present form to

the achievement of the asserted goal of providing local fiscal control. Although my Brother WHITE purports to reach this result by application of that lenient standard of mere rationality traditionally applied in the context of commercial interest, it seems to me that the care with which he scrutinizes the practical effectiveness of the present local property tax as a device for affording local fiscal control reflects the application of a more stringent standard of review, a standard which at the least is influenced by the constitutional significance of the process of public education.

97. See n. 98, infra.

III

In conclusion, it is essential to recognize that an end to the wide variations in taxable district property wealth inherent in the Texas financing scheme would entail none of the untoward consequences suggested by the Court or by the appellants.

First, affirmance of the District Court's decisions would hardly sound the death knell for local control of education. It would mean neither centralized decisionmaking nor federal court intervention in the operation of public schools. Clearly, this suit has nothing to do with local decisionmaking with respect to educational policy or even educational spending. It involves only a narrow aspect of local control—namely, local control over the raising of educational funds. In fact, in striking down interdistrict disparities in taxable local wealth, the District Court took the course which is most likely to make true local control over educational decision-making a reality for all Texas school districts.

Nor does the District Court's decision even necessarily eliminate local control of educational funding. The District Court struck down nothing more than the continued interdistrict wealth discrimination inherent in the present property tax. Both centralized and decentralized plans for educational funding not involving such interdistrict discrimination*****1347*** have been put forward. [98] The choice ****131*** among these or other alternatives would remain with the State, not with the federal courts. In this regard, it should be evident that the degree of federal intervention ****132*** in matters of local concern would be substantially less in this context than in previous decisions in which we have been asked effectively to impose a particular scheme upon the States under the guise of the Equal Protection Clause. See, e.g., Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); Cf. Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

98. Centralized educational financing is, to be sure, one alternative. On analysis, though, it is clear that even centralized financing would not deprive local school district of what has been considered to be the essence of local educational control. See Wright v. Council of the City of Emporia, 407 U.S. 451, 477—478, 92 S.Ct. 2196, 2210—2211, 33 L.Ed.2d 51 (Burger, C.J., dissenting). Central financing would leave in local hands the entire gamut of local educational policy-making—teachers, curriculum, school sites, the whole process of allocating resources among alternative educational objectives. A second possibility is the much-discussed theory of district power equalization put forth by Professors Coons, Clune, and Sugarman in their seminal work, Private Wealth and Public Education 201—242 (1970). Such a scheme would truly reflect a dedication to local fiscal control. Under their system, each school district would receive a

fixed amount of revenue per pupil for any particular level of tax effort regardless of the level of local property tax base. Appellants criticize this scheme on the rather extraordinary ground that it would encourage poorer districts to overtax themselves in order to obtain substantial revenues for education. But under the present discriminatory scheme, it is the poor districts that are already taxing themselves at the highest rates, yet are receiving the lowest returns. District wealth reapportionment is yet another alternative which would accomplish directly essentially what district power equalization would seek to do artificially. Appellants claim that the calculations concerning state property required by such a scheme would be impossible as a practical matter. Yet Texas is already making far more complex annual calculations—involving not only local property values but also local income and other economic factors—in conjunction with the Local Fund Assignment portion of the Minimum Foundation School Program. See 5 Governor's Committee Report 43—44.A fourth possibility would be to remove commercial, industrial, and mineral property from local tax rolls, to tax this property on a statewide basis, and to return the resulting revenues to the local districts in a fashion that would compensate for remaining variations in the local tax bases. None of these particular alternatives are necessarily constitutionally compelled; rather, they indicate the breadth of choice which would remain to the State if the present interdistrict disparities were eliminated.

Still, we are told that this case requires us 'to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests.' Ante, at 1300. Yet no one in the course of this entire litigation has ever questioned the constitutionality of the local property tax as a device for raising educational funds. The District Court's decision, at most, restricts the power of the State to make educational funding dependent exclusively upon local property taxation so long as there exists interdistrict disparities in taxable property wealth. But it hardly eliminates the local property tax as a source of educational funding or as a means of providing local fiscal control.[99]

99. See n. 98, supra.

The Court seeks solace for its action today in the possibility of legislative reform. The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the schoolchildren of Texas' disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more. The possibility of legislative action is, in all events, no answer to this Court's duty under the Constitution to eliminate unjustified state discrimination. In this case we have been presented with an instance of such discrimination, in a particularly invidious form, against an individual interest of *****1348*** large constitutional and practical importance. To support the demonstrated discrimination in the provision ****133*** of educational opportunity the State has offered a justification which, on analysis, takes on at best an ephemeral character. Thus, I believe that the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas financing scheme render that scheme violative of the Equal Protection Clause.[100]

100. Of course, nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions. See Milliken v. Green, 389

Mich. 1, 203 N.W.2d 457 (1972), rehearing granted, Jan. 1973; Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187; 119 N.J. Super. 40, 289 A.2d 569 (1972); cf. Serrano v. Priest, 5 Cal.3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

I would therefore affirm the judgment of the District Court.

Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Supreme Court of the state of Kentucky 1989).

STEPHENS, Chief Justice.

The issue we decide on this appeal is whether the Kentucky General Assembly has complied with its constitutional mandate to "provide an efficient system of common schools throughout the state."[1]

1. Ky. Const. Sec. 183.

In deciding that it has not, we intend no criticism of the substantial efforts made by the present General Assembly and by its predecessors, nor do we intend to substitute our judicial authority for the authority and discretion of the General Assembly. We are, rather, exercising our constitutional duty in declaring that, when we consider the evidence in the record, and when we apply the constitutional requirement of Section 183 to that evidence, it is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state. In a word, the present system of common schools in Kentucky is not an "efficient" one in our view of the clear mandate of Section 183. The common school system in Kentucky is constitutionally deficient.

In reaching this decision, we are ever mindful of the immeasurable worth of education to our state and its citizens, especially to its young people. The framers of our constitution intended that each and every child in this state should receive a ***190** proper and an adequate education, *to be provided for by the General Assembly.* This opinion dutifully applies the constitutional test of Section 183 to the existing system of common schools. We do no more, nor may we do any less.

The goal of the framers of our constitution, and the polestar of this opinion, is eloquently and movingly stated in the landmark case of *Brown v. Board of Education:*

> "*education is perhaps the most important function of state and local governments.* Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*" *Id.,* 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) (emphasis added).

These thoughts were as applicable in 1891 when Section 183 was adopted as they are today and the goals they express reflect the goals set out by the framers of our Kentucky Constitution.

I. PROCEDURAL HISTORY

This declaratory judgment action was filed in the Franklin Circuit Court by multiple plaintiffs, including the Council for Better Education, Inc. a non-profit Kentucky corporation whose membership consists of sixty-six local school districts in the state. Also joining as plaintiffs were the Boards of Education of the Dayton and Harlan Independent School Districts and the school districts of Elliott, Knox, McCreary, Morgan and Wolfe Counties. Twenty-two public school students from McCreary, Wolfe, Morgan and Elliott Counties and Harlan and Dayton Independent School districts were also named, suing, respectively, by and through their parents as next friends.

An averment was made in the original complaint that the student-plaintiffs were not only suing as individuals but also representing a class of all similarly situated students attending so-called “poor” school districts. The requisites of a class action were pleaded. Civil Rule 23 [hereinafter CR].

The defendants named in the complaint were the Governor, the Superintendent of Public Instruction, the State Treasurer, the President *Pro Tempore* of the Senate, the Speaker of the House of Representatives and the State Board of Education and its individual members.

The complaint included allegations that the system of school financing provided for by the General Assembly is inadequate; places too much emphasis on local school board resources; and results in inadequacies, inequities and inequalities throughout the state so as to result in an inefficient system of common school education in violation of Kentucky Constitution, Sections 1, 3 and 183 and the equal protection clause and the due process of law clause of the 14th Amendment to the United States Constitution. Additionally the complaint maintains the entire system is not efficient under the mandate of Section 183.

The relief sought by the plaintiffs was a declaration of rights to the effect that the system be declared unconstitutional; that the funding of schools also be determined to be unconstitutional and inadequate; that the defendant, Superintendent of Public Instruction be enjoined from further implementing said school statutes; that a mandamus be issued, directing the Governor to recommend to the General Assembly the enactment of appropriate legislation which would be in compliance with the aforementioned constitutional provisions; that a mandamus be issued, directing the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives to place before the General Assembly appropriate legislation which is constitutionally ****191*** valid; and that a mandamus be issued, directing the General Assembly to provide for an “equitable and adequate funding program for all school children so as to establish an ‘efficient system of common schools.’ ”

The answers filed by the various defendants were basically identical. It was pled that the complaint failed to state a claim against any of the defendants; that the court had no jurisdiction because the subject matter is purely a “political” one; that all school boards should have been joined as parties defendants; that all members of the General Assembly (1986) should also have been joined as parties defendant; that all the plaintiffs lacked standing to bring the action; that, specifically, the plaintiff Council for Better Education, Inc., had no legal authority to sue; that the plaintiff school boards similarly had no legal authority to sue; that the class action was improper; and as would be expected, the defendants denied all of the alleged constitutional violations and the facts underlying such alleged

violations.

The defendants also filed a self-styled "affirmative defense" claiming that education reform laws passed by the General Assembly at a special session in 1985 and various budget changes and other educational laws passed by the General Assembly at its 1986 regular session inferentially corrected the situation alleged in the complaint. Reference was also made to past legislative efforts of the General Assembly in the education field, presumably to further demonstrate the General Assembly's compliance with its constitutional mandate.

In the trial court, the defendants moved for a summary judgment, based primarily on the claim that no relief could be granted against the General Assembly because of lack of service on all 138 members thereof and that the parties lacked standing or legal capacity to sue. The trial court overruled this motion in its entirety.

The case was tried by the court without the intervention of a jury. Evidence was presented by deposition, along with oral testimony and much documentary evidence. The trial court entered the first of several orders, findings of fact and judgments on May 31, 1988.[2] Generally, that order found Kentucky's common school finance system to be unconstitutional and discriminatory and held that the General Assembly had not produced an efficient system of common schools throughout the state. On October 14, 1988 a final, appealable judgment was entered.

2. An analysis of these documents follows.

A notice of appeal was timely filed by the present appellants, John A. Rose, President *Pro Tempore* of the Senate of Kentucky and Donald J. Blandford, Speaker of the House of Representatives of Kentucky.

Upon a motion properly made, we transferred the appeal to this Court.

II. ANALYSIS OF TRIAL COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Following the trial of this case, the circuit judge, in three separate documents, prepared extensive findings of fact, conclusions of law and judgment(s). Because of the length of these documents, we feel it important to analyze them in some detail.

DOCUMENT NUMBER I

Following the bench trial, and upon proper submission, the judge on May 31, 1988 entered a document that is styled, "Findings of Fact, Conclusions of Law and Judgment."

The trial judge identified four issues before him: (1) The necessity for defining the phrase "an efficient system of common schools" as contained in Section 183 of the Kentucky Constitution; (2) Whether education is a "fundamental right" under our Constitution; (3) Whether Kentucky's current method of financing its common schools violates Section 183, and (4) Whether students in the so-called "poor" school districts are denied equal protection of the laws.

“Efficient,” in the Kentucky constitutional sense was defined as a system which required “substantial uniformity, substantial***192** equality of financial resources and substantial equal educational opportunity for all students.” Efficient was also interpreted to require that the educational system must be adequate, uniform and unitary.

Because of the language of Section 183, the trial court ruled that education, indeed, is a fundamental right in Kentucky.

In ruling on the issue of whether Kentucky's method of school financing violates Section 183 and underpinning the point with extensive findings of fact, the trial court declared that students in property poor school districts are offered a minimal level of educational opportunities, which is inferior to those offered to students in more affluent districts. Such “invidious” discrimination, based on the place of a student's residence, was determined to be unconstitutional. The trial court ruled that the school finance system violates the equal protection guarantees of Section 1 and 3 of the Kentucky Constitution.

In its judgment, the trial court ruled: (1) The Kentucky finance “system” of its common schools is unconstitutional and discriminatory; and (2) The system of common schools is not efficient within the purview of Section 183 of the Kentucky Constitution. The Court indicated it would appoint a “small select committee,” the purpose of which was to review all relevant data, provide additional analysis, consult with financial experts and propose remedies to “correct the deficiencies in the present common school financing system.” The Court clearly stated that the Committee's plan, “when adopted by this Court,” would not “intrude” on the prerogatives of the Executive and Legislative branches of government. Indeed, the report would only be an aid to serve as a guide in establishing “the parameters of the Constitutional requirements of Sections 1, 3 and 183.”

In this open ended document, the Court ruled the school finance system unconstitutional, but gave few guidelines, or criteria, to guide the General Assembly in any action it might take to rectify the constitutional failure. The work of the Committee, if adopted by the Court, was to serve as a guidepost in this murky area.

DOCUMENT NUMBER II

On June 7, 1988, the trial court, in this document, appointed the members of the “select committee.” Apparently fearing he would improperly delegate some of his judicial authority by the creation of this committee, the trial judge emphasized that its role would be “advisory only” to him. But he noted that the report would be of “immense benefit” to him in preparing his final judgment. The Committee was ordered to complete its work by September 15, 1988.

Modifying or explaining part of document # I, the court emphatically stated that there is “no judicial intent to merely redivide the funds now available to the common school districts.” Moreover, he emphasized that funds should not be taken away (presumably by the General Assembly) from any school district to increase the funding level of more impoverished districts. It is a fair inference from this statement that the trial court was strongly suggesting that additional revenues were needed to

make the system “efficient.”

The defendant State Board of Education was ordered to pay, out of its funds, all expenses of the Committee.

DOCUMENT NUMBER III

This final order entered on October 14, 1988, and, cumulated with the first two documents, constitutes the subject matter of this appeal.

Addressing the committee report, but steadfastly maintaining that the report adopted was only part of his decision, the court agreed that the goals set out by the committee for the establishment of an “efficient” school system were “salutary” ones. While not technically adopting the report as part of this final Findings of Fact, Conclusions of Law and Judgment, it is clear that the trial court did, indeed, adopt certain principles from the Committee's report.

In his additional Findings of Fact, the judge modified his previous definition of an “efficient” system of schools. It is a “... ***193** tax supported, coordinated organization, which provides a free, adequate education to all students throughout the state, regardless of geographical location or local fiscal resources.” He opined that an efficient system (of schools) must have “substantial” uniformity.

Ever broadening the definition and setting non-instructional standards, the trial court required an efficient school system to provide sufficient physical facilities, teachers, support personnel, and instructional materials to enhance the educational process. An adequate school system must also include careful and comprehensive supervision at all levels to monitor personnel performance and minimize waste. If and where waste and mismanagement exist, including but not limited to improper nepotism, favoritism, and misallocation of school monies, they must be eliminated, through state intervention if necessary. The General Assembly has all the power necessary to guarantee that the resources provided by Kentucky taxpayers for schools are spent wisely.

The trial court thus, with a very broad brush, included in its constitutional definition of “efficient” goals to be met by an education and requirements as to school financing, curriculum, personnel, accessibility to all children, physical facilities, instructional materials and management of the schools.

Moreover, the trial court made it clear that the duty—the absolute, unequivocal duty—to provide this system is *solely* the responsibility of the General Assembly. The court reiterated that its judicial power did not extend to specifying to the General Assembly the methods by which to implement and maintain this efficient system of education.

Addressing again the question of financing this massive task, the trial court stated directly what had been implied previously, that “substantial additional monies” will have to be raised to provide this constitutional school system. The court suggested three possible ways of financing: 1) increasing existing taxes, 2) levying new taxes, or 3) reallocating existing funds. Since a major reallocation of funds would “cripple” other government functions, the trial court postulated that the imposition of new

taxes appeared to be the only viable alternative.

The trial judge agreed that the separation of powers doctrine would prohibit courts from directing the General Assembly as to how the school system should be financed. But, he reiterated that the General Assembly must provide an efficient system.

Finally, although the trial court encouraged the protection of local school boards, he re-emphasized the General Assembly's authority and responsibility for the establishment and maintenance of the school system.

In the "judgment," the trial judge retained continuing jurisdiction over the subject matter for the purpose of enforcing the judgment. To that effect, he ordered a progress report be made to him on a day certain.

With this lengthy and dramatic series of documents, the Franklin Circuit Court brought into sharp focus a problem that many dedicated citizens of the Commonwealth have "wrestled" with for many years. It placed the sole responsibility for the establishment and maintenance of an efficient system on the General Assembly. It defined "efficient" in an multi-faceted manner, and directed that all these criteria are not only relevant, but are essential, if the development of a constitutionally valid system of common schools is to be had.

The trial court examined the evidence and declared that the present school system was unconstitutional.

On appeal, this Court must now review the basis for the trial court's ruling.

III. CONTENTIONS OF THE PARTIES

The two remaining defendants, now appellants before this Court, raise numerous issues on appeal. They allege that the Council for Better Education, Inc., does not have either the legal authority or the standing to maintain this action; that the purported class action of the student plaintiffs ***194** is not proper; that only 5 of the 22 students are properly before the Court; that the complaint does not state a "cognizable claim" against the two named legislators; that the trial court erred in finding that the system of common schools provided by the General Assembly is not efficient; that the trial court erred in ruling that House Bill 1 and House Bill 44 are part of an unconstitutional system; [3] that the trial court's definition and standards set for an efficient school system are at variance with Section 183; that the trial court's strong reliance on foreign cases was inappropriate; that the trial court erred in declaring that the school system violates the 14th Amendment of the U.S. Constitution; that the trial court's judgment violates the separation of powers provisions of the Kentucky Constitution; and finally, it is claimed that the trial court erred in directing the expenses of the select committee to be paid by the Kentucky Department of Education.

3. H.B. 1 is codified as KRS 160.470 and H.B. 44 is codified in KRS 68.245, 132.010, .020, .023, .027, .690, other sections of Ch. 32, and 160.470. Throughout this opinion, the legislation will be referred to as H.B. 1 and H.B. 44.

Appellees, predictably, defend the trial court's action.

Prior to dealing with these contentions we believe it would be beneficial to give a brief history of school financing in Kentucky, and to review the evidence before us.

IV. SCHOOL FINANCING IN KENTUCKY—PAST AND PRESENT

As originally enacted, Section 186 of our Constitution mandated that school funds appropriated by the General Assembly be apportioned to each individual local school district on the basis of a set amount for each child aged 5 through to 17 years. Thus, state money was given on the basis of a census of school age children—whether they attended school or not. Differences in populations of the districts were not perceived as affecting the quality of the education.

In 1930, the General Assembly adopted a law (an Act approved March 15, 1930, Ch. 36, 1930 Ky. Acts, codified at KS 4364, 4399a–8, 4434a–14a) which appropriated state money for an equalization fund designed to increase per-pupil expenditures in those districts where the standard of education was low. That legislative effort was invalidated in *Talbott v. Kentucky State Board of Education,* 244 Ky. 826, 52 S.W.2d 727 (1932). The basis of the decision was that the attempt to equalize expenditures violated the mandate of Section 186—viz., state funds are limited to a per capita appropriation.

In 1941, Section 186 was amended to permit 10% of state funds to be used for equalization purposes and in 1944 it was further amended to allow 25% of the funds to be so expended. In 1952, the constitutional provision requiring per capita expenditures was eliminated, thus strengthening the role of the General Assembly in its duty to provide for an efficient system of common schools, as provided in Section 183.

In an apparent response to that latest constitutional amendment, and in an attempt to equalize inequities in the educational efforts and abilities to encourage more financial input and effort by local school districts, the General Assembly enacted the so-called Minimum Foundation Program [4] [hereinafter MFP]. To qualify as a participant in this program, a district was required to levy a minimum real property tax of $1.10 per $100 of assessed value in the district. The maximum tax was set at $1.50 per $100.00 of assessed value (1 1/2% of the total assessed value of the real property in the district). Most districts levied the maximum rates, because the assessed values were very low. The assessments ranged from 33 1/3% of the fair cash value of the property to as low as 12 1/2% of that value. The median statewide assessment rate was 27%.

> 4. KRS 157.310–.440. Its stated legislative purpose was "... to assure substantially equal public school educational opportunities." KRS 157.310. A further description of the MFP appears, *infra.*

***195** As a result of this law and diverse local assessments of fair cash value, a lawsuit was filed directly attacking this legislation and the problem of built-in disparity in local school tax levies. Our Court's predecessor, the Court of Appeals, in the case of *Russman v. Luckett,* Ky., 391 S.W.2d 694 (1965), declared that Section 172 of the Kentucky Constitution requires property to be assessed at 100% of its

fair cash value. The mandate of the Court directed the Revenue Cabinet to see that all property in the Commonwealth was so assessed.

The ink was barely dry on this opinion, when, pursuant to a call for a special session by the Governor, the General Assembly enacted H.B. 1, known pleasantly as the "rollback law." Its effect was to countermand and negate the effect of *Russman.* This law reduced the tax rates on property proportionately to offset the increase in assessment required by this Court. It is certainly arguable that, by enacting the "rollback law," the General Assembly continued, or even exacerbated, the inequities that *Russman* intended to correct. Specifically, H.B. 1 reduced the school, county and city property tax revenues to the 1965 level, except for "net assessment growth" resulting from new property.[5] In deference to the education problem, the bill permitted local school districts to take two (2) one-time only 10% increases in their tax levies, for their 1967 and 1968 revenues. The bill virtually froze the revenues available to local school districts and created the ominous spectacle of different maximum tax rates for the then 180 local school districts in Kentucky.

> 5. Examples include a vacant lot having a house built on it or a farm being developed into a subdivision.

In an attempt to enable more local tax efforts the General Assembly at its regular session in 1966 enacted legislation [6] which enabled local school districts to levy one of three specialized permissive taxes: (1) an occupational tax on wages and profits; (2) a tax on gross utility receipts, and (3) an excise tax on income. All of these taxes were, however, specifically permitted to be recalled by the voters.[7]

> 6. KRS 160.597.

> 7. The effect of the permissive taxes has been to create further inequities across the state because, even if the voters did not veto them, those counties with a high population and high payrolls would produce many times more revenue than counties (districts) not so blessed.

The story continues. At its regular session in 1972, the General Assembly redefined the terms "net assessment growth" to include not only new property, but also the difference in the assessed valuation of all property subject to tax in the previous year, thus boosting total revenues by the tax on property value inflation.

In 1976, the handling of revenue took another turn. The General Assembly transferred the levy and collection of the required local tax effort to the State, to be included as part of the receipts of the General Fund. [8] To provide funds which would help equalize, to some extent, the disparities in local financial effort, the General Assembly, also in 1976 passed the so-called Power Equalization Program [9] [hereinafter PEP].

> 8. As the trial judge stated, the appearance that this created additional monies was strictly an illusion; rather it altered the *method* of levy and collection. No new funds were provided to local schools by the state.

9. KRS 157.545 et seq. The relevant details of this program (PEP) will be discussed *infra.*

In 1979, the then Lieutenant Governor, in the Governor's absence from the state, called yet another special session of the General Assembly. At that session, H.B. 44 was enacted. This law required school districts to *reduce* their tax rates on real property each year so that current revenue could not exceed the previous year's revenue by more than 4%. However, in order to institute any increase in revenue, H.B. 44 required the elected school board members to hold a public hearing on the matter. If the proposed increase (through a *tax rate* increase) would generate more than the 4% increase, the voters could force a public referendum on the excess. In other words, an increase of up to 4% (over the ***196** previous year) would not be approved without a public hearing. If the increase proposed were more than 4%, the excess thereof was subject to a vote of the public.

The record in this case shows the property tax rate declined statewide nearly 33% from 1979 to 1981, directly as a result of H.B. 44. Although the tax base (total assessed value) has increased, there has been little or no increase in local revenues for schools.

As can be seen, the state's contribution to the local school programs (the so-called common schools) arises primarily from the MFP and the PEP. It is essential to a decision in this case to give a brief summary of each of these legislative acts.

To qualify as a participant in the MFP, a local school district must operate and pay its teachers for 185 days per school year, and it must actually operate its school(s) the same number of days. The State Superintendent of Public Instruction allots the classroom units to each district, the number of which depends on the average daily attendance in each grade. Each district receives a grant of money from the MFP based on the number of classroom units assigned to it. The funds may be used for teachers' salaries, current expenses, capital outlay and transportation of students.

The state also provides financial resources to local school districts through the PEP. Each year, the Kentucky Department of Revenue determines the equalized fair cash value of all taxable property in each local school district. That data is certified to the Superintendent of Public Instruction. The Superintendent determines annually the maximum tax rate that the PEP fund will equalize and then applies an equal rate to all districts. In order for a local district to receive funds, each local school district must levy a minimum equivalent tax rate of 25 cents per $100 of valuation, or the maximum rate supported by the PEP, whichever is greater. The “minimum equivalent tax rate” is defined as the quotient derived from dividing the districts' previous year's income from tax levies by the total assessed property valuation plus the assessment for motor vehicles.

As pointed out by the trial court, the mandated underlying tax rate has been so low that the results have been that only a fraction of the 25 cents local tax is actually equalized through the PEP.[10]

10. Nine cents per hundred in 1985–86, 10 cents per hundred in 1986–87, and 13 cents per hundred thereafter.

If one were to summarize the history of school funding in Kentucky, one might well say that every

forward step taken to provide funds to local districts and to equalize money spent for the poor districts has been countered by one backward step.

It is certainly true that the General Assembly, over the years, has made substantial efforts to infuse money into the system to improve and equalize the educational efforts in the common schools of Kentucky. What we must decide, based solely on the evidence in the record as tested by the Kentucky Constitution, Section 183, is whether the trial court was correct in declaring that those efforts have failed to create an efficient system of common schools in this Commonwealth.

V. THE EVIDENCE

As we proceed to summarize the evidence before us, the legal test we must apply is whether that evidence supports the conclusion of the trial court that the Kentucky system of common schools is not efficient.[11] It is textbook law that before an appellate court may overturn the trial court's finding, such finding must be clearly erroneous. CR 52.01; *Yates v. Wilson,* Ky., 339 S.W.2d 458 (1960).

> 11. Obviously, we will consider (later in the opinion) as a legal proposition, whether the trial court's definition of "efficient" within the aegis of Kentucky Constitution, Section 183 is correct.

The evidence in this case consists of numerous depositions, volumes of oral evidence heard by the trial court, and a seemingly endless amount of statistical data, reports, etc. We will not unduly lengthen this opinion with an extensive discussion of ***197** that evidence. As a matter of fact, such is really not necessary. The overall effect of appellants' evidence is a virtual concession that Kentucky's system of common schools is underfunded and inadequate; is fraught with inequalities and inequities throughout the 177 local school districts; is ranked nationally in the lower 20–25% in virtually every category that is used to evaluate educational performance; and is not uniform among the districts in educational opportunities. When one considers the evidence presented by the appellants, there is little or no evidence to even begin to negate that of the appellees. The tidal wave of the appellees' evidence literally engulfs that of the appellants.

In spite of the Minimum Foundation Program and the Power Equalization Program, there are wide variations in financial resources and dispositions thereof which result in unequal educational opportunities throughout Kentucky. The local districts have large variances in taxable property per student. Even a total elimination of all mismanagement and waste in local school districts would not correct the situation as it now exists. A substantial difference in the curricula offered in the poorer districts contrasts with that of the richer districts, particularly in the areas of foreign language, science, mathematics, music and art.

The achievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district. Student-teacher ratios are higher in the poorer districts. Moreover, although Kentucky's per capita income is low, it makes an even lower per capita effort to support the common schools.

Students in property poor districts receive inadequate and inferior educational opportunities as compared to those offered to those students in the more affluent districts.

That Kentucky's overall effort and resulting achievement in the area of primary and secondary education are comparatively low, nationally, is not in dispute. Thirty-five percent of our adult population are high school drop-outs. Eighty percent of Kentucky's local school districts are identified as being “poor,” in terms of taxable property. The other twenty percent remain under the national average. Thirty percent of our local school districts are “functionally bankrupt.”

Evidence relative to educational performance was introduced by appellees to make a comparison of Kentucky with its neighbors—Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, and West Virginia. It also ranked Kentucky, nationally in the same areas.

In the area of per pupil expenditures, Kentucky ranks 6th among the 8 states and ranks 40th, nationally. With respect to the average annual salary of instructional staff, Kentucky again ranks 6th among its neighbors and 37th nationally. In the area of classroom teacher compensation, Kentucky is 7th and 37th. Our classroom teacher average salary is 84.68% of the national average and our per pupil expenditure is 78.20% of the national average.

When one considers the use of property taxes as a percent of sources of school revenue, Kentucky is 7th among our neighboring states and 43rd nationally. The national average is 30.1% while Kentucky's rate is 18.2%. If any more evidence is needed to show the inadequacy of our overall effort, consider that only 68.2% of ninth grade students eventually graduate from high school in Kentucky. That ranks us 7th among our eight adjacent sister states. Among the 6 of our neighboring states that use the ACT scholastic achievement test, our high school graduates average score is 18.1, which ranks us 4th. Kentucky's ratio of pupil-teacher is 19.2, which ranks us 7th in this region. In spite of the appellants' claim, at both the trial level and on appeal, that appellees' statistics are not current, all the above figures are based on a 1986 study, which was published in 1987.

Numerous well-qualified educators and school administrators testified before the trial court and all described Kentucky's educational effort as being inadequate and well below the national effort.

***198** With this background of Kentucky's overall effort with regard to education and its comparison to other states in the area, and nationally, we proceed to examine the trial court's finding relative to inequity and lack of uniformity in the overabundance of local school districts. We will discuss the educational opportunities offered and then address the disparity in financial effort and support.

EDUCATIONAL EFFORT

The numerous witnesses that testified before the trial court are recognized experts in the field of primary and secondary education. They have advanced college degrees, they have taught school, they have been school administrators, they have been participants at a local or state level in Kentucky's education system, and they have performed in-depth studies of Kentucky's system. Without exception, they testified that there is great disparity in the poor and the more affluent school districts with regard to classroom teachers' pay; provision of basic educational materials; student-teacher ratio; curriculum; quality of basic management; size, adequacy and condition of school physical plants; and per year

expenditure per student. Kentucky's children, simply because of their place of residence, are offered a virtual hodgepodge of educational opportunities. The quality of education in the poorer local school districts is substantially less in most, if not all, of the above categories.

Can anyone seriously argue that these disparities do not affect the basic educational opportunities of those children in the poorer districts? To ask the question is to answer it. Children in 80% of local school districts in this Commonwealth are not as well-educated as those in the other 20%.

Moreover, most of the witnesses before the trial court testified that not only were the state's educational opportunities unequal and lacking in uniformity, but that *all* were inadequate. Testimony indicated that not only do the so-called poorer districts provide inadequate education to fulfill the needs of the students but the more affluent districts' efforts are inadequate as well, as judged by accepted national standards.

As stated, when one reads the record, and when one considers the argument of counsel for the appellants, one can find no proof, no statement that contradicts the evidence about the existing inequalities and lack of uniformity in the overall performance of Kentucky's system of common schools.

Summarizing appellants' argument, and without intending to give it short shrift, it is contended that over the years the General Assembly has continually enacted such programs as the MFP, the PEP, and other progressive programs during recent sessions of the General Assembly. Moreover, uncontroverted evidence is adduced to show that the overall amount of money appropriated for local schools has increased by a substantial amount. The argument seems to be to the effect that "we have done our best." However, it is significant that *all* the experts were keenly aware of the legislative history, including substantive legislation and increased funding and yet, all of them stated that inequalities still exist, and indeed have been exacerbated by some of the legislation. Appellants conceded, the trial court found and we concur that in spite of legislative efforts, the total local and state effort in education in Kentucky's primary and secondary education is inadequate and is lacking in uniformity. It is discriminatory as to the children served in 80% of our local school districts.

FINANCIAL EFFORT

Uniform testimony of the expert witnesses at trial, corroborated by data, showed a definite correlation between the money spent per child on education and the quality of the education received. As we have previously stated in our discussion of the history of Kentucky's school finances, our system does not *require* a minimum local effort. The MFP, being based on average daily attendance, certainly infuses more money into each local district, but is not designed to correct problems of inequality and lack of uniformity between ***199** local school districts. The experts stated that the PEP, although a good idea, was and is underfunded.

The disparity in per pupil expenditure by the local school boards runs in the thousands of dollars per year. Moreover, between the extreme high allocation and the extreme low allocation lies a wide range of annual per pupil expenditures. In theory (and perhaps in actual practice) there could be 177 different per pupil expenditures, thus leading to 177 different educational efforts. The financing effort

of local school districts is, figuratively speaking, a jigsaw puzzle.

It is argued by the appellants that the so-called permissive taxes, [12] are at least part of the solution to equalizing local financial efforts. There are two easy answers that dispose of this argument. First, the taxes are permissive. Responding to obvious voter resistance to the imposition of taxes, 89 districts have enacted the tax on gross utility receipts; 5 districts have enacted the occupational tax; 82 districts have also enacted a special building tax, normally for a specific project for one time only, and not affecting teacher pay, instructional equipment, or any of the specific needs of educational opportunity. As the nature of the taxes is permissive, in many districts they are not adopted and therefore do not produce one cent in additional local revenue.

12. *See supra* note 6 and accompanying text.

Secondly, according to the testimony of the expert witnesses, even if all the permissive taxes were enacted, the financial effort would still be inadequate, and because the population of the districts is in direct proportion to the amount of money that could and is raised by these taxes, the overall problem of an unequal local effort would be exacerbated by such action. Clearly, the permissive taxes are not the solution to the problems. Rather, they contribute to the disparity of per pupil expenditures.

Additionally, because the assessable and taxable real and personal property in the 177 districts is so varied, and because of a lack of uniformity in tax rates, the local school boards' tax effort is not only lacking in uniformity but is also lacking in adequate effort. The history of school financing in Kentucky, certainly corroborates the trial court's finding as to the lack of uniformity and the lack of adequacy of local and state funding of education in the state. Based on the record before us, it is beyond cavil that the trial court's finding was correct.

Having discussed the procedure, the contentions of the parties, the history of school finance, and having briefly analyzed the facts, we now proceed to discuss the legal arguments raised before us by the parties.

VI. DO THE LOCAL SCHOOL BOARDS AND THE COUNCIL FOR BETTER EDUCATION,[13] INC. HAVE THE LEGAL AUTHORITY TO SUE THE LEGISLATORS AND DO THEY HAVE THE STANDING TO MAINTAIN THE ACTION?

13. Hereinafter referred to as Council.

There are two clear and distinct issues to be decided: (1) Do the Council and the local school districts have *legal authority* to sue two members of the General Assembly; and (2) Do those same plaintiffs-appellees have the *legal standing* to sue?

In considering these issues, we note again that the Council is a non-profit corporation, consisting of sixty-six local school districts. It is a separate, legally constituted authority, formed under the laws of Kentucky. [14] The several local county and independent school districts are also formed under Kentucky statutes.[15]

14. KRS Ch. 273.

15. KRS Ch. 160.

LEGAL AUTHORITY

The main thrust of appellants' argument is that the local boards of education, being creatures of the state, cannot sue it. Even though the Council is a non-profit corporation it is claimed that because the Council's ***200** members are all local boards of education, the Council, whose corporate veil is pierced by some strained logic, is also a servant who cannot challenge the master. We disagree.

In creating the local boards of education, the General Assembly endowed them with broad and specific powers to enable them to execute their statutory mission. "Each board of education shall have general control and management of the public schools in its district...." KRS 160.290(1). It is empowered to promote public education and "the education and the general health and welfare of pupils." *Id.*

> "... *Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued; and do all things necessary to accomplish the purposes for which it is created*...." KRS 160.160 (emphasis added).

This corporate body politic is specifically granted the power to do " *all things necessary* " to carry out its duties and responsibilities, including exercising its right to sue and be sued. Nowhere in the statutes can one find a restriction on the right of the local boards to sue. The General Assembly has not stated that it cannot be sued by local boards. The subject matter of this lawsuit is whether the General Assembly has complied with its constitutional duty to provide an "efficient" system of common schools in Kentucky. Who is better qualified, who is more knowledgeable, who is more duty-bound, than the local school boards to raise the question? If the General Assembly is not adequately meeting its responsibility, how can the local boards meet theirs?

It is sterile logic that says that the local school boards cannot sue their masters, the General Assembly (or the Commonwealth), especially when one considers the statutory grants of authority cited above.

Appellants rely on the case of *Board of Education of Louisville v. Board of Education of Jefferson County,* Ky., 458 S.W.2d 6 (1970), to support their argument. In that case, the question presented was whether the General Assembly had the authority to distribute the proceeds of a county-wide occupational tax among the Louisville, Jefferson County and Anchorage Independent school districts, the effect of which would be that some of the funds raised in Louisville would be distributed to the County and to Anchorage Independent districts. The Louisville district argued in that case that it was a municipal corporation and that its funds could not be used elsewhere. This Court rejected this argument and upheld the General Assembly's authority to determine the distribution of Jefferson County's occupational tax proceeds.

The Court's decision was based on whether the legislation was "appropriate" under the provisions of Section 183 of the Kentucky Constitution.

> " 'The General Assembly shall, by *appropriate* legislation, provide for an efficient system of common schools throughout the state.' " *Id.* at 8 (emphasis added).

We said that legislation is only inappropriate if it conflicts with some other constitutional provisions of equal dignity. In declaring the Louisville Board not to be a municipal corporation, the Court stated:

> "Thus, though a school district possesses some of the attributes of a municipal corporation for some legal purposes ... and though a school district is regarded as a political subdivision for some legal considerations— *a school district is, nevertheless, an agency of the state subject to the will of the legislature and existing for one public purpose only—to locally administer the common schools within a particular area subject to the paramount interest of the state.*" *Id.* at 8–9 (emphasis added).

Appellants seize upon this language to posit that local boards are not empowered to sue the state. We do not agree. This language simply reiterates that the local districts are creatures of the state, and that when the issue of "appropriate legislation" is in contention, the state's decision is final, unless violative of another section of the constitution. The decision does not touch the issue of whether the state has provided ***201** an efficient system, and it certainly does not declare either directly or inferentially that a local school board cannot sue the state. Furthermore, appellants ignore the specific grant of power to local school boards to "sue or be sued" and *to do all things necessary* to carry out the duties of the local school boards.

In *Hogan v. Glasscock,* Ky., 324 S.W.2d 815 (1959) we held that a local school board had the power to hire an attorney when such employment was necessary for their protection and the accomplishment of the purposes for which they were created. The attorneys were employed by the local board to defend an attack on the board members' method of providing public education. This case clearly reinforces the statutory duty of local school boards to promote local education and to defend lawsuits challenging their action, and to do all things which are necessary in the opinion of the local board to promote public education. KRS 160.160, 160.290(1).

Appellants rely heavily on a case from a sister state to support their position. In *East Jackson Public Schools v. State,* 133 Mich. App. 132, 348 N.W.2d 303 (1984), several local school districts sought to overturn a legislative scheme of school financing, claiming a violation of the equal protection clause of the Michigan constitution. The boards did not claim to enforce any constitutional rights regarding public education. As the Court stated, "Education is not a fundamental right under Michigan Constitution of 1963." *Id* at 305. The following language seized on by appellants addressed the school districts' power to sue.

> "School districts and other municipal corporations are creatures of the state. Except as provided by their state, they have no existence, no function, no rights, and no powers. They are given no power, nor can any be implied, to defy their creator over the terms of their existence. They surely have no power to bring suits of such nature on behalf of residents within their boundaries, or to expend public funds to finance such litigation of, or on behalf of, private

citizens." *Id* at 306.

Although the language of this opinion is strong and unequivocal, it cites no authority for its position, and is certainly not persuasive in the case at bar. [16]

> 16. Furthermore, there is ample authority which is contrary to the Michigan case. *See Dupree v. Alma School District No. 30,* 279 Ark. 340, 651 S.W.2d 90 (1983); *Hornbeck v. Somerset County Board of Education,* 295 Md. 597, 458 A.2d 758 (1983); *Board of Education v. Nyquist,* 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.E.2d 359 (1982); *Seattle School District No. 1 of King County v. State,* 90 Wash.2d 476, 585 P.2d 71 (1978); *Washakie County School District No. 1 v. Herschler,* 606 P.2d 310 (Wyo.1980).

Unlike Michigan citizens, our citizens are given a fundamental right to education in our Constitution. Ky. Const. Sec. 183. That fundamental right is reiterated and expanded in our statutes. KRS 158.010 et seq. Moreover, our General Assembly has given local districts a perpetual, corporate existence, and has in two statutes, specifically given local boards virtual unlimited authority to carry out their duty of promoting local education.

In *Reeves v. Jefferson County,* Ky., 245 S.W.2d 606 (1951), we declared that KRS 160.160 and KRS 160.290 "place upon the boards of education, not the taxpayers, the initial responsibility of maintaining legal actions on behalf of the school districts." *Id.* at 608. Perforce a lawsuit to declare an education system unconstitutional falls within the authority, if not the duty, of local school boards to fulfill their statutory responsibilities, no matter who the defendants are.

Even if we had not reached this conclusion as to the individual county and local independent school districts, it is beyond cavil that the Council, being an independent, legally separate, properly formed non-profit corporation, has the legal authority to sue the General Assembly. We are cited no authority, and can find none, that would enable us to pierce the corporate veil and legally cut off the rights of the individual corporate members.

***202** STANDING

Appellants next argue that the Council and the local school boards have no standing to join in this lawsuit.

In order to have standing to sue, a plaintiff need only have a real and substantial interest in the subject matter of the litigation, as opposed to a mere expectancy. *Winn v. First Bank of Irvington,* Ky. App., 581 S.W.2d 21, 23 (1978). And, as we have said:

> "It is fundamental that in order to have standing in a lawsuit a party must have a judicially recognizable interest in the subject matter of the suit." *Health America Corporation of Kentucky v. Humana Health Plan Inc.,* Ky., 697 S.W.2d 946, 947 (1985).

The issue of standing is one which is to be decided on the facts of each case.

The Council and the local school boards as plaintiffs in this case are statutorily obligated to promote public education for their respective constituents—the students in their school districts. The local districts are part and parcel of a system of common schools created by the General Assembly, which purports to be constitutionally efficient. If the system is not efficient, the local school board's duty is to make every effort to remedy that situation. Included in that responsibility is the filing of this lawsuit. The local school board and the Council have a judicially recognizable interest in a system of efficient common schools, and we so recognize and declare.

VII. IS THIS A PROPER CLASS ACTION WITH RESPECT TO THE INDIVIDUAL STUDENT PLAINTIFFS?
Twenty-two student plaintiffs, suing by and through their parents as next friends, argued to the trial court that they were entitled to maintain the lawsuit as a class action on behalf of "all similarly situated students in Kentucky's property-poor districts." Appellants deny appellees' claim.

CR 23.01 authorizes the filing of a class action and sets up the requirements therefore. CR 23.03 requires the trial court, "as soon as practicable after the commencement of an action brought as a class action" to make a determination "by order" as to whether a class action may be maintained.

It is clear that when the trial court fails to make findings of fact and fails to certify the evidence of a class, within the purview of CR 23, there can be no class action. *Brockman v. Jones,* Ky. App., 610 S.W.2d 943 (1980).

No hearing was held by the trial court in this case, no findings of fact were made by the trial court as to the propriety of a class action, and none of the requirements of CR 23.01 or 23.03 were followed. In fact, the only reference to a class action other than in the pleadings appears in Document ## 1, dated May 31, 1988, in which the court, in its findings of fact identified some of the plaintiffs as "a number of parents and individual students representing as a class all similarly situated students in Kentucky's districts."

For the failure of the trial court to follow the mandate of CR 23.01 and 23.03, appellants argue there was no class action. We concur.

However, the absence of, or the failure to create a proper class, in no way changes the decision of the trial court or, for that matter, of this Court, with respect to the issue of the constitutionality of the Kentucky system of common schools. If a statute (or in this case, a system established by statutes) is not constitutionally valid, the existence or non-existence of a class of litigants is immaterial. The constitutional issue has been raised by the Council, the individual school districts, and by those individual students properly before this Court. The system is no more nor no less susceptible to constitutional challenge because of the lack of a class action. *See, e.g., Bright v. Baesler,* 336 F.Supp. 527 (E.D.Ky.1971); *Kelley v. City of Ashland,* Ky., 562 S.W.2d 312 (1978); *Moormen v. Morgan,* Ky., 285 S.W.2d 146 (1955); *Barker v. Crum,* 177 Ky. 637, 198 S.W. 211 (1917).

***203** While we concur with appellants' contention, the effect of our decision on this legal point is that it is non-dispositive.

VIII. ARE ALL THE TWENTY–TWO INDIVIDUAL STUDENT PLAINTIFFS BEFORE THE COURT?

This issue is closely akin to the one previously decided. Twenty-two students were named as individual plaintiffs, suing by and through their parents as next friends. None of the parents testified, and only one of the students testified. At trial, reference was made to four student-plaintiffs by another witness.

Appellants argue only the latter five students are properly before this court, and that there is no evidence in the record to show "that either of these five plaintiff-students has individually suffered a violation of his or her constitutional rights."

We have previously declared that the Council and the individual districts are properly before this court. We are not cited any legal authority for the proposition that a party has to testify before he or she is properly before the court, and we know of none. Twenty-two students allege that the Kentucky system of common schools is violative of Section 183. The fact that all of the students did not testify is irrelevant. The constitutional issue presented is clearly before this Court.

IX. DOES THE COMPLAINT STATE A CLAIM AGAINST THE TWO LEGISLATOR–APPELLANTS?

The remaining appellants in this action are State Senator John A. Rose, who is President *Pro Tempore* of the Senate, and Representative Donald J. Blandford, who is Speaker of the House of Representatives.

Appellants argue that the declaratory judgment is a nullity against them. They claim that all 138 members of the Kentucky General Assembly would have to be joined as parties-defendant for the relief granted to be valid.

The premises for this argument are as follows: that the essence of the trial court's decision is that the financing of the system of common schools by the General Assembly is inadequate; and it is the entire General Assembly which will be required to raise more money for the system. Additionally, appellants maintain that since the General Assembly is not a corporate body, and since the appellants are not authorized to accept service for the entire membership, the court is not empowered in this action to direct the General Assembly to take any action. Lastly, appellants contend that the trial court's retention of continuing supervision through an "open-end" type of jurisdiction will lead to the court improperly attempting to direct the actions of the General Assembly.

The trial court did, as claimed, keep a type of open-end jurisdiction or supervision of the matter. As will be seen *infra,* we believe this to be improper.

Regarding appellants' other assertions we believe that the appellants do not correctly interpret the trial court's judgment, and moreover, we believe that the General Assembly, as a legislative body, is properly before this Court.

To begin with, the issue decided by the trial court, is that the system of common schools of the Commonwealth is not efficient, and is not constitutionally valid. The trial court set out numerous standards by which an "efficient system" can be judged. We do the same. The trial court emphasized

and re-emphasized, in its three documents, that it was not directing the General Assembly to enact specific legislation and that it was not directing the General Assembly to raise taxes. We do the same.

The impact of this decision that the system is constitutionally deficient will be to set certain standards that we believe are required by Section 183 for the establishment and maintenance of an efficient system of common schools. It will be the responsibility of the General Assembly, using its own judgment and exercising its own power and constitutional duty, to establish such a system. Further, the trial court required these two appellants to, in effect, introduce legislation to correct the constitutional defect. We do not agree ***204** with the trial court here, and we do not so order the two legislator-appellants.

We do not agree that, in order to bring the Kentucky General Assembly within the jurisdiction of a court, a plaintiff must effect service upon all of the individual members thereof. While we have no Kentucky authority directly on point, we do recognize a line of cases holding that members of lesser administrative and legislative bodies must be named individually as parties-defendant in order to invoke a trial court's jurisdiction. In *Lewis v. Board of Councilmen Of Frankfort,* 305 Ky. 509, 204 S.W.2d 813 (1947), for example, the court affirmed the dismissal of an action for a writ of mandamus. The plaintiff failed to name individual members of the Frankfort Board of Councilmen in the complaint; thus the court determined that the Board was not properly before the court. The court was concerned with affected parties' ability to defend themselves and the court's power to enforce a writ, if granted.

While it is certainly true that the named appellants in the instant case cannot, by themselves, enact any legislation, they can defend the constitutionality of an act or acts. They have done so in this case. Furthermore, the trial court did not issue a writ of mandamus and appellants were not ordered to enact *specific legislation,* but to "proceed as rapidly as possible to establish an efficient system of elementary and secondary public schools within the guidelines laid down...."

The two appellants in this case are the elected leaders of the House of Representatives and the Senate. In the Complaint, they are described as follows.

> "Defendant, Joseph W. Prather, is President Pro Tempore of Kentucky's Senate. Defendant, Donald J. Blandford, is Speaker of Kentucky's House of Representatives. *Those defendants are the presiding officers and are representative of their respective legislative bodies. They are named in their official capacities as President Pro Tempore of the Kentucky Senate and Speaker of the Kentucky House of Representatives, respectively.*" (emphasis added).

While the legislative leaders are not named as official representatives of the General Assembly in the caption of the complaint, as they should have been, it is clear from the statement of parties contained within the complaint that appellants were in fact named in a representative capacity that is sufficient to indicate the capacity in which they were being sued. *See Beverly v. Highfield,* 307 Ky. 179, 209 S.W.2d 739, 741 (1948).

We are also persuaded by authority from other jurisdictions that further obviates the need for serving all members of a legislative body. In *Seattle School District No. 1 of King County v. State,* 90 Wash.2d

476, 585 P.2d 71 (1978) the Speaker of the House of Representatives was named as a defendant representing all members of the House and the President of the state Senate was likewise named as a defendant representing the entire Senate. In *Barkely v. O'Neill,* 624 F.Supp. 664 (S.D. Ind., 1981) the plaintiff sued members of the United States House of Representatives by suing the Speaker of the House and several members of a special task force. Although the plaintiff lost on the merits, the House was before the court. *See also, Jackson v. Congress of the United States,* 558 F.Supp. 1288 (S.D.N.Y.1983); *cf. Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (both Houses of Congress found to be proper parties as intervenors in a suit challenging the House's exercise of legislative veto); *Synar v. United States,* 626 F.Supp. 1374 (D.D.C.1986) (House Speaker O'Neill and Bipartisan Leadership Group intervened as defendants to support an Act challenged on constitutional grounds), *aff'd, Bowsher v. Synar,* 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986).

As in several of the above cases, the case at bar attacks the constitutionality of an act or series of acts of a legislative body. This case of major statewide importance has been tried and practiced vigorously by all parties and was decided on the merits by the trial court. We will not now initiate useless circuity of action by requiring the cumbersome process of serving all members***205** of the General Assembly. *See Bruner v. City of Danville,* Ky., 394 S.W.2d 939, 941 (1965). We believe it is only common sense and practical to hold that service on both the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives, named in their respective capacities is sufficient to acquire jurisdiction over the General Assembly in this action.

X. WHAT IS AN “EFFICIENT SYSTEM OF COMMON SCHOOLS”?

In a few simple, but direct words, the framers of our present Constitution set forth the will of the people with regard to the importance of providing public education in the Commonwealth.

> “*General Assembly to provide for school system*—The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.” Ky. Const. Sec. 183.

Several conclusions readily appear from a reading of this section. First, it is the obligation, the sole obligation, of the General Assembly to provide for a system of common schools in Kentucky. The obligation to so provide is clear and unequivocal and is, in effect, a constitutional mandate. Next, the school system must be provided throughout the entire state, with no area (or its children) being omitted. The creation, implementation and maintenance of the school system must be achieved by appropriate legislation. Finally, the system must be an efficient one.

It is, of course, the last “conclusion” that gives us pause and requires study and analysis. What, indeed, is the meaning of the word “efficient” as used in Section 183?

THE CONSTITUTIONAL DEBATES

A brief sojourn into the Constitutional debates will give some idea—a contemporaneous view—of the depth of the delegates' intention when Section 183 was drafted and eventually made its way into the

organic law of this state. It will provide a background for our definition of “efficient.”

Comments of Delegate Beckner on the report which led to the selection of the language in Section 183 reflect the framers' cognizance of the importance of education and, emphasized that the educational system in Kentucky must be improved. Referring to the education of our children, he admonished the delegates, “do not let us make a mistake in dealing with the most vital question that can come before us.” III *Debates Constitutional Convention 1890* 4459 [hereinafter *Debates*].

After summarizing other achievements made in the proposed new Constitution he continued—

> “If, however, after accomplishing so much good on these lines—we forget the children, and, in the slightest degree, fail to appreciate the obligations of the State to provide sufficient facilities for training them to be good citizens, we will deserve and receive in the great hereafter anathema, and not ascription of praise.” *Id.* at 4460.

Incorporating a report made to the Kentucky legislature in 1822, Beckner quoted (referring to a system of common schools):

> “ ‘... It is a system of practical equality in which the children of the rich and poor meet upon a perfect level and the only superiority is that of the mind.’ ” *Id.* at 4460.

Beckner further declared, “Instruction of children under the auspices of the State has become the settled policy of our people.” *Id.* at 4461.

Beckner set out four permanent justifications for and characteristics of state provided schools:

1) The education of young people is essential to the prosperity of a free people.

2) The education should be universal and should embrace all children.

3) Public education should be supervised by the State, to assure that students develop patriotism and understand our government.

206 4) Education should be given to all—rich and poor—so that our people will be homogeneous in their feelings and desires.

Id. at 4462–63.

One final passage merits quotation. Since education provided by the State is no longer an open question, the only thing that remains is how it shall be made “most valuable and effective.” Let Mr. Beckner's answer be a guidepost for all Kentuckians today and in the future:

> “If public schools have come to stay, if they are a part and parcel of our free institutions, woven into the very web and woof of popular government; and if they are in the future to be the

> dependence of the people of Kentucky for the instruction of their youth, what is the logic of the situation? Manifestly to encourage and improve them, *to seize every opportunity to make them more efficient,* to treat them with no niggard or stinted hand, but just in so far as we love our children, to try to make their training-places fit nurseries of immortal spirits that have divine purposes to fulfill on earth, and cannot hope to succeed, unless their intellectual powers be properly developed." *Id.* at 4463 (emphasis added).

As if these powerful words were not sufficient to show the purpose of Section 183, consider those of delegate Moore—

> "Common schools make patriots and men who are willing to stand upon a common land. The boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, *but all stand upon one level.*" *Id.* at 4531 (emphasis added).

It serves no purpose to further lengthen this opinion with more verbiage from the Constitutional debates. Delegates Beckner and Moore told their fellow delegates and have told us, what this section means.

—The providing of public education through a system of common schools by the General Assembly is the most "vital question" presented to them.

—Education of children must not be minimized to the "slightest degree."

—Education must be provided to the children of the rich and poor alike.

—Education of children is essential to the prosperity of our state.

—Education of children should be supervised by the State.

—There must be a constant and continuing effort to make our schools more efficient.

—We must not finance our schools in a *de minimis* fashion.

—All schools and children stand upon one level in their entitlement to equal state support.

This Court, in defining efficiency must, at least in part, be guided by these clearly expressed purposes. The framers of Section 183 emphasized that education is essential to the welfare of the citizens of the Commonwealth. By this animus to Section 183, we recognize that education is a fundamental right in Kentucky.

LEGAL PRECEDENTS IN KENTUCKY

Although the Court did not specifically comment on Section 183 in *Major v. Cayce,* 98 Ky. 357, 33 S.W.

93 (1895), it did state the essential requirements of a statute which the General Assembly enacted in compliance with that constitutional provision.

> "[U]nder the school law the pupils, all within the age and resident in the district, are entitled to attend these common schools, and to receive tuition in all the branches [of learning] prescribed by the state board of education to be taught therein, free of expenses..." 33 S.W. at 94.

This decision, very close in time to the adoption of the present Constitution, recognized a prohibition against any practice which "impairs the equal benefit of the common-school system" to all students. *Id.* at 95.

In *City of Louisville v. Commonwealth,* 134 Ky. 488, 121 S.W. 411 (1909), the Court held:

> "In this state the subject of public education has always been regarded and treated as a matter of state concern. In the last ***207** Constitution, as well as in the one preceding it, *the most explicit care was evinced to promote public education as a duty of the state*....

In obedience to that requirement, the General Assembly has provided a system of public schools.... All [schools throughout the state] have the one main essential—that they are free schools, open to all the children of proper school age residing in the locality, *and affording equal opportunity for all* to acquire the learning taught in the various common school branches...." 121 S.W. at 412 (emphasis added).

The decision, specifically relying on Section 183, postulated: public education in the common schools is a duty of the state; that the General Assembly attempted to obey the mandate (as it certainly has attempted to do now); and although there are certain different provisions for different localities, *all* common schools must be free, open to all students, and provide equal opportunities for all students to acquire the same education. In other words, although by accident of birth and residence, a student lives in a poor, financially deprived area, he or she is still entitled to the same educational opportunities that those children in the wealthier districts obtain. What principle could be more fair, more just, and more importantly, what would be more consistent with the purpose of Section 183 and the common school system it spawned?

We further emphasized the mandate of Section 183 in *Board of Education of Boyle County v. McChesney,* 235 Ky. 692, 32 S.W.2d 26 (1930). Affirming the General Assembly's constitutional duty to provide for an efficient system, the Court idealistically observed the citizens' burden.

> "Onerous taxes are levied annually and paid willingly by the people for this essential governmental service." 32 S.W.2d at 28.

In the case of *Commonwealth ex rel. Baxter v. Burnett,* 237 Ky. 473, 35 S.W.2d 857 (1931), we again emphasized the constitutional mandate of Section 183, and the great importance of public education. In addition, the element of "efficiency" was highlighted. The Court also acknowledged and approved strong, centralized control (by the state) of the system of common schools.

> "In the progress towards the highest degree of efficiency the legislature more and more has centralized the control of schools and sought uniformity and equality of advantage for the school children of the state as a whole." 35 S.W.2d at 859.

Describing the growing centralization as "progress," we restated the overall goals of the system as "uniformity and equality" for the school children of the state "as a whole." What could be clearer? Since the Constitution acknowledges the importance of education to this Commonwealth and since the establishment and maintenance of a system of common schools is a mandated duty of the General Assembly, it is part and parcel of this overall goal that the system have the twin attributes of uniformity and equality.

In *Wooley v. Spalding,* Ky., 293 S.W.2d 563 (1956), a suit was filed by citizens and taxpayers to prohibit the defendant superintendent of Marion County schools from expending funds in alleged illegal ways, to prohibit sectarian instruction from being given in public schools and to seek the reopening and proper operation of a high school. The trial court denied the request, but our predecessor Court reversed and granted the requested injunction. In language which brings together and re-emphasizes earlier decisions, we said,

> "The fundamental mandate of the Constitution and Statutes of Kentucky is that there shall be equality and that all public schools shall be nonpartisan and nonsectarian.

Uniformity does not require equal classification but it does demand that there shall be a substantially uniform system and equal school facilities without discrimination as between different sections of a district or a county." *Id.* at 565 (references omitted).

The lack of uniformity and the unequal educational opportunity existing in the county was said to constitute "a violation ***208** of both the spirit and intent of Section 183 of our State Constitution." *Id.* That reasoning therein applies, *a fortiori,* to the entire state system of common schools. Public schools must be efficient, equal and substantially uniform.

As can be seen, this Court, since the adoption of the present Constitution, has, in reflecting on Section 183, drawn several conclusions:

1) The General Assembly is mandated, is duty bound, to create and maintain a system of common schools—throughout the state.

2) The expressed purpose of providing such service is vital and critical to the well being of the state.

3) The system of common schools must be efficient.

4) The system of common schools must be free.

5) The system of common schools must provide equal educational opportunities for all students in the Commonwealth.

6) The state must control and administer the system.

7) The system must be, if not uniform, "substantially uniform," with respect to the state as a whole.

8) The system must be equal to and for all students.

Finally, a Federal Court has stated the financial burden entailed in meeting these responsibilities in no way lessens the constitutional duty. *Carroll v. Board of Education of Jefferson County,* 410 F.Supp. 234 (W.D.Ky.1976), *aff'd* 561 F.2d 1 (6th Cir.1977).

> "In short, once the citizens of Kentucky made the voluntary commitment to educate the children of this state in public schools neither the Kentucky General Assembly nor those individuals responsible for discharging the duties imposed on them by the state constitution ... can abrogate those duties merely because the monetary obligations becomes unexpectedly large or onerous." *Id.* at 238.

The taxpayers of this state must pay for the system, no matter how large, even to the point of being "unexpectedly large or even onerous."

Before proceeding, therefore, to a definition of "efficient" we must address a point made by the appellants with respect to our authority to enter this fray and to "stick our judicial noses" into what is argued to be strictly the General Assembly's business.

Appellants argue and cite several cases to support their position, that the General Assembly has sole and exclusive authority to determine whether the system of common schools is constitutionally "efficient" and that a Court may not substitute its judgment for that of the General Assembly.

In *Prowse v. Board of Education for Christian County,* 134 Ky. 365, 120 S.W. 307 (1909), the constitutionality of an act requiring the fiscal court to enact a tax previously set by the board of education for local school operation was upheld. We said, in light of Section 183:

> "What system will be most efficient is for the judgment of the General Assembly.... In a matter like this, resting within the discretion of the General Assembly, the Court will not substitute its judgment for the judgment of the General Assembly and it will not interfere with the action of the legislature, unless a palpable effort to evade the mandate of the Constitution should appear." 120 S.W. at 308.[17]

> 17. *See also, Board of Education of Louisville v. Board of Education of Jefferson County,* Ky., 458 S.W.2d 6, 8 (1970) (determining whether legislation is appropriate is legislative function); *City of Louisville v. Board of Education,* 302 Ky. 647, 195 S.W.2d 291, 293 (1946) (General Assembly has authority "to deal with the common schools in any way it should desire"); *Commonwealth v. Griffen,* 268 Ky. 830, 105 S.W.2d 1063, 1065 (1937) (lawmakers have "wide latitude." "What that system is is ... left wholly to the discretion of the Legislature."); *Madison County Board of*

Education v. Smith, 250 Ky. 495, 63 S.W.2d 620, 621 (1933) ("legislative discretion the best method of providing for an efficient system of common schools."); *Elliott v. Garner,* 140 Ky. 157, 130 S.W. 997, 998 (1910) (how General Assembly shall best accomplish efficient system of common schools "is purely a matter of legislative discretion").

***209** It is textbook law that enactments of the General Assembly have a strong presumption of constitutionality. *Jefferson County Police Merit Board v. Bilyeu,* Ky., 634 S.W.2d 414 (1982). It is also a textbook law that where legislative discretion is present, the judiciary will be reluctant to interfere. *See, e.g., American Insurance Association v. Geary,* Ky., 635 S.W.2d 306 (1982). The separation of powers doctrine of the Kentucky Constitution underpins and buttresses these legal theories. Ky. Const. Sec. 27, 28, 29; *Legislative Research Commission v. Brown,* Ky., 664 S.W.2d 907 (1984).

In this context, we review the question before us. The ultimate issue is whether the system of common schools in the Commonwealth established by the General Assembly, with respect to the mandate of Section 183, is in compliance with the constitution. Specifically, we are asked—based solely on the evidence in the record before us—if the present system of common schools in Kentucky is "efficient" in the constitutional sense. It is our sworn duty, to decide such questions when they are before us by applying the constitution. The duty of the judiciary in Kentucky was so determined when the citizens of Kentucky enacted the social compact called the Constitution and in it provided for the existence of a third equal branch of government, the judiciary.

The issue before us—the constitutionality of the system of statutes that created the common schools—is the only issue. To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.

We believe that what these several cases cited as controlling by appellants mean is that great weight should be given to the decision of the General Assembly. We believe they mean that the presumption of constitutionality is substantial. We believe that they mean that legislative discretion—in this specific matter of common schools—is to be given great weight and, we do so in this decision. We do not question the wisdom of the General Assembly's decision, only its failure to comply with its constitutional mandate. In so doing, we give deference and weight to the General Assembly's enactments; however, we find them constitutionally deficient.[18]

18. This Court did, in fact, address the constitutionality of a statute under the mandate of Section 183 in *Trustees of Graded Free Colored Common Schools v. Trustees of Graded Free White Common Schools,* 180 Ky. 574, 203 S.W. 520 (1918).

The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do. This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.

OTHER AUTHORITY

In our sister and adjoining state of West Virginia, the state Constitution requires that

> "The legislature shall provide, by general law, for a thorough and efficient system of free schools." W.Va. Const. Art. XII, Sec. 1.

In the landmark case of *Pauley v. Kelly,* 162 W.Va. 672, 255 S.E.2d 859 (1979) the West Virginia Supreme Court faced a lawsuit similar to the one before us. The trial court found that one county's school system was inadequate, in comparison with four other local systems. Although the West Virginia Supreme Court remanded the case for further evidentiary hearings it courageously spoke out in defining the "thorough and efficient" clause of Section 1 of its constitution.

The Court engaged in extensive historical analysis, in which it carefully interpreted other states' constitutional mandates ****210*** with regard to public education.[19] The court rejected the contention that legislative discretion in public school system matters is determinative.

> 19. We recommend a study of this opinion for those who are interested in the historical background of similar constitutional provisions. We are persuaded that the history and reasoning expressed in the *Pauley* case is applicable and persuasive in the decision of the case before us.

> "So, on the threshold question: no court has been hesitant to affirm legislation; many have required specific actions by local boards to bring them to compliance with the constitutional mandate; and legislation has been declared unconstitutional because it failed the mandate. *There is ample authority that courts will enforce constitutionally mandated education quality standards.*" *Id.* at 874 (emphasis added).

In turning to the definition of "efficient" the Court, began with definition which was "lexically" founded.

> "... (T)he mandate, ... becomes a command that the education system be absolutely complete, attentive to every detail, extending beyond ordinary parameters, and further, it must produce results without waste." *Id.* at 874.

Following an analysis of the admitted plethora of legal precedent, the West Virginia Supreme Court adopted a definition of "thorough and efficient."

> "[8] We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically." *Id.* at 877.

The court continued by recognizing areas in which each child educated in the system should develop to full capacity: 1) literacy; 2) mathematical ability; 3) knowledge of government sufficient to equip the individual to make informed choices as a citizen; 4) self-knowledge sufficient to intelligently choose life work; 5) vocational or advanced academic training; 6) recreational pursuits; 7) creative interests; 8) social ethics. Support services, such as good physical facilities and instructional resources, and state and local monitoring for waste and incompetency were considered to be implicit in the definition of "a thorough and efficient system." *Id.*

We cite *Pauley,* and quote from it at some length to show that Courts may, should and have involved themselves in defining the standards of a constitutionally mandated educational system.[20]

> 20. We invite the interested reader to consider cases in other jurisdictions, which have been instructive and helpful to us. See also *Dupree v. Alma School District No. 30 of Crawford County, et al.,* 279 Ark. 340, 651 S.W.2d 90 (1983); *Horton v. Meskill,* 172 Conn. 615, 376 A.2d 359 (1977); *Robinson v. Cahill,* 69 N.J. 449, 355 A.2d 129 (1976); *Washakie County School District v. Herschler,* 606 P.2d 310 (Wyo.1980).

We consider foreign cases, along with our constitutional debates, Kentucky precedents and the opinion of experts in formulating the definition of "efficient" as it appears in our Constitution.

OPINIONS OF EXPERTS

Numerous well-qualified experts testified in this case. They were all well educated, experienced teachers, educators, or administrators; and all were familiar with the Kentucky system of common schools and with other states' and national school issues.

Dr. Richard Salmon testified that the concept of efficiency was a three part concept. First, the system should impose no financial hardship or advantage on any group of citizens. Further, local school districts must make comparable tax efforts. Second, resources provided by the system must be adequate and uniform throughout the state. Third, the system must not waste resources.

Dr. Kern Alexander opined that an efficient system is one which is unitary. It is one in which there is uniformity throughout the state. It is one in which equality is a hallmark and one in which students must be given equal educational opportunities, regardless of economic status, or place of ***211** residence. He also testified that "efficient" involves pay and training of teachers, school buildings, other teaching staff, materials, and adequacy of all educational resources. Moreover, he, like Dr. Salmon, believed that "efficient" also applies to the quality of management of schools. Summarizing Dr. Alexander's opinion, an efficient system is unitary, uniform, adequate and properly managed.

The definitions of "efficient" were documented and supported by numerous national and local studies, prepared and authorized by many of the giants of the education profession.

The primary expert for the appellees was a local school superintendent who felt that an efficient system is one which is operated as best as can be with the money that was provided. We reject such a

definition which could result in a system of common schools, efficient only in the uniformly deplorable conditions it provides throughout the state.

In summary the experts in this case believed that an “efficient” system of common schools should have several elements:

1) The system is the sole responsibility of the General Assembly.

2) The tax effort should be evenly spread.

3) The system must provide the necessary resources throughout the state—they must be uniform.

4) The system must provide an adequate education.

5) The system must be properly managed.

DEFINITION OF “EFFICIENT”

We now hone in on the heart of this litigation. In defining “efficient,” we use all the tools that are made available to us. In spite of any protestations to the contrary, we do not engage in judicial legislating. We do not make policy. We do not substitute our judgment for that of the General Assembly. We simply take the plain directive of the Constitution, and, armed with its purpose, we decide what our General Assembly must achieve in complying with its solemn constitutional duty.

Any system of common schools must be created and maintained with the premise that education is absolutely vital to the present and to the future of our Commonwealth. As Herbert Spencer observed, “Education has for its object the formation of character.” H. Spencer, *Social Studies* pt. 1, ch. 2, p. 17 (1851). No tax proceeds have a more important position or purpose than those for education in the grand scheme of our government. The importance of common schools and the education they provide Kentucky's children cannot be overemphasized or overstated.

The sole responsibility for providing the system of common schools is that of our General Assembly. It is a duty—it is a constitutional mandate placed by the people on the 138 members of that body who represent those selfsame people.

The General Assembly must not only establish the system, but it must monitor it on a continuing basis so that it will always be maintained in a constitutional manner. The General Assembly must carefully supervise it, so that there is no waste, no duplication, no mismanagement, at any level.

The system of common schools must be adequately funded to achieve its goals. The system of common schools must be substantially uniform throughout the state. Each child, *every child,* in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and

access to an adequate education. This obligation cannot be shifted to local counties and local school districts.

As we have indicated, Section 183 requires the General Assembly to establish a system of common schools that provides an equal opportunity for children to have an adequate education. In no way does this constitutional requirement act as a limitation***212** on the General Assembly's power to create local school entities and to grant to those entities the authority to supplement the state system. Therefore, if the General Assembly decides to establish local school entities, it may also empower them to enact local revenue initiatives to supplement the uniform, equal educational effort that the General Assembly must provide. This includes not only revenue measures similar to the special taxes previously discussed, but also the power to assess local ad valorem taxes on real property and personal property at a rate over and above that set by the General Assembly to fund the statewide system of common schools.[21] Such local efforts may not be used by the General Assembly as a substitute for providing an adequate, equal and substantially uniform educational system throughout this state.

21. See text on page 216.

Having declared the system of common schools to be constitutionally deficient, we have directed the General Assembly to recreate and redesign a new system that will comply with the standards we have set out. Such system will guarantee to all children the opportunity for an adequate education, through a *state* system. To allow local citizens and taxpayers to make a supplementary effort in no way reduces or negates the minimum quality of education required in the statewide system.

We do not instruct the General Assembly to enact any specific legislation. We do not direct the members of the General Assembly to raise taxes. It is their decision how best to achieve efficiency. We only decide the nature of the constitutional mandate. We only determine the intent of the framers. Carrying-out that intent is the duty of the General Assembly.

A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right. We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[22]

22. In recreating and redesigning the Kentucky system of common schools, these seven characteristics should be considered as *minimum* goals in providing an adequate education.

> Certainly, there is no prohibition against higher goals—whether such are implemented statewide by the General Assembly or through the efforts of any local education entities that the General Assembly may establish—so long as the General Assembly meets the standards set out in this Opinion.

The essential, and minimal, characteristics of an "efficient" system of common schools, may be summarized as follows:

1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.

2) Common schools shall be free to all.

3) Common schools shall be available to all Kentucky children.

4) Common schools shall be substantially uniform throughout the state.

5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.

***213** 6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.

7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.

8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.

9) An adequate education is one which has as its goal the development of the seven capacities recited previously.

XI. IS THE PRESENT SYSTEM "EFFICIENT"?

We have described, *infra,* in some detail, the present system of common schools. We have noted the overall inadequacy of our system of education, when compared to national standards and to the standards of our adjacent states. We have recognized the great disparity that exists in educational opportunities throughout the state. We have noted the great disparity and inadequacy, of financial effort throughout the state.

In spite of the past and present efforts of the General Assembly, Kentucky's present system of common schools falls short of the mark of the constitutional mandate of "efficient." When one juxtaposes the standards of efficiency as derived from our Constitution, the cases decided thereunder, the persuasive authority from our sister states and the opinion of experts, with the virtually unchallenged evidence in the record, no other decision is possible.

XII. DID THE TRIAL COURT'S JUDGMENT VIOLATE THE SEPARATION OF POWERS PROVISION OF THE KENTUCKY CONSTITUTION?

Appellants assert that the trial court's judgment violates the separation of powers doctrine in that it exceeded the authority of the court in “dictating” to the General Assembly, and it exceeded the authority of the court by creating a type of open-ended judgment which required legislator-defendants to report their progress to the trial court.

Our constitutional provisions which relate to separation of powers between the three separate and independent branches of government were authored by Thomas Jefferson. They are as follows:

> “Sec. 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of the magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”
>
> “Sec. 28. No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”

Section 29 vests the legislative power in the General Assembly, and Section 109 grants the judicial power to the Court of Justice.

Because of the specific wording of the Constitution, we have previously noted the strength of the separation of powers doctrine in this state:

> “Our present Constitution contains explicit provisions which, on one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch of government into the powers and functions of the other. Thus, our constitution has a double-barreled, positive-negative approach....” *Legislative Research Commission v. Brown,* Ky., 664 S.W.2d 907, 912 (1984) (emphasis added).

Moreover, in *Brown,* we reiterated that the doctrine of separation of powers must be “strictly construed.” *Id.*

Simply stated, we have declared that the power to legislate belongs to the General Assembly, and the power to adjudicate belongs to the judiciary. It is our goal to honor both the letter and spirit of that constitutional mandate.

***214** “Our functions are to determine the constitutional validity and to declare the meaning of what the legislative department has done. We have no other concern.” *Johnson v. Commonwealth,* 291 Ky. 829, 165 S.W.2d 820, 825 (1942).

With these principles to guide us, we now address appellants' contentions.

It is argued that the trial court directed the General Assembly to enact specific legislation and to raise taxes and that such is a violation of the separation of powers. We do not agree that that is what the judgment of the trial court does. The trial judge did define "efficient," he did declare that a common school education is a fundamental constitutional right in this state, and he did say that any educational system to be "efficient," must have certain characteristics. He commented on the possible methods of financing the system of common schools in Kentucky and did, of course, opine that additional money would be required. This later conclusion was based on an abundance of virtually uncontested and unchallenged evidence in this record.

Moreover, the trial judge specifically denied that he was directing the General Assembly to enact any *specific legislation,* including raising taxes. His mandate to the General Assembly was to bring the system of common schools into compliance with Section 183 of our Constitution. He did as we have done, established certain criteria, standards and goals which must be met to so comply. It is clear that the specifics of the legislation will be left up to the wisdom of the General Assembly. Clearly, no "legislating" is present in the decision of the trial court, and more importantly, as we have previously said, there is none present in the decision of this Court. We do not agree with appellants.

However, we agree with appellants that the decision of the trial court to require the appellants to report to him on their progress is a clear incursion, by the judiciary, of the functions of the legislature.

The implications of such an open-ended judgment are very clear. The trial court retains jurisdiction and supervision of the General Assembly's effort to provide a constitutional system of common schools. Under such an order, the General Assembly, in theory if not in practice, would literally have to confer, report, and comply with the judge's view of the legislation proposed to comply with the order. The legislation would be that of the joint efforts of the General Assembly and the trial court, with the latter having the final word. This is, without doubt, the type of action that was eschewed when the framers of the four constitutions of this state placed the separation of powers doctrine in the organic law of this state.

Our job is to determine the constitutional validity of the system of common schools within the meaning of the Kentucky Constitution, Section 183. We have done so. We have declared the system of common schools to be unconstitutional. It is now up to the General Assembly to re-create, and re-establish a system of common schools within this state which will be in compliance with the Constitution. We have no doubt they will proceed with their duty.

The enactments of the General Assembly, in this subject area, or in any area, is always subject to the scrutiny of the Court of Justice, under the authority described in *Brown, supra,* and *Johnson, supra.*

One last point must be disposed of. We are referred by appellees to several federal cases where federal courts maintained continuing supervision over its own order—e.g., supervision of prisons, court ordered busing, etc. The United States Constitution has no separation of powers provision within it. The separation of powers doctrine in the Federal area, has been recognized in federal common law. We on the other hand, are faced with a strongly written, definitive constitutional scheme. We must,

perforce, follow our constitution. The federal cases and situations referred to are clearly not even persuasive here.

We reverse the decision of the trial court with respect to the requirement that the General Assembly, or any of the defendants***215** in the trial court, further report to the trial court.

XIII. DID THE TRIAL COURT ERR IN DIRECTING THE DEPARTMENT OF EDUCATION TO PAY THE EXPENSES OF THE SELECT COMMITTEE?

We find no authority that would justify the appointment of the "special committee" which was to advise the trial court. While the purpose of the committee was undoubtedly an admirable one, and while the members of the committee did an excellent job, their work product essentially is not a proper tool in the formulation of a judicial decision. A judge must make his or her own decision, and must use only the evidence in the record, and the available legal precedents. A judge may not delegate part of his or her authority to non-judicial persons or institutions. We therefore hold the appointment of the committee was improper, and, obviously the assessment of the committee expenses against the Board of Education was improper as well.

SUMMARY/CONCLUSION

We have decided this case solely on the basis of our Kentucky Constitution, Section 183. We find it unnecessary to inject any issues raised under the United States Constitution or the United States Bill of Rights in this matter. We decline to issue any injunctions, restraining orders, writs of prohibition or writs of mandamus.

We have decided one legal issue—and one legal issue only—viz., that the General Assembly of the Commonwealth has failed to establish an efficient system of common schools throughout the Commonwealth.

Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system—all its parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.

While individual statutes are not herein addressed specifically or considered and declared to be facially unconstitutional, the statutory system as a whole and the interrelationship of the parts therein are hereby declared to be in violation of Section 183 of the Kentucky Constitution. Just as the bricks and mortar used in the construction of a schoolhouse, while contributing to the building's facade, do not ensure the overall structural adequacy of the schoolhouse, particular statutes drafted by the legislature in crafting and designing the current school system are not unconstitutional in and of themselves. Like the crumbling schoolhouse which must be redesigned and revitalized for more

efficient use, with some component parts found to be adequate, some found to be less than adequate, statutes relating to education may be reenacted as components of a constitutional system if they combine with other component statutes to form an efficient and thereby constitutional system.

Since we have, by this decision, declared the system of common schools in Kentucky to be unconstitutional, Section 183 places an absolute duty on the General Assembly to re-create, re-establish a new system of common schools in the Commonwealth. As we have said, the premise of this opinion is that education is a basic, fundamental constitutional right that is available to all children within this Commonwealth. The General Assembly should begin with the same premise as it goes about its duty. The system, as we have said, must be efficient, and the criteria we have set out are binding on the General Assembly as it develops Kentucky's new system of common schools.

***216** As we have previously emphasized, the *sole responsibility* for providing the system of common schools lies with the General Assembly. If they choose to delegate any of this duty to institutions such as the local boards of education, the General Assembly must provide a mechanism to assure that the ultimate control remains with the General Assembly, and assure that those local school districts also exercise the delegated duties in an efficient manner.

The General Assembly must provide adequate funding for the system. How they do this is their decision. However, if ad valorem taxes on real and personal property are used by the General Assembly as part of the financing of the redesigned state system of common schools, the General Assembly has the obligation to see that *all such property* is assessed at 100% of its fair market value. *Russman v. Luckett,* Ky., 391 S.W.2d 694 (1965). Moreover, because of the great disparity of local tax efforts in the present system of common schools, the General Assembly must establish a uniform *tax rate* for such property. In this way, all owners of real and personal property throughout the *state* will make a comparable effort in the financing of the state system of common schools.

This decision has not been reached without much thought and consideration. We do not take our responsibilities lightly, and we have decided this case based on our perception and interpretation of the Kentucky Constitution. We intend no criticism of any person, persons or institutions. We view this decision as an opportunity for the General Assembly to launch the Commonwealth into a new era of educational opportunity which will ensure a strong economic, cultural and political future.

Because of the enormity of the task before the General Assembly to recreate a new statutory system of common schools in the Commonwealth, and because we realize that the educational process must continue, we withhold the finality of this decision until 90 days after the adjournment of the General Assembly, *sine die,* at its regular session in 1990.

COMBS, GANT, LAMBERT and WINTERSHEIMER, JJ., concur.
GANT and WINTERSHEIMER, JJ., file separate concurring opinions.
LEIBSON and VANCE, JJ., file separate dissenting opinions.

GANT, Justice, concurring.

I concur in that portion of the majority's decision which holds that the Kentucky General Assembly has failed to comply with Section 183 of the Kentucky Constitution and has not provided for “an efficient system of common schools throughout the State.” [1] The majority accurately acknowledges that this Court has a *constitutional duty* to make such a holding. However, the Court's *constitutional duty* is not fulfilled merely by declaring that the common school system in Kentucky is constitutionally deficient. This Court must take the additional step of directing the Trial Court to issue appropriate writs to compel correction of this constitutional deficiency.

> 1. I also join in the majority's ruling on the procedural issues concerning the parties to this action.

The Governor, the Superintendent of Public Instruction, and members of the State Board of Education and General Assembly, all of whom are parties to this litigation, swore to “support the Constitution of the United States and the Constitution of this Commonwealth....” Ky. Const. § 228. The majority finds that the General Assembly has failed to perform a major mandatory duty imposed on it by § 183 of the Constitution, yet it grants appellees no remedy for the grievous wrongs they suffer from this dereliction of duty. To declare the right but withhold a remedy is to shirk the Court's own duty.

> It is the province of the courts to protect private rights under the Constitution. Constitutional guaranties would amount to nothing if there was no way to protect ***217** them ... where it is plain that the Constitution has been violated, it is the duty of the courts to say what the law is, and to protect private rights. Otherwise, the Constitution may be disregarded, and power may be exercised by the Legislature in a case where, under the Constitution, it is without power to act at all, while those whose rights are thus destroyed would be left without remedy.

Zimmerman v. Brooks, 118 Ky. 85, 80 S.W. 443, 447 (1904).

It is well within the power of the courts to issue a writ of mandamus compelling performance of a “plain duty” required by the Constitution. *Wooley v. Spalding,* Ky., 293 S.W.2d 563, 565 (1956).[2] The Governor's obligation to report the findings of this Court to the General Assembly and to call an Extraordinary Session of the General Assembly to rectify the constitutional deficiency in the Commonwealth's school system, and to recommend corrective measure, is such a duty. § 79 of the Kentucky Constitution requires the Governor to “give to the General Assembly information of the state of the Commonwealth, and recommend to their consideration such measures as he may deem expedient.” On “extraordinary occasions,” the Governor may convene the General Assembly for a Special Session. Ky. Const. § 80. Undoubtedly, a ruling that the entire common school system in Kentucky is constitutionally deficient is such an extraordinary occasion.

> 2. Therein the Marion County Board of Education was compelled to establish a high school system “that will afford all children in Marion County equal educational opportunities.” *Wooley v. Spalding,* 293 S.W.2d at 568 (1956).

Although the Governor's power to convene the General Assembly for an Extraordinary Session is discretionary, Kentucky courts have the authority to compel the exercise of a discretionary duty. *See*

McKinstry v. Wells, Ky. App., 548 S.W.2d 169, 174 (1977); *Evans v. Thomas,* Ky., 372 S.W.2d 798, 800 (1963), cert. denied, 376 U.S. 934, 84 S.Ct. 705, 11 L.Ed.2d 653 (1964); *Kaufman v. Humphrey,* Ky., 329 S.W.2d 575, 576 (1959).

In dividing the powers of their government into "legislative, executive and judicial departments," Ky. Const. § 27, the citizens of Kentucky established a government of checks and balances. Each department must play its constitutional role if confrontation and stalemate are to be avoided.

This Court has neither the expertise nor the power to instruct the General Assembly as to how the constitutional deficiency should be corrected. *See McKinstry v. Wells, supra.* Corrective measures are for the executive department to recommend and for the legislative department to adopt.

The majority's description of the magnitude of the problem is well stated: "Kentucky's *entire* system of common schools is unconstitutional." (Emphasis supplied.) The importance and complexity of the task forbids postponing the finality of the Court's decision until the adjournment of the 1990 General Assembly.

The Court must do more than describe, albeit eloquently, the tasks faced by the Executive and Legislative Departments. This decision has provided the Executive and Legislative branches of our government with a rare opportunity to start with a clean slate; to utilize the expertise of its members and others (both inside and outside the state) to study other jurisdictions which have faced a similar problem and successfully solved it; and to stamp a distinguished impression upon the pages of the history of this Commonwealth. Although adequate and additional funding is a necessary part of the contemplated procedure, money alone is not the answer. Efficiency of administration, curriculum, facilities, the ravages of inflation, and many other problems are extant and pleading for cure.

This action should be remanded to the Franklin Circuit Court with direction to immediately issue writs of mandamus requiring the Governor to call an Extraordinary Session of the General Assembly; requiring the Governor, the Superintendent of Public Instruction, and members of the State Board of Education to recommend appropriate corrective measures; and requiring the General Assembly to enact legislation***218** necessary to bring the Kentucky school system into compliance with § 183 of the Kentucky Constitution.

WINTERSHEIMER, Justice, concurring.

I concur with the majority opinion only to the extent that it holds that an efficient system of common schools has not been provided throughout the state. The General Assembly has not yet succeeded in achieving the constitutional goal directed by Section 183.

I further specifically agree that the majority does not require the General Assembly to pass any law or authorize the adoption of any regulation. All that the General Assembly must do is comply with the constitutional direction to provide, through appropriate legislation, an efficient system of common schools throughout the state. I also agree with the majority that a class action is not properly before this Court. CR 23. I further concur with the opinion to the degree that it does not endorse the so-called

Corns plan and that it condemns the use of the committee report and any payments in connection therewith. I concur that this Court does not retain any open-ended continuing jurisdiction.

I agree that the finality of this decision should be withheld because to do otherwise would result in educational chaos to the degree that the system of common schools is unconstitutional. However, I would not give the General Assembly any particular deadline with the understanding that adjournment *sine die* contemplates adjournment without any future date being designated for resumption. This situation can easily be addressed procedurally by the legislature.

I agree with the majority opinion when it cites *Prowse v. Bd. of Education of Christian Co.,* 134 Ky. 365, 120 S.W. 307 (1909), in that a system that will be most efficient is for the judgment of the General Assembly. For similar statements of the law *see City of Louisville v. Board of Education,* 302 Ky. 647, 195 S.W.2d 291 (1946); *Elliott v. Garner,* 140 Ky. 157, 130 S.W. 997 (1910); *Madison County Board of Education v. Smith,* 250 Ky. 495, 63 S.W.2d 620 (1933). Such a matter is within the sound discretion of the General Assembly, and the Court will not substitute its judgment for that of the legislature and will not interfere with the actions of the legislature.

My principal area of departure from the majority opinion relates to the matter of service on the members of the General Assembly. I do not believe that service on two members of the General Assembly acts as service on the remaining 136 members. The holding of the majority must be strictly limited to the unique circumstances presented in this case.

This action is unique because this Court has not been asked to declare a single act of the legislature unconstitutional. Relief is sought by means of a declaration that the system is unconstitutional because it is not efficient.

Clearly this Court does not have any authority to order the other members of the General Assembly to take any action when they have not been properly summoned before any court or been given an opportunity to be heard in regard to this proceeding. Obviously the two members who have been properly served have presented a comprehensive defense and it would not serve the ends of judicial economy in this voluminous litigation to remand the case solely because of the failure to join the members of the General Assembly individually. I believe this Court can only express an advisory opinion regarding the matter of an efficient system of common schools throughout the state as to the members of the legislature other than Rose and Blandford.

In one sense, too much emphasis has been placed on the role of the legislature in the entire educational framework of the Commonwealth. We must keep in mind that the primary responsibility for the education of children is with the parents. The rights and responsibilities of the parents must always be recognized. The fractured fabric of the family is one of the prime causes for educational failure. Obviously money alone cannot heal such a break. ***219** The lack of scholastic success is not just the fault of the system. Education is a joint venture in which the parents, students and school must be committed to cooperation rather than conflict. As the child advances in age, the educational system must respond by meeting different needs tailored to the specific circumstances of the child. Consequently, the involvement of the state public common school system must be different as needed

in each educational situation. Our concern should be primarily focused on the common schools at the primary level.

The circuit court ruling is far too broad and undisciplined as to its conclusions regarding education as a fundamental right. What is a right is what has been promulgated in the 1890 Constitution, that is an efficient system of common schools throughout the state. The majority decision does not order the General Assembly to do anything, however, great care must be taken that independent lawsuits should not be frivolously spawned by such a decision. "Scarcely any political question arises in the United States," Alexis de Tocqueville wrote long ago in *Democracy in America,* "that is not resolved sooner or later, into a judicial question." Proper use of the judicial system is inherent in our system of representative democracy under law, however, great care must be taken to avoid an abuse of the system particularly so that it would not lead to disillusionment and frustration.

Although the majority opinion declares the entire system of education unconstitutional, it should be obvious to any student of government that an overwhelming percentage of the laws now in place must be reenacted by the legislature to provide any form or substance to the system in Kentucky.

The school system is based on many detailed statutes and regulations, none of which have been specifically challenged and many of which have no constitutional impact. Local effort cannot be destroyed; such a conclusion would not be efficient by any definition and is well beyond the scope of the relief sought in this action.

It is beyond question that educational opportunity should be equal for all Kentucky children. The General Assembly has the constitutional responsibility of providing a minimum level of opportunity by establishing an efficient system of common schools throughout the state. Under no circumstances does that mandate preclude local school districts from supplementing the funds received from the state by specific local effort. Although such local taxes may now be considered as state taxes, *Cullinan v. Jefferson County,* Ky. 418 S.W.2d 407 (1967), they should be treated as trust funds and scrupulously attributed to the local district involved. The General Assembly might wish to make such treatment a statutory reality. The total independence and authority of local school districts to supplement any state effort should be carefully preserved.

The only concern we might have is to what specific areas the legislature will change. Such a determination is totally within their authority. It may be that they will properly determine that they must only fine-tune certain aspects of the system. Obviously they should not throw out the good with the bad without careful thought and particular attention to detail. My concern is that the language of the majority is too sweeping when it asserts that the result of the decision is that the entire system of common schools is unconstitutional. We must leave it to the good common sense of the legislature to develop an appropriate system of legislation.

Great care must be taken to differentiate the holding of the majority from dicta that arises from the many words used in the opinion. As an example, references to adequacy, a unitary system and definitions of efficiency are not binding on the General Assembly in any sense.

I concur with the majority in again emphasizing that the sole responsibility for providing a system of efficient common schools throughout the state lies with the General Assembly. That is the sole holding of this case.

***220** VANCE, Justice, dissenting.

I respectfully dissent. I believe the majority opinion is inherently inconsistent in that it says that our system of common schools, to be constitutionally efficient, must provide substantially equal educational opportunity for children throughout the Commonwealth, yet it actually permits the continuation of a system which does not provide substantially equal educational opportunity.

I believe this is so because the opinion expressly holds that individual school districts may continue to levy taxes for school purposes to be used solely within the district.[1] Primarily, it is the levy of these taxes by local school districts, which produces greatly disparate revenues in richer counties than in poorer ones, that has caused the great disparity in school funding per child in the various districts throughout the Commonwealth.

> 1. The taxes levied by local school districts are local in the sense that they are levied upon property within the district, but this court has held on many occasions that these taxes are in fact state taxes which have been authorized by the General Assembly to fulfill the requirements of § 183 of the Kentucky Constitution. *Cullinan v. Jefferson County,* Ky., 418 S.W.2d 407 (1967); *Board of Education v. City of Louisville,* 288 Ky. 656, 157 S.W.2d 337 (1941); *Commonwealth v. Louisville National Bank,* 220 Ky. 89, 294 S.W. 815 (1927).

Although there are factors other than the amount of money available per child that must be considered when determining the equality of educational opportunity, I submit that this whole case is predicated upon the proposition that children who reside in districts where the amount of funding available per child is disproportionately less than is available in other districts will be denied an educational opportunity which is equal to the educational opportunity afforded in districts with vastly greater resources.

Because the value of taxable property is so much greater in some districts than others, the continued levy of school taxes for use within individual districts, even if levied at a uniform rate throughout the state and property is assessed at 100 percent of its value, will continue to produce much more revenue in richer counties than in poorer ones. It follows that the continuation of such a tax policy will leave us exactly where we are now, and the school system will not provide substantially equal educational opportunity throughout the Commonwealth, but will in fact, result in better educational opportunity for those who reside in the wealthier sections of the state.

The majority seems to envision that the General Assembly can provide a dually funded educational system, one to be funded by the state which will be applied uniformly throughout the state, the second to be funded locally wherein there is no limit to the amount which local districts can enhance the funding in their district above the level of funding provided by the state. This overlooks the fact that the majority has defined an “efficient” common school system as one which uniformly provides an

equal educational opportunity throughout the state. As the majority opinion states, "The children of the poor and the children of the rich, the children who live in the poorer districts and the children who reside in the rich districts must be given the same access to an adequate education." A school system provided by the General Assembly which is funded partially by the state and supplemented by local districts to the extent that it results in any significant difference in funding per child in the richer and poorer districts will not be constitutionally "efficient" under the definition of the term as set forth in the majority opinion.

Although the constitution requires the General Assembly to provide, through appropriate legislation, for an "efficient" system of common schools throughout the Commonwealth, the debates of the delegates to the Constitutional Convention shed very little light upon what the delegates had in mind by the use of the word "efficient." None of the delegates debated the meaning of the word efficient in the sense that it was used.

There was a general agreement among the delegates that common school education should be a state rather than a local ***221** responsibility. There was much discussion concerning the advantages to children of a common school education and the advantage to the state of having an educated populace.

The primary thrust of the debate went to the equality of educational opportunity; that a system of common schools throughout the state should provide alike for the sons of the poor and the sons of the rich; and provide alike for the children who reside in rural areas as well as for those who reside in centers of population. There was much concern that if education in the common schools throughout the state were not made a constitutional responsibility of the Commonwealth, it would simply become or remain a local matter, and the children of the wealthy and those who reside in the cities would be afforded greater educational opportunity than the children of the poor and those who reside in rural areas. The primary concern was that the opportunity be equal for all children throughout the Commonwealth.

It is because of this universal concern expressed by the delegates to the convention that I conclude that the word "efficient" as used by them must include not only its dictionary definition but must also be construed to include the requirement of substantial equality of educational opportunity.

I do not concur with the majority that the present system of common schools has, on the basis of the record before us, been shown to be *constitutionally* under-funded or inadequate.

While there is a constitutional requirement, I think, as to equality of educational opportunity, I can find no such requirement as to the level of funding. In a sense, of course, any system so inadequately funded that any money put into it is simply a waste of resources is, of necessity, not an efficient system, and to this extent there may be said to be a constitutional mandate as to the minimum level of funding.

During the constitutional debates an amendment was offered to the committee report on education by Mr. Becker, who is quoted in the majority opinion. He offered to amend Section 1 of the committee

report to require that the General Assembly provide an *adequate* and efficient system of common schools throughout the Commonwealth. So far as I can determine from reading the constitutional debates, Mr. Becker was the only member of the delegation who spoke in favor of this amendment. His support was hardly fervent. He simply said that in his opinion it would not be inappropriate to require the system of common schools to be "adequate" as well as "efficient." The word "adequate" did not make it into the present constitution, however.

As was noted in the majority opinion, this court has always granted a great degree of deference to the discretion of the General Assembly in the manner of operation of the system of common schools. In *City of Louisville v. Board of Education,* 302 Ky. 647, 195 S.W.2d 291 (1946) we said:

> "Section 183 of the constitution is as broad as it is possible to frame an authority to the legislature to deal with the common schools in any way it should desire."

In *Elliot v. Garner,* 140 Ky. 157, 130 S.W. 997 (1910), we said: "The constitution requires the General Assembly to provide an efficient system of common schools throughout the state; and how it shall best accomplish this object is purely a matter of legislative discretion."

Section 183 of the Constitution of Kentucky leaves to the legislative discretion the best method of providing for an efficient system of common schools. *Madison County Board of Education v. Smith,* 250 Ky. 495, 63 S.W.2d 620 (1933). Legislative discretion cannot be extended to such limits as to allow the legislature, in its discretion, to fail to meet its constitutional mandate, but I do not believe it is within the province of this court to interfere with legislative discretion as to the level of school funding unless it clearly appears from the record that the level of funding is so low that it cannot reasonably accomplish basic educational necessities. Not all academic failure is the result of under-funding.

***222** I cannot agree with the majority that the constitution requires the General Assembly to monitor the school system to insure that schools are operated with no waste, mismanagement, or political influence. It is not possible for the General Assembly to oversee the day-to-day operation of schools. In my view, the General Assembly has discharged its duty when it has provided by law for a school system which, if properly administered, will result in substantially equal educational opportunity throughout the Commonwealth. The administration of the school system is not a legislative responsibility, and if the system, because of waste, mismanagement, or political influence, fails in its purpose, the failure is not to be charged to the General Assembly.

Above the minimum level of funding that is constitutionally required for a system of common schools to be efficient, there is room for unlimited enhancement of educational opportunity. The range of this enhancement of educational opportunity above the minimum requirements must be left to the General Assembly. The General Assembly is the representative of the people and is the proper branch of government to determine public policy. The question of how much enhancement there should be of educational opportunity above the minimum requirements is a matter of public policy.

Whether the General Assembly will provide a system of common schools of the highest order or one which barely meets the minimum requirements is a burden which must be placed squarely upon the

shoulders of the General Assembly, where the constitution places it. It does not rest with the courts, and indeed the doctrine of separation of powers prohibits judicial interference with legislative prerogative. If we do not exercise restraint in this matter, I fear that every theoretical defect in the educational system will be escalated into litigation to determine the constitutional efficiency of the system.

The system of common schools is created by many statutes, none of which have been directly attacked. Since we have not been asked to declare any statute unconstitutional, I fail to see how we can, in effect, declare them all unconstitutional.

The majority has heaped upon the General Assembly a monumental task with little guidance. It is confronted with a necessity to create a new system of common schools without being told specifically what is wrong with the old one. The majority has not declared any specific statute unconstitutional and, in effect, I think has condoned the continuation of a system which, in all likelihood, will not result in equal educational opportunity throughout the Commonwealth.

There is now imposed a requirement that the system be adequately funded, but no specific standards have been established to determine the adequacy of funding. Instead, it is held that the school system must be funded adequately so as to achieve seven goals, each of which is expressed in the most general terms. Those goals are:

> "to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."

How will the General Assembly be able to know if the legislation it enacts will provide each and every student throughout ***223** the Commonwealth with a sufficient grounding in the arts to enable that student to appreciate his cultural or historical heritage? This goal, like the other seven, is so vague that regardless of what legislation is enacted by the General Assembly the door has been opened for another group or groups of students to sue the General Assembly *ad infinitum,* claiming that in some respects the General Assembly has failed to provide a system of common schools which achieves the seven goals of an efficient system. I fear it will be the courts rather than the General Assembly, which will end up monitoring the common school system.

I am willing to declare, on the basis of this record, that the system of common schools throughout the

state does not meet the constitutional imperative of substantially equal educational opportunity for all children. I would go no further. It is the duty of the General Assembly to abide by its constitutional responsibility, but in my opinion, because of the failure to name all of the members of the General Assembly as parties to this action, and to serve them with process or otherwise secure their appearance, we are powerless at this time and in this litigation to mandate any action on the part of the General Assembly or to place the school system in limbo absent some legislative action.

LEIBSON, Justice, dissenting.

Respectfully, I dissent.

I agree in principle with the majority's opinion that the General Assembly has failed thus far to, "by appropriate legislation, provide for an efficient system of common schools throughout the State." [1] Ky. Const., § 183. Nevertheless, this case should be reversed and dismissed because it does not present an "actual" or "justiciable" controversy. *See* KRS 418.040; *Black's Law Dictionary,* 5th ed. 1979, p. 777.

> 1. By "throughout" I do not mean everywhere, but simply *not* in all school districts. For examples to the contrary: Woodford County has been praised as a "model" district; Jefferson County has been recently televised nationally as an example of a successful program.

An "actual controversy" for purposes of adjudication requires three things: (1) a justiciable issue (2) involving the legal rights (3) of adverse parties. *Revis v. Daugherty,* 215 Ky. 823, 287 S.W. 28 (1926); *Veith v. City of Louisville,* Ky., 355 S.W.2d 295 (1962).

An actual controversy is one admitting of specific relief through a decree conclusive in character. A judicial pronouncement in the present case where there are public questions of the utmost importance but no such justiciable controversy will cause more problems than it will solve. Worse yet, it opens the doors of the courthouse to a host of new lawsuits by litigants seeking a forum to argue questions of public policy which are incapable of specific judicial resolution. In line with the legal truism that "bad cases make bad law," we can expect this case to be cited as precedent in a new wave of litigation involving issues that should be debated in the forum of public opinion, and then legislated rather than litigated.

To qualify as a judicial controversy the issues must touch legal relationships of parties having adverse legal interests, clearly definable, concrete, and admitting of specific resolution. The Declaratory Judgment Act, KRS 418.040, was never intended for advisory opinions. As the late great wordsmith, Judge Gus Thomas, so aptly said: "[C]ontroverted questions are justiciable ones, and ... do [] not include abstract legal questions designed merely to furnish information to the inquirer and which, if jurisdiction was taken, would convert courts into a sort of law school for the instruction of the inquisitive mind." *Oldham County v. Arvin,* 244 Ky. 551, 51 S.W.2d 657, 658–59 (1932).

I. THE PROBLEMS RELATED TO THE ISSUES

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), provides a framework for considering the problems related to the issues. First, as to justiciability:

224 "[T]he Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." 369 U.S. at 198, 82 S.Ct. at 700.

Then, as to nonjusticiability:

> "The nonjusticiability of a political question is primarily a function of the separation of powers. 369 U.S. at 210 [82 S.Ct. at 706].

....

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217 [82 S.Ct. at 710].

Viewed objectively, the issues in this case fail to qualify under the standards for justiciability in *Baker v. Carr,* falling instead squarely within its description of a nonjusticiable case: there is (1) in our Kentucky Constitution a "textually demonstrable ... commitment of the issue to a coordinate political department," viz., the General Assembly; (2) "a lack of judicially discoverable and manageable standards"; and (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.*

The case as presented to us neither asks for nor is amenable to specific relief through a decree conclusive in character. The appellees have made it painfully clear throughout that they do *not* want our Court to declare any particular statute or group of statutes unconstitutional, including the system of local school districts, local financing and local administration now in place. Yet, the Majority Opinion decides otherwise: "Lest there by any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional ...—all its parts and parcels. This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. [Emphasis original].

If this verbiage is taken literally, local school districts who are the members of the Council for Better Education, the moving force behind this lawsuit may be eaten up by the monster they created when they invited the courts into the dialogue about how to improve the public school system. The statutes that create them have now been declared unconstitutional. Unable to rationalize an opinion that declares *nothing* unconstitutional, we seem to have declared *everything* unconstitutional.

Elsewhere, the Opinion states that "individual statutes are not herein addressed specifically or considered and declared to be facially unconstitutional." But our "school system" is nothing more and nothing less than the statutes, individually and collectively, structuring its existence and providing for its financing. The system does not exist apart from the statutes, and cannot be declared unconstitutional without specifying which of its components, in whole or in part, make it so.

At oral argument appellees' counsel conceded that, in asking that we declare the system unconstitutional but not the statutes, they were presenting us with a “Gordian” knot. But ask they did, thus presenting us with an insolvable, nonjusticiable dilemma. And, we have responded with what could be expected when you open Pandora's box, an Opinion which at the same time declares everything unconstitutional and nothing unconstitutional. This is more than just a vain act or a bad precedent. This result may well create havoc in the educational process. It adds to the General Assembly's burden in seeking to improve our educational system rather than lightening the load.

The lawsuit filed in Franklin Circuit Court, carefully analyzed, does no more than ask the courts to demand that the Governor and the General Assembly proceed to improve the public school system, specifically by telling the executive and legislative branch to propose and enact new ***225** taxes. While for the most part the trial court's response, like ours, was limited to advice and comments rather than judicial decision-making, its decision went further by granting specific relief in two areas: (1) a mandate to the General Assembly to impose additional new taxes and (2) an order to the President Pro Tempore of the Senate and the Speaker of the House of Representatives to return to Franklin Circuit Court to report on the General Assembly's progress. Both of these, the only concrete or specific “relief” granted, are invalidated by our decision, and rightly so, recognizing they are orders that exceed the power of the judiciary.

As to funding, we state only that “[t]he General Assembly must provide adequate funding for the system. How they do this is their decision.”

As to Judge Corns' Order to the leadership of the General Assembly to report to him on its progress, we declare this “a clear incursion, by the judiciary, of the functions of the legislature.”

On the other hand, in our Opinion we ordered nothing specific, only that the General Assembly comply with the Constitution, which, of course, it is already duty bound to do.

I say this with one major reservation, because there is one portion of our Opinion that seems to do more than simply encourage the General Assembly to enact legislation to improve the school system. It states:

> “[B]ecause of the great disparity of local tax efforts in the present system of common schools, the General Assembly must establish a uniform *tax rate* for such property.” [Emphasis original.]

If this sentence means what it says, we have done what we were not asked to do, declare unconstitutional the statutes permitting local school districts to set local tax rates within certain guidelines. Destroying the power presently assigned by statute to local school districts to set local school tax rates may or may not work an improvement. Either way, certainly, it is beyond the scope of the relief sought by the appellees. It is the last thing they would want done, as they have said in no uncertain terms. Yet it is the only thing of a judicial nature that we have decided in our Majority Opinion, and it is beyond the parameters of this lawsuit.[2]

2. The Response to the Petition for Rehearing filed by the appellee, Council for Better Education, requests us to add this clarification to the Majority Opinion:

"The record in this case clearly shows that no school district in Kentucky is overfunded. No district is funded to the level of the National average. Therefore, to take money from one district and give it to another would be a step toward a mediocre system statewide. This would violate Section 183 of the constitution and would not be approved by this Court."

Perhaps, since we are prepared to enter the political arena, we should be prepared to go this extra mile.

We were only asked to decide one issue in this lawsuit: whether the General Assembly has responded adequately to its constitutional responsibility. This is a political question, pure and simple. We have undertaken to "enter upon policy determinations for which judicially manageable standards are lacking." *Baker v. Carr, supra,* 369 U.S. at 226, 82 S.Ct. at 715. Without such standards, a case is not justiciable. It is not enough to decide that Kentucky does not have an "efficient system of common schools throughout the State," as Section 183 of the Constitution requires, without specifying what statutes are unconstitutional, and why. Yet, the former is not asked, and the latter is not possible. I repeat, this case is not justiciable.

II. THE PROBLEMS RELATED TO THE PARTIES

Essentially, the plaintiffs comprise two groups, one consisting of sixty-six local school districts represented through the Council for Better Education plus seven more school districts specifically named, and a second consisting of twenty-two public school students suing as individuals.

Turning first to the school districts, it should be obvious from a legal standpoint that these school districts have no authority***226** to sue the General Assembly, their creator, over the circumstances of their existence. As stated in *Board of Ed. of Louisville v. Board of Ed. of Jefferson County,* Ky., 458 S.W.2d 6, 8–9, (1970), quoted but disregarded in the Majority Opinion:

> "Certainly there are no constitutional guarantees that local school districts, which are purely creatures of the legislature in their creation and alteration, must be regarded by the legislature as autonomous fiefdoms for all purposes, particularly in face of the plenary power vested in the legislature by section 183 of the Constitution of Kentucky as regards the common schools of the state. *Id.* at 8.

This would seem to be conclusive of the matter. But if a case factually to the point is needed, *East Jackson Public Schools v. State,* 133 Mich. App. 132, 348 N.W.2d 303 (1984), should be persuasive. In a suit seeking to declare Michigan's school financing unconstitutional because it produced unequal per student funding between districts, the Michigan court held, *inter alia,* that the school districts did not have standing "to defy their creator over the terms of their existence.... [o]r to expend public funds to finance such litigation." 348 N.W.2d at 306. We should hold the same. Cases from other jurisdictions cited to the contrary, and footnoted in our Majority Opinion, are without exception fundamentally unsound as judicial precedents because they fail to address this question. They also fail to deal with the inherent limitations upon the scope of judicial activity and the constitutional limitations mandated by the doctrine of separation of powers.

The next group of parties-plaintiff is twenty-two students, suing by and through their parents as next friends, who most certainly would have standing to sue, but who had no right to relief unless and until first they pleaded and proved they had been damaged in some specific manner by a named defendant's violation of their constitutional rights. No evidence was presented that such was the case.

Only five of the students were even mentioned in the proof, and only one of these five testified, a ninth grade student in the Dayton Independent School District system who said there were computer courses she would like to take if available, and that only Spanish, not French or Latin, were offered in her school. Certainly this evidence falls short of proving a case on her behalf. There is no evidence at all to sustain the claims of the remaining plaintiffs.

The fundamental error in the trial court, and in our Court, is that the claims of these individual students were treated as a vehicle for a class action on behalf of the entire student body of Kentucky seeking declarative judgment relief against the General Assembly. The students were given relief of a nature appropriate to a class action, not to the violation of their individual rights. These students never legally represented anybody but themselves. None of the requirements for a class action were followed. Nevertheless, the trial court referred to the students and their parents as “representing as a class all similarly situated students in Kentucky's districts.”

Our Majority Opinion acknowledges that the trial court erred, that “there was no class action.” But, as in the trial court, in our Majority Opinion the relief granted was of a type appropriate to a class action, but wholly inappropriate to a suit by an individual student seeking a judicial remedy for a specific deprivation of rights. There was no proof supporting their claim as individuals and they had no right to relief as representatives of the class.

The problems with parties-defendant are even more glaring and insurmountable. The case below included as defendants the Governor, the Superintendent of Public Instruction, the State Treasurer, and the State Board of Education, as well as the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The Governor, the Superintendent of Public Instruction, the State Treasurer, and the State Board of Education, although appearing in the suit below, took no appeal from the final judgments, presumably because their authority was not seriously challenged nor were they required to do ***227** anything specific by its terms. John A. Rose, President Pro Tempore of the Senate, and Donald J. Blandford, Speaker of the House of Representatives, are the *only* parties-defendant on this appeal.[3]

> 3. The judgment is final as to the Governor, whether meaningless or not. Nevertheless, Justice Gant's Opinion suggests that the case “should be remanded to the Franklin Circuit Court with direction to immediately issue writs of mandamus requiring the Governor to call an Extraordinary Session of the General Assembly.” This shows how far one's thinking can go once we forget we are confined to the limitations of a justiciable controversy.

The fundamental problem is, of course, how does one sue the General Assembly, a legislative body but not a body corporate, to force them to take action, or to declare unconstitutional their actions or

nonactions not embodied in any specific legislation. The General Assembly does not exist as a legal entity apart from its specific legislative acts. Our Majority Opinion cites as authority *Seattle Sch. Dist. No. 1 of King Cty. v. State,* 90 Wash.2d 476, 585 P.2d 71 (1978), but this case never discussed by what authority the legislature of the State of Washington can be sued by naming the Speaker of the House and President of the Senate. On the other hand, the Dissenting Opinion by Justice Rosellini in the State of Washington case, joined by two others, does address the problem: "The real and only party against whom relief is demanded is the legislature and that body is one which is not amenable to suit.... [T]he people have seen fit to protect the members of their legislature from harassment by litigants while they are in session (Const. art. 2, § 16). [Note: Our Kentucky Constitution does likewise in § 43; see *Wiggins v. Stuart,* Ky. App., 671 S.W.2d 262 (1984)]. *When they are not in session, they are not a legislature.*

The legislature is not a corporate body, and its officers are not authorized to accept service on behalf of their fellow members. Furthermore, it is contrary to the nature of our representative form of government to permit interference by the court with the internal functioning of the legislature." [Emphasis added.] 585 P.2d at 127.

Using a very liberal procedural construction, our Majority Opinion reaches the conclusion that the President Pro Tempore and Speaker of the House "were in fact named in a representative capacity." The question is, representing who? Certainly not the individuals who will serve in the next General Assembly. This Court cannot assert power over these future legislators to direct their future actions or to punish them for contempt if they fail to legislate in response to our mandate in a manner that we deem appropriate.

In *Legislative Research Comm'n v. Brown,* Ky., 664 S.W.2d 907 (1984), wherein it was the General Assembly trying to expand the nature of its legislative function rather than the judiciary seeking to direct it, we stated: "The Kentucky General Assembly is not one of continuous session.... A legislative body ceases to exist at the moment of its adjournment." 664 S.W.2d at 915.

The Speaker of the House and the President Pro Tempore of the Senate were elected to preside at the *last* legislative session. They cannot be designated as representatives of a body that "ceases to exist." Under our Constitution the House of Representatives and the Senate have power to choose officers anew "biannually." Ky. Const. § 34. This means they must be elected anew every two years, when the General Assembly regenerates and reorganizes as provided for in the Kentucky Constitution § 36. Who is the legal representative for the next General Assembly between sessions when it has no official existence? For that matter, who is to say that an order entered against the leadership while in session is binding upon the members of the General Assembly?

In sum, it is pure fiction, not legal fiction, to hold that the President Pro Tempore and the Speaker of the House at the last legislative session represent the General Assembly, or that the General Assembly is before this Court in this case for purposes of adjudication. This is a lawsuit ***228** with no defendants. It is one thing to order a school district to take some specific actions required by the constitution or statutes, or to desist from actions contrary thereto, as was done in *Wooley v. Spalding,* Ky., 293 S.W.2d 563 (1956), and quite a different thing to declare unconstitutional the action of legislators as

individuals or as a body in failing to enact "appropriate legislation" to "provide for an efficient system of common schools throughout the State [Ky. Const. § 183]," particularly when we have not been asked to designate any specific legislation as constitutionally inappropriate. A school district is a legal entity created by statute with a corporate existence. Its actions as a body may be judicially reviewed and it may be ordered as a body by a court to take certain specific actions that the law requires. Such is not the case with our General Assembly.

Finally, there is one further procedural problem when we undertake to order legislators what to do. The manner in which legislative power is exercised, like judicial power, is discretionary. It is fundamental premise of mandamus against public officials in the exercise of legislative or judicial power, that mandamus will not lie to compel the exercise of a discretionary power in any particular way. *Fannin v. Keck,* Ky., 296 S.W.2d 226 (1956); *Childers v. Stephenson,* Ky., 320 S.W.2d 797 (1959); *Kaufman v. Humphrey,* Ky., 329 S.W.2d 575 (1959). Thus, even had we the power to order the General Assembly to enact new or different legislation on the subject of school financing or management of the public school system, it is beyond our power to suggest what the remedial legislation should be.

We have exceeded the judicial power vested in the Court of Justice by Section 109 of the Constitution and violated the doctrine of separation of powers constitutionalized in Sections 27 and 28 of the Kentucky Constitution.

At the heart of this case is the problem created by the uneven tax base for support in a public school system that is built on local property taxes. This problem is not unique to our state. Supreme courts from several of our sister states, confronted with this problem and caught up in a rush of judicial activism, have attempted to intervene judicially in the legislative process. *None* have undertaken to intervene where the issues were as nonspecific as presented here, and thus as incapable of judicial resolution. Further, as subsequent cases from West Virginia and New Jersey attest, when they intervened in the process their initial rulings were just the beginning of a long-running dialogue. They have been confronted with complex sequels to original decisions that did not improve matters significantly in the first place. They have been inundated with subsequent litigation.

An appreciation of the difference between legislative and judicial lawmaking is essential to maintaining constitutionally mandated separation of powers. Speaking to the constitutional limitations inherent in the separation of powers doctrine, in *Valley Forge College v. Americans United,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700, 709 (1982), the United States Supreme Court explains that the "actual controversies" principle: "at an *irreducible minimum* ... requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' [Citation omitted], and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' [Citation omitted].... [J]udicial power [is limited] 'to those disputes which confine ... courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.' " [Emphasis added.]

The case now before us fails to meet this "irreducible minimum" necessary to invoke judicial power.

This same concept is thus explained by legal historian G. Edward White of the University of Virginia School of Law in his recent book, *The American Judicial Tradition,* 2d ed., p. 461 (1988):

> ***229** "The power of judges pertains only to those matters peculiarly 'legal,' as distinguished from political.... [T]he burden of judicial opinion-writing, then, has been to show that a decision has not been grounded on other than 'legal' considerations, and that within that ambit it analyzes legal issues in an intelligible fashion."

Since publication of the initial Majority Opinion three months ago, the predominant reaction from the public, the press, and the politicians, has been that our decision provides the Governor and General Assembly an unprecedented *opportunity* to reform a deficient state educational process. The operative word is "opportunity," not "power," because the General Assembly has always had the same "power" it has now to reform the system. We have not enhanced its power. Unfortunately, providing opportunities at the expense of the integrity of the judicial process is not a traditional item on the judicial agenda, nor in my view an appropriate role for the courts.

Our Majority Opinion is fundamentally unsound, not because there is no problem but because the case does not present issues capable of judicial resolution. We have now become part of the problem when we intend to be part of the solution.

Plyler v. Doe, 457 U.S. 202 (US Supreme Court 1982).

Syllabus [*]

> * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***202** *Held*: A Texas statute which withholds from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 2391–2402.

(a) The illegal aliens who are plaintiffs in these cases challenging the statute may claim the benefit of the Equal Protection Clause, which provides that no State shall "deny to *any person within its jurisdiction* the equal protection of the laws." Whatever his status under the immigration laws, an alien is a "person" in any ordinary sense of that term. This Court's prior cases recognizing that illegal aliens are "persons" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, which Clauses do not include the phrase "within its jurisdiction," cannot be distinguished on the asserted ground that persons who have entered the country illegally are not "within the jurisdiction" of a State even if they are present within its boundaries and subject to its laws. Nor do the logic and history of the Fourteenth Amendment support such a construction. Instead, use of the phrase "within its jurisdiction" confirms the understanding that the Fourteenth Amendment's protection extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory. Pp. 2391–2394.

(b) The discrimination contained in the Texas statute cannot be considered rational unless it furthers some substantial goal of the State. Although undocumented resident aliens cannot be treated as a "suspect class," and although education is not a "fundamental right," so as to require the State to justify the statutory classification by showing that it serves a compelling governmental interest, nevertheless the Texas statute imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. These children can neither affect their parents' conduct nor their own undocumented status. The deprivation***203** of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement. In determining the rationality of the Texas statute, its costs to the Nation and to the innocent children may properly be considered. Pp. 2394–2398.

(c) The undocumented status of these children *vel non* does not establish a sufficient rational basis for denying them benefits that the State affords other residents. It is true that when faced with an equal *****2388*** protection challenge respecting a State's differential treatment of aliens, the courts must be attentive to congressional policy concerning aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the

legislative record, no national policy is perceived that might justify the State in denying these children an elementary education. Pp. 2398–2400.

(d) Texas' statutory classification cannot be sustained as furthering its interest in the "preservation of the state's limited resources for the education of its lawful residents." While the State might have an interest in mitigating potentially harsh economic effects from an influx of legal immigrants, the Texas statute does not offer an effective method of dealing with the problem. Even assuming that the net impact of illegal aliens on the economy is negative, charging tuition to undocumented children constitutes an ineffectual attempt to stem the tide of illegal immigration, at least when compared with the alternative of prohibiting employment of illegal aliens. Nor is there any merit to the suggestion that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. The record does not show that exclusion of undocumented children is likely to improve the overall quality of education in the State. Neither is there any merit to the claim that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the State's boundaries and to put their education to productive social or political use within the State. Pp. 2400–2402.

***205** Justice BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.

I

Since the late 19th century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime, 8 U.S.C. § 1325, and those who have entered unlawfully are subject to deportation, 8 U.S.C. §§ 1251, 1252 (1976 ed. and Supp. IV). But despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now live within various States, including the State of Texas.

In May 1975, the Texas Legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not "legally admitted" into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not "legally admitted" to the country. Tex. Educ. Code Ann. § 21.031 (Vernon Supp.1981).[1] These ****2389** cases involve constitutional challenges to those provisions.

1. That section provides, in pertinent part:

"(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

"(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

"(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district."

***206** *No. 80–1538*
Plyler v. Doe

This is a class action, filed in the United States District Court for the Eastern District of Texas in September 1977, on behalf of certain school-age children of Mexican origin residing in Smith County, Tex., who could not establish that they had been legally admitted into the United States. The action complained of the exclusion of plaintiff children from the public schools of the Tyler Independent School District.[2] The Superintendent and members of the Board of Trustees of the School District were named as defendants; the State of Texas intervened as a party-defendant. After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District, the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class. In December 1977, the court conducted an extensive hearing on plaintiffs' motion for permanent injunctive relief.

2. Despite the enactment of § 21.031 in 1975, the School District had continued to enroll undocumented children free of charge until the 1977–1978 school year. In July 1977, it adopted a policy requiring undocumented children to pay a "full tuition fee" in order to enroll. Section 21.031 had not provided a definition of "a legally admitted alien." Tyler offered the following clarification:

"A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation." App. to Juris. Statement in No. 80–1538, p. A–38.
***207** In considering this motion, the District Court made extensive findings of fact. The court found that neither § 21.031 nor the School District policy implementing it had "either the purpose or effect of keeping illegal aliens out of the State of Texas." 458 F.Supp. 569, 575 (1978). Respecting defendants' further claim that § 21.031 was simply a financial measure designed to avoid a drain on the State's fisc, the court recognized that the increases in population resulting from the immigration of Mexican nationals into the United States had created problems for the public schools of the State, and that these problems were

exacerbated by the special educational needs of immigrant Mexican children. The court noted, however, that the increase in school enrollment was primarily attributable to the admission of children who were legal residents. *Id.*, at 575–576. It also found that while the "exclusion of all undocumented children from the public schools in Texas would eventually result in economies at some level," *id.*, at 576, funding from both the State and Federal Governments was based primarily on the number of children enrolled. In net effect then, barring undocumented children from the schools would save money, but it would "not necessarily" improve "the quality of education." *Id.*, at 577. The court further observed that the impact of § 21.031 was borne primarily by a very small subclass of illegal aliens, "entire families who have migrated illegally and—for all practical purposes—permanently to the United States." *Id.*, at 578. [3] Finally, the court noted that under ***2390** current laws and practices "the illegal alien of today may well be the legal alien of tomorrow," [4] and that without an education, these undocumented***208** children, "[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, ... will become permanently locked into the lowest socio-economic class." *Id.*, at 577.

3. The court contrasted this group with those illegal aliens who entered the country alone in order to earn money to send to their dependents in Mexico, and who in many instances remained in this country for only a short period of time. 458 F.Supp., at 578.

4. Plaintiffs' expert, Dr. Gilbert Cardenas, testified that "fifty to sixty per cent ... of current legal alien workers were formerly illegal aliens." *Id.*, at 577. A defense witness, Rolan Heston, District Director of the Houston District of the Immigration and Naturalization Service, testified that "undocumented children can and do live in the United States for years, and adjust their status through marriage to a citizen or permanent resident." *Ibid.* The court also took notice of congressional proposals to "legalize" the status of many unlawful entrants. *Id.*, at 577–578. See also n. 17, *infra.*

The District Court held that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, and that § 21.031 violated that Clause. Suggesting that "the state's exclusion of undocumented children from its public schools ... may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed," the court held that it was unnecessary to decide whether the statute would survive a "strict scrutiny" analysis because, in any event, the discrimination embodied in the statute was not supported by a rational basis. *Id.*, at 585. The District Court also concluded that the Texas statute violated the Supremacy Clause.[5] *Id.*, at 590–592.

5. The court found § 21.031 inconsistent with the scheme of national regulation under the Immigration and Nationality Act, and with federal laws pertaining to funding and discrimination in education. The court distinguished *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), by emphasizing that the state bar on employment of illegal aliens involved in that case mirrored precisely the federal policy, of protecting the domestic labor market, underlying the immigration laws. The court discerned no express federal policy to bar illegal immigrants from education. 458 F.Supp., at 590–592.

The Court of Appeals for the Fifth Circuit upheld the District Court's injunction. 628 F.2d 448 (1980). The Court of Appeals held that the District Court had erred in finding the Texas statute pre-empted by federal law.[6] With respect to ***209** equal protection, however, the Court of Appeals affirmed in all essential respects the analysis of the District Court, *id.*, at 454–458, concluding that § 21.031 was "constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test," *id.*, at 458. We noted probable jurisdiction. 451 U.S. 968, 101 S.Ct. 2044, 68 L.Ed.2d 347 (1981).

6. The Court of Appeals noted that *DeCanas v. Bica, supra*, had not foreclosed all state regulation with respect to illegal aliens, and found no express or implied congressional policy favoring the education of illegal aliens. The court therefore concluded that there was no pre-emptive conflict between state and federal law. 628 F.2d, at 451–454.

No. 80–1934
In re Alien Children Education Litigation

During 1978 and 1979, suits challenging the constitutionality of § 21.031 and various local practices undertaken on the authority of that provision were filed in the United States District Courts for the Southern, Western, and Northern Districts of Texas. Each suit named the State of Texas and the Texas Education Agency as defendants, along with local officials. In November 1979, the Judicial Panel on Multidistrict Litigation, on motion of the State, consolidated the claims against the state officials into a single action to be heard in the District Court for the Southern District of Texas. A hearing was conducted in February and March 1980. In July 1980, the court entered an opinion and order holding that § 21.031 violated the Equal Protection Clause of the Fourteenth Amendment. ****2391** *In re Alien Children Education Litigation*, 501 F.Supp. 544.[7] The court held that "the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit." *Id.*, at 582. The court determined that the State's concern for fiscal integrity was not a compelling state interest, *id.*, at 582–583; that exclusion of these children had not been shown to be necessary to improve education within the State, *id.*, at 583; and that the educational needs of the children statutorily excluded were not different from the needs of children not excluded, *ibid.* The court therefore concluded that ***210** § 21.031 was not carefully tailored to advance the asserted state interest in an acceptable manner. *Id.*, at 583–584. While appeal of the District Court's decision was pending, the Court of Appeals rendered its decision in No. 80–1538. Apparently on the strength of that opinion, the Court of Appeals, on February 23, 1981, summarily affirmed the decision of the Southern District. We noted probable jurisdiction, 452 U.S. 937, 101 S.Ct. 3078, 69 L.Ed.2d 950 (1981), and consolidated this case with No. 80–1538 for briefing and argument.[8]

7. The court concluded that § 21.031 was not pre-empted by federal laws or international agreements. 501 F.Supp., at 584–596.

8. Appellees in both cases continue to press the argument that § 21.031 is pre-empted by federal law and policy. In light of our disposition of the Fourteenth Amendment issue, we have no occasion to reach this claim.

II

The Fourteenth Amendment provides that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws.” (Emphasis added.) Appellants argue at the outset that undocumented aliens, because of their immigration status, are not “persons within the jurisdiction” of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. Whatever his status under the immigration laws, an alien is surely a “person” in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as “persons” guaranteed due process of law by the Fifth and Fourteenth Amendments. *Shaughnessy v. Mezei*, 345 U.S. 206, 212, 73 S.Ct. 625, 629, 97 L.Ed. 956 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886). Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government. *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976).[9]

> 9. It would be incongruous to hold that the United States, to which the Constitution assigns a broad authority over both naturalization and foreign affairs, is barred from invidious discrimination with respect to unlawful aliens, while exempting the States from a similar limitation. See 426 U.S., at 84–86, 96 S.Ct., at 1893–1894.

211 Appellants seek to distinguish our prior cases, emphasizing that the Equal Protection Clause directs a State to afford its protection to persons *within its jurisdiction* while the Due Process Clauses of the Fifth and Fourteenth Amendments contain no such assertedly limiting phrase. In appellants' view, persons who have entered the United States illegally are not “within the jurisdiction” of a State even if they are present within a State's boundaries and subject to its laws. Neither our cases nor the logic of the Fourteenth Amendment supports that constricting construction of the phrase “within its jurisdiction.” [10] We ***2392*** have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process. To the contrary, we have recognized ***212*** that both provisions were fashioned to protect an identical class of persons, and to reach every exercise of state authority.

> 10. Although we have not previously focused on the intended meaning of this phrase, we have had occasion to examine the first sentence of the Fourteenth Amendment, which provides that “[a]ll persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States....” (Emphasis added.) Justice Gray, writing for the Court in *United States v. Wong Kim Ark*, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890 (1898), detailed at some length the history of the Citizenship Clause, and the predominantly geographic sense in which the term “jurisdiction” was used. He further noted that it was “impossible to construe the words ‘subject to the jurisdiction thereof,’ in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words ‘within its jurisdiction,’ in the concluding sentence of the same section; or to hold that persons ‘within the jurisdiction’ of one of the States of the Union are not ‘subject to the jurisdiction of the United States.’ ” *Id.*, at 687, 18 S.Ct., at 471.

Justice Gray concluded that "[e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." *Id.*, at 693, 18 S.Ct., at 473. As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment "jurisdiction" can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful. See C. Bouvé, Exclusion and Expulsion of Aliens in the United States 425–427 (1912).

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' *These provisions are universal in their application, to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws." *Yick Wo, supra*, at 369, 6 S.Ct., at 1070 (emphasis added).

In concluding that "all persons within the territory of the United States," including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State. *Wong Wing, supra*, at 238, 16 S.Ct., at 981.[11] Our cases applying the Equal Protection Clause reflect the same territorial theme: [12]

***213** "Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the ***2393** States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350, 59 S.Ct. 232, 236, 83 L.Ed. 208 (1938).

11. In his separate opinion, Justice Field addressed the relationship between the Fifth and Fourteenth Amendments:

"The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.... The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar—in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Wong Wing v. United States*, 163 U.S., at 242–243, 16 S.Ct., at 982–983 (concurring in part and dissenting in part).

12. *Leng May Ma v. Barber*, 357 U.S. 185, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958), relied on by

appellants, is not to the contrary. In that case the Court held, as a matter of statutory construction, that an alien paroled into the United States pursuant to § 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) (1952 ed.), was not "within the United States" for the purpose of availing herself of § 243(h), which authorized the withholding of deportation in certain circumstances. The conclusion reflected the longstanding distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings. The undocumented children who are appellees here, unlike the parolee in *Leng May Ma, supra*, could apparently be removed from the country only pursuant to deportation proceedings. 8 U.S.C. § 1251(a)(2). See 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure § 3.16b, p. 3–161 (1981).

There is simply no support for appellants' suggestion that "due process" is somehow of greater stature than "equal protection" and therefore available to a larger class of persons. To the contrary, each aspect of the Fourteenth Amendment reflects an elementary limitation on state power. To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.

***214** Although the congressional debate concerning § 1 of the Fourteenth Amendment was limited, that debate clearly confirms the understanding that the phrase "within its jurisdiction" was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws. Indeed, it appears from those debates that Congress, by using the phrase "person within its jurisdiction," sought expressly to ensure that the equal protection of the laws was provided to the alien population. Representative Bingham reported to the House the draft resolution of the Joint Committee of Fifteen on Reconstruction (H.R. 63) that was to become the Fourteenth Amendment.[13] Cong. Globe, 39th Cong., 1st Sess., 1033 (1866). Two days later, Bingham posed the following question in support of the resolution:

> "Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, *whether citizens or strangers, within this land*, shall have equal protection in every State in this Union in the rights of life and liberty and property?" *Id.*, at 1090.

13. Representative Bingham's views are also reflected in his comments on the Civil Rights Bill of 1866. He repeatedly referred to the need to provide protection, not only to the freedmen, but to "the alien and stranger," and to "refugees ... and all men." Cong. Globe, 39th Cong., 1st Sess., 1292 (1866).

Senator Howard, also a member of the Joint Committee of Fifteen, and the floor manager of the

Amendment in the Senate, was no less explicit about the broad objectives of the Amendment, and the intention to make its provisions applicable to all who "may happen to be" within the jurisdiction of a State:

> ***215** "The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but *any person, whoever he may be*, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.... It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, *and to all persons who may happen to be within their jurisdiction.*" *Id.*, at 2766 (emphasis added).

*****2394*** Use of the phrase "within its jurisdiction" thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish.

Our conclusion that the illegal aliens who are plaintiffs in these cases may claim the benefit of the Fourteenth Amendment's guarantee of equal protection only begins the inquiry. The more difficult question is whether the Equal Protection Clause has been violated by the refusal of the State of Texas to reimburse local school boards for the education of children who cannot demonstrate that their presence within the ***216*** United States is lawful, or by the imposition by those school boards of the burden of tuition on those children. It is to this question that we now turn.

III

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction

on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class," [14] or that ***2395** impinge upon ***217** the exercise of a "fundamental right." [15] With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a ***218** substantial interest of the State.[16] We turn to a consideration of the standard appropriate for the evaluation of § 21.031.

14. Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964); *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943). Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973); *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 538 (1971); see *United States v. Carolene Products Co.*, 304 U.S. 144, 152–153, n. 4, 58 S.Ct. 778, 783–784, n. 4, 82 L.Ed. 1234 (1938). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

15. In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972), even though "the right to vote, *per se*, is not a constitutionally protected right." *San Antonio Independent School Dist., supra*, at 35, n. 78, 93 S.Ct., at 1298, n. 78. With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886).

16. See *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978). This technique of "intermediate" scrutiny permits us to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles. "In expounding the Constitution, the Court's role is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.' " *University of California Regents v. Bakke*, 438 U.S. 265, 299, 98 S.Ct. 2733, 2752, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J.), quoting A. Cox, The Role of the Supreme Court in American Government 114 (1976). Only when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this standard to aid us in determining the rationality of the legislative choice.

A

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders.[17] This situation raises the specter of a permanent***219** caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.[18] The existence****2396** of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[19]

17. The Attorney General recently estimated the number of illegal aliens within the United States at between 3 and 6 million. In presenting to both the Senate and House of Representatives several Presidential proposals for reform of the immigration laws—including one to "legalize" many of the illegal entrants currently residing in the United States by creating for them a special status under the immigration laws—the Attorney General noted that this subclass is largely composed of persons with a permanent attachment to the Nation, and that they are unlikely to be displaced from our territory:

"We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community. By granting limited legal status to the productive and law-abiding members of this shadow population, we will recognize reality and devote our enforcement resources to deterring future illegal arrivals." Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 9 (1981) (testimony of William French Smith, Attorney General).

18. As the District Court observed in No. 80–1538, the confluence of Government policies has resulted in "the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject

them." 458 F.Supp., at 585.

> 19. We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class, see, *e.g.*, n. 14, *supra*, has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy." With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction. See *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply***220** with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." *Trimble v. Gordon*, 430 U.S. 762, 770, 97 S.Ct. 1459, 1465, 52 L.Ed.2d 31 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

> "[V]isiting ... condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the ... child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the ... child is an ineffectual—as well as unjust—way of deterring the parent." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed.2d 768 (1972) (footnote omitted).

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But § 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031.

***221** Public education is not a "right" granted to individuals by the Constitution. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S.Ct. 1278, 1298, 36 L.Ed.2d 16 (1973). But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the ****2397** distinction. The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923). We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," *Abington School District v. Schempp*, 374 U.S. 203, 230, 83 S.Ct. 1560, 1575, 10 L.Ed.2d 844 (1963) (BRENNAN, J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979). "[A]s ... pointed out early in our history, ... some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin v. Yoder*, 406 U.S. 205, 221, 92 S.Ct. 1526, 1536, 32 L.Ed.2d 15 (1972). And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." *Ambach v. Norwick, supra*, 411 U.S., at 77, 99 S.Ct., at 1594. In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals ***222** of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin v. Yoder, supra*, 406 U.S., at 221, 92 S.Ct., at 1536. Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[20] What we said 28 years ago in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), still holds true:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school ***223** attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education****2398** to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child

may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.*, at 493, 74 S.Ct., at 691.

20. Because the State does not afford noncitizens the right to vote, and may bar noncitizens from participating in activities at the heart of its political community, appellants argue that denial of a basic education to these children is of less significance than the denial to some other group. Whatever the current status of these children, the courts below concluded that many will remain here permanently and that some indeterminate number will eventually become citizens. The fact that many will not is not decisive, even with respect to the importance of education to participation in core political institutions. "[T]he benefits of education are not reserved to those whose productive utilization of them is a certainty ...." 458 F.Supp., at 581, n. 14. In addition, although a noncitizen "may be barred from full involvement in the political arena, he may play a role—perhaps even a leadership role—in other areas of import to the community." *Nyquist v. Mauclet*, 432 U.S. 1, 12, 97 S.Ct. 2120, 2126, 53 L.Ed.2d 63 (1977). Moreover, the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.

B

These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. See *San Antonio Independent School Dist. v. Rodriguez, supra*, at 28–39, 93 S.Ct., at 1293–1300. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining ***224** the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

IV

It is the State's principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children *vel non* establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents. The State notes that while other aliens are admitted "on an equality of legal privileges with all citizens under non-discriminatory laws," *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420, 68 S.Ct. 1138, 1143, 92 L.Ed. 1478 (1948), the asserted right of these children to an education can claim no implicit congressional imprimatur. [21] Indeed, in the State's view, Congress' apparent disapproval of the presence of these children within the United

States, and the evasion of the federal regulatory program that is the mark of undocumented status, provides authority for its decision to impose upon them special disabilities. Faced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens. But we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly ***225** in arriving at an equal protection ****2399** balance concerning the State's authority to deprive these children of an education.

> 21. If the constitutional guarantee of equal protection was available only to those upon whom Congress affirmatively granted its benefit, the State's argument would be virtually unanswerable. But the Equal Protection Clause operates of its own force to protect anyone "within [the State's] jurisdiction" from the State's arbitrary action. See Part II, *supra.* The question we examine in text is whether the federal *disapproval* of the presence of these children assists the State in overcoming the presumption that denial of education to innocent children is not a rational response to legitimate state concerns.

The Constitution grants Congress the power to "establish an uniform Rule of Naturalization." Art. I., § 8, cl. 4. Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders. See *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–589, 72 S.Ct. 512, 518–519, 96 L.Ed. 586 (1952). The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field. *Mathews, supra*, at 81, 96 S.Ct., at 1892. But this traditional caution does not persuade us that unusual deference must be shown the classification embodied in § 21.031. The States enjoy no power with respect to the classification of aliens. See *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). This power is "committed to the political branches of the Federal Government." *Mathews*, 426 U.S., at 81, 96 S.Ct., at 1892. Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status, *id.*, at 85, 96 S.Ct., at 1894, and to "take into account the character of the relationship between the alien and this country," *id.*, at 80, 96 S.Ct., at 1891, only rarely are such matters relevant to legislation by a State. See *Id.*, at 84–85, 96 S.Ct., at 1893–1894; *Nyquist v. Mauclet*, 432 U.S. 1, 7, n. 8, 97 S.Ct. 2120, 2124, n. 8, 53 L.Ed.2d 63 (1977).

As we recognized in *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal. In *DeCanas*, the State's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country. *Id.*, at 361, 96 S.Ct., at 939. In contrast, there is no indication that the disability imposed by § 21.031 corresponds to any identifiable congressional policy. The ***226** State does not claim that the conservation of state educational resources was ever a congressional concern in restricting immigration. More importantly, the classification reflected in § 21.031 does not operate harmoniously within the federal program.

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. 8 U.S.C. §§ 1251, 1252 (1976 ed. and Supp. IV). But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. See, *e.g.*, 8 U.S.C. §§ 1252, 1253(h), 1254 (1976 ed. and Supp. IV). In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.

We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education. In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education. The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory*****2400*** policy, the State must demonstrate that the classification is reasonably adapted to " *the purposes for which the state desires to use it.*" *Oyama v. California*, 332 U.S. 633, 664–665, 68 S.Ct. 269, 284, 92 L.Ed. 249 (1948) (Murphy, J., concurring) (emphasis added). We therefore turn to the state objectives that are said to support § 21.031.

****227*** V

Appellants argue that the classification at issue furthers an interest in the "preservation of the state's limited resources for the education of its lawful residents." [22] Brief for Appellants 26. Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. *Graham v. Richardson*, 403 U.S. 365, 374–375, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971). The State must do more than justify its classification with a concise expression of an intention to discriminate. *Examining Board v. Flores de Otero*, 426 U.S. 572, 605, 96 S.Ct. 2264, 2282, 49 L.Ed.2d 65 (1976). Apart from the asserted state prerogative to act against undocumented children solely on the basis of their undocumented status—an asserted prerogative that carries only minimal force in the circumstances of these cases—we discern three colorable state interests that might support § 21.031.

> 22. Appellant School District sought at oral argument to characterize the alienage classification contained in § 21.031 as simply a test of residence. We are unable to uphold § 21.031 on that basis. Appellants conceded that if, for example, a Virginian or a legally admitted Mexican citizen entered Tyler with his school-age children, intending to remain only six months, those children would be viewed as residents entitled to attend Tyler schools. Tr. of Oral Arg. 31–32. It is thus clear that Tyler's residence argument amounts to nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools. A State may not, however, accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as nonresident. And illegal entry into the country would not, under traditional criteria, bar a

person from obtaining domicile within a State. C. Bouvé, Exclusion and Expulsion of Aliens in the United States 340 (1912). Appellants have not shown that the families of undocumented children do not comply with the established standards by which the State historically tests residence. Apart from the alienage limitation, § 21.031(b) requires a school district to provide education only to resident children. The school districts of the State are as free to apply to undocumented children established criteria for determining residence as they are to apply those criteria to any other child who seeks admission.

***228** First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population,[23] § 21.031 hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc. 458 F.Supp., at 578; 501 F.Supp., at 570–571. The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.[24] Thus, even making ***2401** the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that "[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration," at least when compared with the alternative of ***229** prohibiting the employment of illegal aliens. 458 F.Supp., at 585. See 628 F.2d, at 461; 501 F.Supp., at 579 and n. 88.

23. Although the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service. Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns. See *DeCanas v. Bica*, 424 U.S., at 354–356, 96 S.Ct., at 935–936.

24. The courts below noted the ineffectiveness of the Texas provision as a means of controlling the influx of illegal entrants into the State. See 628 F.2d, at 460–461; 458 F.Supp., at 585; 501 F.Supp., at 578 ("The evidence demonstrates that undocumented persons do not immigrate in search for a free public education. Virtually all of the undocumented persons who come into this country seek employment opportunities and not educational benefits.... There was overwhelming evidence ... of the unimportance of public education as a stimulus for immigration") (footnote omitted).

Second, while it is apparent that a State may "not ... reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools," *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S.Ct. 1322, 1330, 22 L.Ed.2d 600 (1969), appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. But the record in no way supports the claim that

exclusion of undocumented children is likely to improve the overall quality of education in the State.[25] As the District Court in No. 80–1934 noted, the State failed to offer any "credible supporting evidence that a proportionately small diminution of the funds spent on each child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education." 501 F.Supp., at 583. And, after reviewing the State's school financing mechanism, the District Court in No. 80–1538 concluded that barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools. 458 F.Supp., at 577. Of course, even if improvement in the quality of education were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are "basically indistinguishable" from legally resident alien children. *Id.*, at 589; 501 F.Supp., at 583, and n. 104.

> 25. Nor does the record support the claim that the educational resources of the State are so direly limited that some form of "educational *triage* " might be deemed a reasonable (assuming that it were a permissible) response to the State's problems. *Id.*, at 579–581.

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence ***230** within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

VI

If the State is to deny a discrete group of innocent children the free public education ****2402** that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is

Affirmed.

Justice MARSHALL, concurring.

While I join the Court's opinion, I do so without in any way retreating from my opinion in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 70–133, 93 S.Ct. 1278, 1315–1348, 36 L.Ed.2d 16 (1973) (dissenting opinion). I continue to believe that an individual's interest in education is

fundamental, and that this view is amply supported "by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values." ***231** *Id.*, at 111, 93 S.Ct., at 1336. Furthermore, I believe that the facts of these cases demonstrate the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *Id.*, at 99, 93 S.Ct., at 1330. See also *Dandridge v. Williams*, 397 U.S. 471, 519–521, 90 S.Ct. 1153, 1178–1180, 25 L.Ed.2d 491 (1970) (MARSHALL, J., dissenting). It continues to be my view that a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment.

Justice BLACKMUN, concurring.

I join the opinion and judgment of the Court.

Like Justice POWELL, I believe that the children involved in this litigation "should not be left on the streets uneducated." *Post*, at 2406. I write separately, however, because in my view the nature of the interest at stake is crucial to the proper resolution of these cases.

The "fundamental rights" aspect of the Court's equal protection analysis—the now-familiar concept that governmental classifications bearing on certain interests must be closely scrutinized—has been the subject of some controversy. Justice Harlan, for example, warned that "[v]irtually every state statute affects important rights.... [T]o extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'super-legislature.' " *Shapiro v. Thompson*, 394 U.S. 618, 661, 89 S.Ct. 1322, 1345, 22 L.Ed.2d 600 (1969) (dissenting opinion). Others have noted that strict scrutiny under the Equal Protection Clause is unnecessary when classifications infringing enumerated constitutional rights are involved, for "a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications." ***232** *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 61, 93 S.Ct. 1278, 1311, 36 L.Ed.2d 16 (1973) (Stewart, J., concurring). See *Shapiro v. Thompson*, 394 U.S., at 659, 89 S.Ct., at 1344 (Harlan, J., dissenting). Still others have suggested that fundamental rights are not properly a part of equal protection analysis at all, because they are unrelated to any defined principle of equality.[1]

> 1. See, *e.g.*, Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1075–1983 (1979).

These considerations, combined with doubts about the judiciary's ability to make fine distinctions in assessing the effects of complex social policies, led the Court in *Rodriguez* to articulate a firm rule: fundamental rights are those that "explicitly or implicitly [are] guaranteed by the Constitution." 411 U.S., at 33–34, 93 S.Ct., 1296–1297. It therefore squarely rejected the ****2403** notion that "an ad hoc determination as to the social or economic importance" of a given interest is relevant to the level of scrutiny accorded classifications involving that interest, *id.*, at 32, 93 S.Ct., at 1296, and made clear that "[i]t is not the province of this Court to create substantive constitutional rights in the name of

guaranteeing equal protection of the laws." *Id.*, at 33, 93 S.Ct., at 1296.

I joined Justice POWELL's opinion for the Court in *Rodriguez*, and I continue to believe that it provides the appropriate model for resolving most equal protection disputes. Classifications infringing substantive constitutional rights necessarily will be invalid, if not by force of the Equal Protection Clause, then through operation of other provisions of the Constitution. Conversely, classifications bearing on nonconstitutional interests—even those involving "the most basic economic needs of impoverished human beings," *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970)—generally are not subject to special treatment under the Equal Protection Clause, because they are not distinguishable in any relevant way from other regulations in "the area of economics and social welfare." *Ibid.*

With all this said, however, I believe the Court's experience has demonstrated that the *Rodriguez* formulation does ***233** not settle every issue of "fundamental rights" arising under the Equal Protection Clause. Only a pedant would insist that there are *no* meaningful distinctions among the multitude of social and political interests regulated by the States, and *Rodriguez* does not stand for quite so absolute a proposition. To the contrary, *Rodriguez* implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis. Thus, the Court's decisions long have accorded strict scrutiny to classifications bearing on the right to vote in state elections, and *Rodriguez* confirmed the "constitutional underpinnings of the right to equal treatment in the voting process." 411 U.S., at 34, n. 74, 93 S.Ct., at 1297, n. 74. Yet "the right to vote, *per se*, is not a constitutionally protected right," *id.*, at 35, n. 78, 93 S.Ct., at 1319, n. 78. See *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665, 86 S.Ct. 1079, 1080, 16 L.Ed.2d 169 (1966); *Rodriguez*, 411 U.S., at 59, n. 2, 93 S.Ct., at 1310, n. 2 (Stewart, J., concurring). Instead, regulation of the electoral process receives unusual scrutiny because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964). See *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972). In other words, the right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen [2] cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status.

> 2. I use the term "citizen" advisedly. The right to vote, of course, is a political interest of concern to citizens. The right to an education, in contrast, is a social benefit of relevance to a substantial number of those affected by Texas' statutory scheme, as is discussed below.

It is arguable, of course, that the Court never should have applied fundamental rights doctrine in the fashion outlined above. Justice Harlan, for one, maintained that strict equal protection scrutiny was appropriate only when racial or analogous***234** classifications were at issue. *Shapiro v. Thompson*, 394 U.S., at 658–663, 89 S.Ct., at 1344–1346 (dissenting opinion). See *Reynolds v. Sims*, 377 U.S., at 590–591, 84 S.Ct., at 1396 (Harlan, J., dissenting). But it is too late to debate that point, and I believe that accepting the principle of the voting cases—the idea that state classifications bearing on certain interests pose the risk of allocating rights in a fashion inherently contrary to any notion of "equality"—

dictates the outcome here. As both Justice ***2404** POWELL and THE CHIEF JUSTICE observe, the Texas scheme inevitably will create "a subclass of illiterate persons," *post*, at 2408 (POWELL, J., concurring); see *post*, at 2408, 2414 (BURGER, C.J., dissenting); where I differ with THE CHIEF JUSTICE is in my conclusion that this makes the statutory scheme unconstitutional as well as unwise.

In my view, when the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes, mentioned above, of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group—through the State's action—will have been converted into a discrete underclass. Other benefits provided by the State, such as housing and public assistance, are of course important; to an individual in immediate need, they may be more desirable than the right to be educated. But classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. Cf. *Rodriguez*, 411 U.S., at 115, n. 74, 93 S.Ct., at 1338, n. 74 (MARSHALL, J., dissenting). In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.

235 This conclusion is fully consistent with *Rodriguez.* The Court there reserved judgment on the constitutionality of a state system that "occasioned an absolute denial of educational opportunities to any of its children," noting that "no charge fairly could be made that the system [at issue in *Rodriguez*] fails to provide each child with an opportunity to acquire ... basic minimal skills." *Id.*, at 37, 93 S.Ct., at 1299. And it cautioned that in a case "involv[ing] the most persistent and difficult questions of educational policy, ... [the] Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." *Id.*, at 42, 93 S.Ct., at 1301. Thus *Rodriguez* held, and the Court now reaffirms, that "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population." *Ante*, at 2398. Similarly, it is undeniable that education is not a "fundamental right" in the sense that it is constitutionally guaranteed. Here, however, the State has undertaken to provide an education to most of the children residing within its borders. And, in contrast to the situation in *Rodriguez*, it does not take an advanced degree to predict the effects of a complete denial of education upon those children targeted by the State's classification. In such circumstances, the voting decisions suggest that the State must offer something more than a rational basis for its classification.[3]

> 3. The Court concludes that the provision at issue must be invalidated "unless it furthers some substantial goal of the State." *Ante*, at 2398. Since the statute fails to survive this level of scrutiny, as the Court demonstrates, there is no need to determine whether a more probing level of review would be appropriate.

Concededly, it would seem ironic to discuss the social necessity of an education in a case that concerned only undocumented aliens "whose very presence in the state and this country is illegal." *Post*, at 2412 (BURGER, C.J., dissenting). But because of the nature of the federal immigration laws and the pre-eminent role of the Federal Government in ***236*** regulating immigration, the class of children

here is not a monolithic one. Thus, the District Court in the *Alien Children Education* case found as a factual matter that a significant number of illegal aliens will remain in this country permanently, 501 F.Supp. 544, 558–559 (SD Tex.1980); that some of the children involved in this litigation are "documentable,"*****2405*** *id.*, at 573; and that "[m]any of the undocumented children are not deportable. None of the named plaintiffs is under an order of deportation." *Id.*, at 583, n. 103. As the Court's alienage cases demonstrate, these children may not be denied rights that are granted to citizens, excepting only those rights bearing on political interests. See *Nyquist v. Mauclet*, 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63 (1977). And, as Justice POWELL notes, the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported. *Post*, at 2407–2408, n. 6. Indeed, any attempt to do so would involve the State in the administration of the immigration laws. Whatever the State's power to classify deportable aliens, then—and whatever the Federal Government's ability to draw more precise and more acceptable alienage classifications—the statute at issue here sweeps within it a substantial number of children who will in fact, and who may well be entitled to, remain in the United States. Given the extraordinary nature of the interest involved, this makes the classification here fatally imprecise. And, as the Court demonstrates, the Texas legislation is not otherwise supported by any substantial interests.

Because I believe that the Court's carefully worded analysis recognizes the importance of the equal protection and preemption interests I consider crucial, I join its opinion as well as its judgment.

Justice POWELL, concurring.

I join the opinion of the Court, and write separately to emphasize the unique character of the cases before us.

****237*** The classification in question severely disadvantages children who are the victims of a combination of circumstances. Access from Mexico into this country, across our 2,000-mile border, is readily available and virtually uncontrollable. Illegal aliens are attracted by our employment opportunities, and perhaps by other benefits as well. This is a problem of serious national proportions, as the Attorney General recently has recognized. See *ante*, at 2395, n. 17. Perhaps because of the intractability of the problem, Congress—vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens—has not provided effective leadership in dealing with this problem. [1] It *****2406*** therefore is certain that illegal aliens will continue ****238*** to enter the United States and, as the record makes clear, an unknown percentage of them will remain here. I agree with the Court that their children should not be left on the streets uneducated.

> 1. Article I, § 8, cl. 4, of the Constitution provides: "The Congress shall have Power ... To establish an uniform Rule of Naturalization." The Federal Government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419, 68 S.Ct. 1138, 1142, 92 L.Ed. 1478 (1948). See *Graham v. Richardson*, 403 U.S. 365, 378, 91 S.Ct. 1848, 1855, 29 L.Ed.2d 534 (1971) (regulation of aliens is "constitutionally entrusted to the Federal Government"). The

> Court has traditionally shown great deference to federal authority over immigration and to federal classifications based upon alienage. See, *e.g., Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1477, 52 L.Ed.2d 50 (1977) ("it is important to underscore the limited scope of judicial inquiry into immigration legislation"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–589, 72 S.Ct. 512, 518–519, 96 L.Ed. 586 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"). Indeed, even equal protection analysis in this area is based to a large extent on an underlying theme of pre-emption and exclusive federal power over immigration. See *Takahashi v. Fish & Game Comm'n, supra*, at 420, 68 S.Ct., at 1143 (the Federal Government has admitted resident aliens to the country "on an equality of legal privileges with all citizens under non-discriminatory laws" and the States may not alter the terms of this admission). Compare *Graham v. Richardson, supra*, and *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973), with *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), and *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976). Given that the States' power to regulate in this area is so limited, and that this is an area of such peculiarly strong federal authority, the necessity of federal leadership seems evident.

Although the analogy is not perfect, our holding today does find support in decisions of this Court with respect to the status of illegitimates. In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed.2d 768 (1972), we said: "[V]isiting ... condemnation on the head of an infant" for the misdeeds of the parents is illogical, unjust, and "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."

In these cases, the State of Texas effectively denies to the school-age children of illegal aliens the opportunity to attend the free public schools that the State makes available to all residents. They are excluded only because of a status resulting from the violation by parents or guardians of our immigration laws and the fact that they remain in our country unlawfully. The appellee children are innocent in this respect. They can "affect neither their parents' conduct nor their own status." *Trimble v. Gordon*, 430 U.S. 762, 770, 97 S.Ct. 1459, 1465, 52 L.Ed.2d 31 (1977).

Our review in a case such as these is properly heightened.[2] See *id.*, at 767, 97 S.Ct., at 1463. Cf. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children thus have been ***239** singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the State's interests be substantial and that the means bear a "fair and substantial relation" to these interests.[3] See *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978) ("classifications based on illegitimacy ... are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests"); *id.*, at 271, 99 S.Ct., at 526 ("[a]s the State's

interests are substantial, we now consider the means adopted").

2. I emphasize the Court's conclusion that strict scrutiny is not appropriately applied to this classification. This exacting standard of review has been reserved for instances in which a "fundamental" constitutional right or a "suspect" classification is present. Neither is present in these cases, as the Court holds.

3. THE CHIEF JUSTICE argues in his dissenting opinion that this heightened standard of review is inconsistent with the Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). But in *Rodriguez* no group of children was singled out by the State and then penalized because of their parents' status. Rather, funding for education varied across the State because of the tradition of local control. Nor, in that case, was any group of children totally deprived of all education as in these cases. If the resident children of illegal aliens were denied welfare assistance, made available by government to all other children who qualify, this also—in my opinion—would be an impermissible penalizing of children because of their parents' status.

In my view, the State's denial of education to these children bears no substantial relation to any substantial state interest. Both of the District Courts found that an uncertain but significant percentage of illegal alien children will remain in Texas as residents and many eventually will become citizens. The discussion by the Court, *ante*, at Part V, of the State's purported interests demonstrates that they are poorly served by the educational exclusion. Indeed, the interests relied upon by the State would seem to be insubstantial in view of the consequences to the State itself of wholly uneducated persons living indefinitely within its borders. By contrast, access to the public schools is made available *****2407*** to the children of lawful residents without regard to the temporary****240*** nature of their residency in the particular Texas school district.[4] The Court of Appeals and the District Courts that addressed these cases concluded that the classification could not satisfy even the bare requirements of rationality. One need not go so far to conclude that the exclusion of appellees' class [5] of children from state-provided education is a type of punitive discrimination based on status that is impermissible under the Equal Protection Clause.

4. The State provides free public education to all lawful residents whether they intend to reside permanently in the State or only reside in the State temporarily. See *ante*, at 2400, n. 22. Of course a school district may require that illegal alien children, like any other children, actually reside in the school district before admitting them to the schools. A requirement of *de facto* residency, uniformly applied, would not violate any principle of equal protection.

5. The classes certified in these cases included all undocumented school-age children of Mexican origin residing in the school district, see *ante*, at 2389, or the State. See *In re Alien Children Education Litigation*, 501 F.Supp. 544, 553 (SD Tex.1980). Even so, it is clear that neither class was thought to include mature Mexican minors who were solely responsible for violating the immigration laws. In 458 F.Supp. 569 (ED Tex.1978), the court characterized plaintiffs as "entire families who have migrated illegally." *Id.*, at 578. Each of the plaintiff children in that case was represented by a parent or guardian. Similarly the court in *In re Alien*

Children Education Litigation found that “[u]ndocumented children do not enter the United States unaccompanied by their parents.” 501 F.Supp., at 573. A different case would be presented in the unlikely event that a minor, old enough to be responsible for illegal entry and yet still of school age, entered this country illegally on his own volition.

In reaching this conclusion, I am not unmindful of what must be the exasperation of responsible citizens and government authorities in Texas and other States similarly situated. Their responsibility, if any, for the influx of aliens is slight compared to that imposed by the Constitution on the Federal Government.[6] So long as the ease of entry remains inviting, ***241** and the power to deport is exercised infrequently by the Federal Government, the additional expense of admitting these children to public schools might fairly be shared by the Federal and State Governments. But it hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons many of whom will remain in the State, adding to the problems and costs of both State and ****2408** National Governments attendant upon unemployment, welfare, and crime.

6. In addition, the States' ability to respond on their own to the problems caused by this migration may be limited by the principles of pre-emption that apply in this area. See, *e.g., Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). In *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), the Court found that a state law making it a criminal offense to employ illegal aliens was not pre-empted by federal authority over aliens and immigration. The Court found evidence that Congress intended state regulation in this area. *Id.*, at 361, 96 S.Ct., at 939 (“there is evidence ... that Congress intends that States may, to the extent consistent with federal law, regulate the employment of illegal aliens”). Moreover, under federal immigration law, only immigrant aliens and nonimmigrant aliens with special permission are entitled to work. See 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure, §§ 1.34a, 1.36, 2.6b (1981). Because federal law clearly indicates that only certain specified aliens may lawfully work in the country and because these aliens have documentation establishing this right, the State in *DeCanas* was able to identify with certainty which aliens had a federal permission to work in this country. The State did not need to concern itself with an alien's current or future deportability. By contrast, there is no comparable federal guidance in the area of education. No federal law invites state regulation; no federal regulations identify those aliens who have a right to attend public schools. In addition, the Texas educational exclusion requires the State to make predictions as to whether individual aliens eventually will be found to be deportable. But it is impossible for a State to determine which aliens the Federal Government will eventually deport, which the Federal Government will permit to stay, and which the Federal Government will ultimately naturalize. Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country, perhaps even as a citizen. Indeed, even the Immigration and Naturalization Service cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course. See, *e.g.*, 8 U.S.C. §§ 1252, 1253(h), 1254 (1976 ed. and Supp. IV).

***242** Chief Justice BURGER, with whom Justice WHITE, Justice REHNQUIST, and Justice O'CONNOR join, dissenting.

Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language.[1] However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense." See *TVA v. Hill*, 437 U.S. 153, 194–195, 98 S.Ct. 2278, 2301–2302, 57 L.Ed.2d 312 (1978). We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

1. It does not follow, however, that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here. Surely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation.

The Court makes no attempt to disguise that it is acting to make up for Congress' lack of "effective leadership" in dealing with the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders.[2] ***243** See *ante*, at 2405–2506 (POWELL, J., concurring). The failure of enforcement of the immigration laws over more than a decade and the inherent difficulty and expense of sealing our vast borders have combined to create a grave socioeconomic dilemma. It is a dilemma that has not yet even been fully assessed, let alone addressed. However, it is not the function of the Judiciary to provide "effective leadership" simply because the political branches of government fail to do so.

2. The Department of Justice recently estimated the number of illegal aliens within the United States at between 3 and 6 million. Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 7 (1981) (testimony of Attorney General Smith). Other estimates run as high as 12 million. See Strout, Closing the Door on Immigration, Christian Science Monitor, May 21, 1982, p. 22, col. 4.

The Court's holding today manifests the justly criticized judicial tendency to attempt speedy and wholesale formulation of "remedies" for the failures—or simply the laggard pace—of the political processes of our system of government. The Court employs, and in my view abuses, the Fourteenth Amendment in an effort to become an omnipotent and omniscient problem solver. That the motives for doing so are noble and compassionate does not alter the fact that the Court distorts our constitutional function to make amends for the defaults of others.

I

In a sense, the Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases. Yet the extent to which the Court departs from principled constitutional adjudication is nonetheless disturbing.

I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment *applies* to aliens who, after their illegal entry into this country, are indeed physically "within the jurisdiction" of a state. However, as the Court concedes, this "only begins the inquiry." *****2409*** *Ante*, at 2394. The Equal Protection Clause does not mandate identical treatment of different categories of persons. *Jefferson v. Hackney*, 406 U.S. 535, 549, 92 S.Ct. 1724, 1732, 32 L.Ed.2d 285 (1972); *Reed v. Reed*, 404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971); *Tigner v. Texas*, 310 U.S. 141, 147–148, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940).

The dispositive issue in these cases, simply put, is whether, for purposes of allocating its finite resources, a state has a legitimate reason to differentiate between persons ****244*** who are lawfully within the state and those who are unlawfully there. The distinction the State of Texas has drawn—based not only upon its own legitimate interests but on classifications established by the Federal Government in its immigration laws and policies—is not unconstitutional.

A

The Court acknowledges that, except in those cases when state classifications disadvantage a "suspect class" or impinge upon a "fundamental right," the Equal Protection Clause permits a state "substantial latitude" in distinguishing between different groups of persons. *Ante*, at 2394–2395. Moreover, the Court expressly—and correctly—rejects any suggestion that illegal aliens are a suspect class, *ante*, at 2396, n. 19, or that education is a fundamental right, *ante*, at 2397, 2398. Yet by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.

In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public education, see *ante*, at 2398.[3] If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.

> 3. The Court implies, for example, that the Fourteenth Amendment would not require a state to provide welfare benefits to illegal aliens.

(1)

The Court first suggests that these illegal alien children, although not a suspect class, are entitled to special solicitude under the Equal Protection Clause because they lack "control" over or "responsibility" for their unlawful entry into this country. *Ante*, at 2397, 2398. Similarly, the Court appears to take the position that § 21.031 is presumptively "irrational" because it has the effect of imposing "penalties" ****245*** on "innocent" children. *Ibid.* See also *ante*, at 2406 (POWELL, J., concurring).[4] However, the Equal Protection Clause does not preclude legislators from classifying among persons on the basis of factors and characteristics over which individuals may be said to lack "control." Indeed, in some circumstances persons generally, and children in particular, may have little control over or responsibility for such things as their ill health, need for public assistance, or place of residence. Yet a

state legislature is not barred from considering, for example, relevant differences between the mentally healthy and the mentally ill, or between the residents of different counties, [5] simply because these may be factors ***2410** unrelated to individual choice or to any "wrongdoing." The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility; it is not an all-encompassing "equalizer" designed to eradicate every distinction for which persons are not "responsible."

4. Both the opinion of the Court and Justice POWELL's concurrence imply that appellees are being "penalized" because their *parents* are illegal entrants. *Ante*, at 2396; *ante*, at 2406, and 2406, n. 3 (POWELL, J., concurring). However, Texas has classified appellees on the basis of *their own* illegal status, not that of their parents. Children born in this country to illegal alien parents, including some of appellees' siblings, are not excluded from the Texas schools. Nor does Texas discriminate against appellees because of their Mexican origin or citizenship. Texas provides a free public education to countless thousands of Mexican immigrants who are lawfully in this country.

5. Appellees "lack control" over their illegal residence in this country in the same sense as lawfully resident children lack control over the school district in which their parents reside. Yet in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), we declined to review under "heightened scrutiny" a claim that a State discriminated against residents of less wealthy school districts in its provision of educational benefits. There was no suggestion in that case that a child's "lack of responsibility" for his residence in a particular school district had any relevance to the proper standard of review of his claims. The result was that children lawfully here but residing in different counties received different treatment.

***246** The Court does not presume to suggest that appellees' purported lack of culpability for their illegal status prevents them from being deported or otherwise "penalized" under federal law. Yet would deportation be any less a "penalty" than denial of privileges provided to legal residents? [6] Illegality of presence in the United States does not—and need not—depend on some amorphous concept of "guilt" or "innocence" concerning an alien's entry. Similarly, a state's use of federal immigration status as a basis for legislative classification is not necessarily rendered suspect for its failure to take such factors into account.

6. Indeed, even children of illegal alien parents born in the United States can be said to be "penalized" when their parents are deported.

The Court's analogy to cases involving discrimination against illegitimate children—see *ante*, at 2396; *ante*, at 2406–2407 (POWELL, J., concurring)—is grossly misleading. The State has not thrust any disabilities upon appellees due to their "status of birth." Cf. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 176, 92 S.Ct. 1400, 1407, 31 L.Ed.2d 768 (1972). Rather, appellees' status is predicated upon the circumstances of their concededly illegal presence in this country, and is a direct result of Congress' obviously valid exercise of its "broad constitutional powers" in the field of immigration and naturalization. U.S. Const., Art. I, § 8, cl. 4; see *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419, 68

S.Ct. 1138, 1142, 92 L.Ed. 1478 (1948). This Court has recognized that in allocating governmental benefits to a given class of aliens, one "may take into account the character of the relationship between the alien and this country." *Mathews v. Diaz*, 426 U.S. 67, 80, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976). When that "relationship" is a federally prohibited one, there can, of course, be no presumption that a state has a constitutional duty to include illegal aliens among the recipients of its governmental benefits.[7]

> 7. It is true that the Constitution imposes lesser constraints on the Federal Government than on the states with regard to discrimination against *lawfully* admitted aliens. *E.g., Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976). This is because "Congress and the President have broad power over immigration and naturalization which the States do not possess," *Hampton, supra*, at 95, 96 S.Ct., at 1901, and because state discrimination against legally resident aliens conflicts with and alters "the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419, 68 S.Ct. 1138, 1142, 92 L.Ed. 1478 (1948). However, the same cannot be said when Congress has decreed that certain aliens should not be admitted to the United States at all.

****247*** (2)

The second strand of the Court's analysis rests on the premise that, although public education is not a constitutionally guaranteed right, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Ante*, at 2397. Whatever meaning or relevance this opaque observation might have in some other context,[8] it simply has no *****2411*** bearing on the issues at hand. Indeed, it is never made clear what the Court's opinion means on this score.

> 8. In support of this conclusion, the Court's opinion strings together quotations drawn from cases addressing such diverse matters as the right of individuals under the Due Process Clause to learn a foreign language, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); the First Amendment prohibition against state-mandated religious exercises in the public schools, *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); and state impingements upon the free exercise of religion, *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). However, not every isolated utterance of this Court retains force when wrested from the context in which it was made.

The importance of education is beyond dispute. Yet we have held repeatedly that the importance of a governmental service does not elevate it to the status of a "fundamental right" for purposes of equal protection analysis. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 30–31, 93 S.Ct. 1278, 1295, 36 L.Ed.2d 16 (1973); *Lindsey v. Normet*, 405 U.S. 56, 73–74, 92 S.Ct. 862, 874, 31 L.Ed.2d 36 (1972). In *San Antonio Independent School Dist., supra*, Justice POWELL, speaking for the Court, expressly rejected the proposition that state laws dealing with public education are subject to special scrutiny under the Equal Protection Clause. Moreover, the Court points to no meaningful way to distinguish between education and other governmental benefits****248*** in this context. Is the Court suggesting that education is more "fundamental" than food, shelter, or medical care?

The Equal Protection Clause guarantees similar treatment of similarly situated persons, but it does not mandate a constitutional hierarchy of governmental services. Justice POWELL, speaking for the Court in *San Antonio Independent School Dist., supra*, 411 U.S., at 31, 93 S.Ct., at 1295, put it well in stating that to the extent this Court raises or lowers the degree of "judicial scrutiny" in equal protection cases according to a transient Court majority's view of the societal importance of the interest affected, we "assum[e] a legislative role and one for which the Court lacks both authority and competence." Yet that is precisely what the Court does today. See also *Shapiro v. Thompson*, 394 U.S. 618, 655–661, 89 S.Ct. 1322, 1342–1345, 22 L.Ed.2d 600 (1969) (Harlan, J., dissenting).

The central question in these cases, as in every equal protection case not involving truly fundamental rights "explicitly or implicitly guaranteed by the Constitution," *San Antonio Independent School Dist., supra*, 411 U.S., at 33–34, 93 S.Ct., at 1296–1297, is whether there is some legitimate basis for a legislative distinction between different classes of persons. The fact that the distinction is drawn in legislation affecting access to public education—as opposed to legislation allocating other important governmental benefits, such as public assistance, health care, or housing—cannot make a difference in the level of scrutiny applied.

B

Once it is conceded—as the Court does—that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose. *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942, 59 L.Ed.2d 171 (1979); *Dandridge v. Williams*, 397 U.S. 471, 485–487, 90 S.Ct. 1153, 1161–1162, 25 L.Ed.2d 491 (1970); see *ante*, at 2394.[9]

9. This "rational basis standard" was applied by the Court of Appeals. 628 F.2d 448, 458–461 (1980).

***249** The State contends primarily that § 21.031 serves to prevent undue depletion of its limited revenues available for education, and to preserve the fiscal integrity of the State's school-financing system against an ever-increasing flood of illegal aliens—aliens over whose entry or continued presence it has no control. Of course such fiscal concerns alone could not justify discrimination against a suspect class or an arbitrary and irrational denial of benefits to a particular group of persons. Yet I assume no Member of this Court would argue that prudent conservation of finite state revenues is *per se* an illegitimate goal. Indeed, the numerous classifications this Court has sustained in social welfare ****2412** legislation were invariably related to the limited amount of revenues available to spend on any given program or set of programs. See, *e.g., Jefferson v. Hackney*, 406 U.S., at 549–551, 92 S.Ct., at 1733–1734; *Dandridge v. Williams, supra*, at 487, 90 S.Ct., at 1162. The significant question here is whether the requirement of tuition from illegal aliens who attend the public schools—as well as from residents of other states, for example—is a rational and reasonable means of furthering the State's legitimate fiscal ends.[10]

10. The Texas law might also be justified as a means of deterring unlawful immigration. While regulation of immigration is an exclusively federal function, a state may take steps, consistent

with federal immigration policy, to protect its economy and ability to provide governmental services from the "deleterious effects" of a massive influx of illegal immigrants. *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976); *ante*, at 2400, n. 23. The Court maintains that denying illegal aliens a free public education is an "ineffectual" means of deterring unlawful immigration, at least when compared to a prohibition against the employment of illegal aliens. *Ante*, at 2401. Perhaps that is correct, but it is not dispositive; the Equal Protection Clause does not mandate that a state choose either the most effective and all-encompassing means of addressing a problem or none at all. *Dandridge v. Williams*, 397 U.S. 471, 486–487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). Texas might rationally conclude that more significant "demographic or economic problem[s]," *ante*, at 2401, are engendered by the illegal entry into the State of entire families of aliens for indefinite periods than by the periodic sojourns of single adults who intend to leave the State after short-term or seasonal employment. It blinks reality to maintain that the availability of governmental services such as education plays no role in an alien family's decision to enter, or remain in, this country; certainly, the availability of a free bilingual public education might well influence an alien to bring his children rather than travel alone for better job opportunities.

***250** Without laboring what will undoubtedly seem obvious to many, it simply is not "irrational" for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present. By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state. [11] In *DeCanas v. Bica*, 424 U.S. 351, 357, 96 S.Ct. 933, 937, 47 L.Ed.2d 43 (1976), we held that a State may protect its "fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens." And only recently this Court made clear that a State has a legitimate interest in protecting and preserving the quality of its schools and "the right of its own *bona fide residents* to attend such institutions on a preferential tuition basis." *Vlandis v. Kline*, 412 U.S. 441, 453, 93 S.Ct. 2230, 2237, 37 L.Ed.2d 63 (1973) (emphasis added). See also *Elkins v. Moreno*, 435 U.S. 647, 663–668, 98 S.Ct. 1338, 1348–1350, 55 L.Ed.2d 614 (1978). The Court has failed to offer even a plausible explanation why illegality of residence ***251** in this country is not a factor that may legitimately bear upon the bona fides of state residence and entitlement to the benefits of lawful residence.[12]

11. The Court suggests that the State's classification is improper because "[a]n illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen." *Ante*, at 2399. However, once an illegal alien is given federal permission to remain, he is no longer subject to exclusion from the tuition-free public schools under § 21.031. The Court acknowledges that the Tyler Independent School District provides a free public education to any alien who has obtained, *or is in the process of obtaining*, documentation from the United States Immigration and Naturalization Service. See *ante*, at 2389, n. 2. Thus, Texas has not taken it upon itself to determine which aliens are or are not entitled to United States residence. Justice BLACKMUN's assertion that the Texas statute will be applied to aliens "who may well be entitled to ... remain in the United States," *ante*, at 2405 (concurring opinion), is wholly without foundation.

12. The Court's opinion is disingenuous when it suggests that the State has merely picked a "disfavored group" and arbitrarily defined its members as nonresidents. *Ante*, at 2400, n. 22. Appellees' "disfavored status" stems from the very fact that federal law explicitly prohibits them from being in this country. Moreover, the analogies to Virginians or legally admitted Mexican citizens entering Texas, *ibid.*, are spurious. A Virginian's right to migrate to Texas, without penalty, is protected by the Constitution, see, *e.g., Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); and a lawfully admitted alien's right to enter the State is likewise protected by federal law. See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948). Cf. *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672.

*****2413*** It is significant that the Federal Government has seen fit to exclude illegal aliens from numerous social welfare programs, such as the food stamp program, 7 U.S.C. § 2015(f) (1976 ed. and Supp. IV) and 7 CFR § 273.4 (1981), the old-age assistance, aid to families with dependent children, aid to the blind, aid to the permanently and totally disabled, and supplemental security income programs, 45 CFR § 233.50 (1981), the Medicare hospital insurance benefits program, 42 U.S.C. § 1395i–2 and 42 CFR § 405.205(b) (1981), and the Medicaid hospital insurance benefits for the aged and disabled program, 42 U.S.C. § 1395 and 42 CFR § 405.103(a)(4) (1981). Although these exclusions do not conclusively demonstrate the constitutionality of the State's use of the same classification for comparable purposes, at the very least they tend to support the rationality of excluding illegal alien residents of a state from such programs so as to preserve the state's finite revenues for the benefit of lawful residents. See *Mathews v. Diaz*, 426 U.S., at 80, 96 S.Ct., at 1891; see also n. 7, *supra.*

The Court maintains—as if this were the issue—that "barring undocumented children from local schools would not necessarily improve the quality of education provided in those ****252*** schools." *Ante*, at 2401. See 458 F.Supp. 569, 577 (ED Tex.1978).[13] However, the legitimacy of barring illegal aliens from programs such as Medicare or Medicaid does not depend on a showing that the barrier would "improve the quality" of medical care given to persons lawfully entitled to participate in such programs. Modern education, like medical care, is enormously expensive, and there can be no doubt that very large added costs will fall on the State or its local school districts as a result of the inclusion of illegal aliens in the tuition-free public schools. The State may, in its discretion, use any savings resulting from its tuition requirement to "improve the quality of education" in the public school system, or to enhance the funds available for other social programs, or to reduce the tax burden placed on its residents; each of these ends is "legitimate." The State need not show, as the Court implies, that the incremental cost of educating illegal aliens will send it into bankruptcy, or have a " 'grave impact on the quality of education,' " *ante*, at 2401; that is not dispositive under a "rational basis" scrutiny. In the absence of a constitutional imperative to provide for the education of illegal aliens, the State may "rationally" choose to take advantage of whatever savings will accrue from limiting access to the tuition-free public schools to its own lawful residents, excluding even citizens of neighboring States.[14]

13. The District Court so concluded primarily because the State would decrease its funding to local school districts in proportion to the exclusion of illegal alien children. 458 F.Supp., at 577.

14. I assume no Member of the Court would challenge Texas' right to charge tuition to students

residing across the border in Louisiana who seek to attend the nearest school in Texas.

Denying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public schools may well outweigh the costs of educating them. But that is not the issue; the fact ***253** that there are sound *policy* arguments against the Texas Legislature's choice does not render that choice an unconstitutional one.

II

The Constitution does not provide a cure for every social ill, nor does it vest judges ***2414** with a mandate to try to remedy every social problem. *Lindsey v. Normet*, 405 U.S., at 74, 92 S.Ct., at 874. See *Reynolds v. Sims*, 377 U.S. 533, 624–625, 84 S.Ct. 1362, 1414, 12 L.Ed.2d 506 (1964) (Harlan, J., dissenting). Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy. Today's cases, I regret to say, present yet another example of unwarranted judicial action which in the long run tends to contribute to the weakening of our political processes.[15]

15. Professor Bickel noted that judicial review can have a "tendency over time seriously to weaken the democratic process." A. Bickel, The Least Dangerous Branch 21 (1962). He reiterated James Bradley Thayer's observation that

> " 'the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.' "

Id., at 22 (quoting J. Thayer, John Marshall 106–107 (1901)).

Congress, "vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens," *ante*, at 2405 (POWELL, J., concurring), bears primary responsibility for addressing the problems occasioned by the millions of illegal aliens flooding across our southern border. Similarly, it is for Congress, and not this Court, to ***254** assess the "social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Ante*, at 2397; see *ante*, at 2398. While the "specter of a permanent caste" of illegal Mexican residents of the United States is indeed a disturbing one, see *ante*, at 2395–2396, it is but one segment of a larger problem, which is for the political branches to solve. I find it difficult to believe that Congress would long tolerate such a self-destructive result—that it would fail to deport these illegal alien families or to provide for the education of their children. Yet instead of allowing the political processes to run their course—albeit with some delay—the Court seeks to do Congress' job for it, compensating for congressional inaction. It is not unreasonable to think that this encourages the political branches to pass their problems to the Judiciary.

The solution to this seemingly intractable problem is to defer to the political processes, unpalatable as that may be to some.

Wisconsin v. Yoder, 406 U.S. 205 (US Supreme Court 1972).

Syllabus[*]

> * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondents, members of the Old Order Amish religion and the Conservative Amish Mennonite Church, were convicted of violating Wisconsin's compulsory school attendance law (which requires a child's school attendance until age 16) by declining to send their children to public or private school after they had graduated from the eighth grade. The evidence showed that the Amish provide continuing informal vocational education to their children designed to prepare them for life in the rural Amish community. The evidence also showed that respondents sincerely believed that high school attendance was contrary to the Amish religion and way of life and that they would endanger their own salvation and that of their children by complying with the law. The State Supreme Court sustained respondents' claim that application of the compulsory school-attendance law to them violated their rights under the Free Exercise Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. Held:

1. The State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest in parents with respect to the religious upbringing of their children. Pp. 1532—1533.

2. Respondents have amply supported their claim that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs. Pp. 1533—1535.

3. Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish have demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continuing survival of Old Order Amish communities, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have ***206*** carried the difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of the overall interests that the State relies on in support of its program of compulsory high school education. In light of this showing, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. Pp. 1535-1540.

*****1529*** 4. The State's claim that it is empowered, as parens patriae, to extend the benefit of secondary education to children regardless of the wishes of their parents cannot be sustained against a free

exercise claim of the nature revealed by this record, for the Amish have introduced convincing evidence that accommodating their religious objections by foregoing one or two additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society. Pp. 1540—1542.

***207** Mr. Chief Justice BURGER delivered the opinion of the Court.

On petition of the State of Wisconsin, we granted the writ of certiorari in this case to review a decision of the Wisconsin Supreme Court holding that respondents' convictions for violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. For the reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin.

Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. They and their families are residents of Green County, Wisconsin. Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they complete the eighth grade.[1] The children were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law,[2] and they are conceded to be subject to the Wisconsin statute.

1. The children, Frieda Yoder, aged 15, Barbara Miller, aged 15, and Vernon Yutzy, aged 14, were all graduates of the eighth grade of public school.

2. Wis. Stat. § 118.15 (1969) provides in pertinent part: '118.15 Compulsory school attendance '(1)(a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age. '(3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school. '(4) Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside. '(5) Whoever violates this section . . . may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both.' Section 118.15(1)(b) requires attendance to age 18 in a school district containing a 'vocational, technical and adult education school,' but this section is concededly inapplicable in this case, for there is no such school in the district involved.

***208** On complaint of the school district administrator for the public schools, respondents were charged, tried, and convicted of violating the compulsory-attendance law in Green County Court and ****1530** were fined the sum of $5 each.[3] Respondents defended on the ground that the application ***209** of the compulsory-attendance law violated their rights under the First and Fourteenth Amendments. [4] The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

> 3. Prior to trial, the attorney for respondents wrote the State Superintendent of Public Instruction in an effort to explore the possibilities for a compromise settlement. Among other possibilities, he suggested that perhaps the State Superintendent could administratively determine that the Amish could satisfy the compulsory-attendance law by establishing their own vocational training plan similar to one that has been established in Pennsylvania. Supp. App. 6. Under the Pennsylvania plan, Amish children of high school age are required to attend an Amish vocational school for three hours a week, during which time they are taught such subjects as English, mathematics, health, and social studies by an Amish teacher. For the balance of the week, the children perform farm and household duties under parental supervision, and keep a journal of their daily activities. The major portion of the curriculum is home projects in agriculture and homemaking. See generally J. Hostetler & G. Huntington, Children in Amish Society: Socialization and Community Education, c. 5 (1971). A similar program has been instituted in Indiana. Ibid. See also Iowa Code § 299.24 (1971); Kan. Stat. Ann. § 72—1111 (Supp. 1971).The Superintendent rejected this proposal on the ground that it would not afford Amish children 'substantially equivalent education' to that offered in the schools of the area. Supp. App. 6.

> 4. The First Amendment provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ..'

In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. The history of the Amish ***210** sect was given in some detail, beginning with the Swiss Anabaptists of the 16th century who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.

A related feature of Old Order Amish communities is their devotion to a life in harmony with nature

and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the Ordnung, or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of ****1531*** the Jews, to abide by the rules of the church community. [5]

> 5. See generally J. Hostetler, Amish Society (1968); J. Hostetler & G. Huntington, Children in Amish Society (1971); Littell, Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?, in Public Controls for Nonpublic Schools 61 (G. Erickson ed. 1969).

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach ***211* are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into ***212* the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the 'three R's' in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does

not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local schools of the past. In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.

On the basis of such considerations, Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States *****1532*** today. The testimony of Dr. Donald A. Erickson, an expert witness on education, also showed that the Amish succeed in preparing their high school age children to be productive members of the Amish community. He described their system of learning through doing the skills directly relevant to their adult roles in the Amish community as 'ideal' and perhaps superior to ordinary high school education. The evidence also showed that the Amish have an excellent ****213*** record as law-abiding and generally self-sufficient members of society.

Although the trial court in its careful findings determined that the Wisconsin compulsory school-attendance law 'does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief' it also concluded that the requirement of high school attendance until age 16 was a 'reasonable and constitutional' exercise of governmental power, and therefore denied the motion to dismiss the charges. The Wisconsin Circuit Court affirmed the convictions. The Wisconsin Supreme Court, however, sustained respondents' claim under the Free Exercise Clause of the First Amendment and reversed the convictions. A majority of the court was of the opinion that the State had failed to make an adequate showing that its interest in 'establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion.' 49 Wis.2d 430, 447, 182 N.W.2d 539, 547 (1971).

I

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their off-spring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing ****214*** and education of their children in their early and formative years have a high place in our society. See also Ginsberg v. New York, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); cf. Rowan v. United States Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, 'prepare (them) for

additional obligations.' 268 U.S., at 535, 45 S.Ct., at 573.

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating *****1533*** to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress. ****215*** Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). See also Everson v. Board of Education, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947).

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. E.g., Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); McGowan v. Maryland, 366 U.S. 420, 459, 81 S.Ct. 1101, 1122, 6 L.Ed.2d 393 (1961) (separate opinion of Frankfurter, J.); Prince v. Massachusetts, 321 U.S. 158, 165, 64 S.Ct. 438, 441, 88 L.Ed. 645 (1944).

II

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forbears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question,[6] the very concept of ordered liberty precludes ****216*** allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

6. See Welsh v. United States, 398 U.S. 333, 351—361, 90 S.Ct. 1792, 1802—1807, 26 L.Ed.2d 308 (1970) (Harlan, J., concurring in result); United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944).

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world . . ..' This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and *****1534*** determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education.[7] The respondents****217*** freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call 'life style' have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and 'worldly' influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

7. See generally R. Butts & L. Cremin, A History of Education in American Culture (1953); L. Cremin, The Transformation of the School (1961).

As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict.[8] ****218*** The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish

faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

8. Hostetler, supra, n. 5, c. 9; Hostetler & Huntington, supra, n. 5.

The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. See Braunfeld v. Brown, 366 U.S. 599, 605, 81 S.Ct. 1144, 1147, 6 L.Ed.2d 563 (1961). Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into ***1535** society at large, or be forced to migrate to some other and more tolerant region.[9]

9. Some States have developed working arrangements with the Amish regarding high school attendance. See n. 3, supra. However, the danger to the continued existence of an ancient religious faith cannot be ignored simply because of the assumption that its adherents will continue to be able, at considerable sacrifice, to relocate in some more tolerant State or country or work out accommodations under threat of criminal prosecution. Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses. See, e.g., Everson v. Board of Education, 330 U.S. 1, 9—10, 67 S.Ct. 504, 508—509, 91 L.Ed. 711 (1947); Madison, Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183 (G. Hunt ed. 1901).

***219** In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

III

Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion—indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.

Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the

State's control, but it argues that ‘actions,’ even though religiously grounded, are outside the protection of the First Amendment. [10] But our decisions have rejected the idea that ***220** religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, e.g., Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971); Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1879). But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. E.g., Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303—304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). This case, therefore, does not become easier because respondents were convicted for their ‘actions' in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in ****1536** logic-tight compartments. Cf. Lemon v. Kurtzman, 403 U.S., at 612, 91 S.Ct., at 2111, 29 L.Ed.2d 745.

> 10. That has been the apparent ground for decision in several previous state cases rejecting claims for exemption similar to that here. See, e.g., State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), cert. denied, 389 U.S. 51, 88 S.Ct. 236, 19 L.Ed.2d 50 (1967); State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951).

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. Sherbert v. Verner, supra; cf. Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). The Court must not ignore the danger that an exception ***221** from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses

> ‘we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a ‘tight rope’ and one we have successfully traversed.' Walz v. Tax Commission, supra, at 672, 90 S.Ct., at 1413.

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping

claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption. See, e.g., Sherbert v. Verner, supra; Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

222 However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. See Meyer v. Nebraska, 262 U.S., at 400, 43 S.Ct., at 627, 67 L.Ed. 1042.

The State attacks respondents' position as one fostering 'ignorance' from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful*****1537*** social unit within our society, even if apart from the conventional 'mainstream.' Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.[11]

> 11. Title 26 U.S.C. § 1402(h) authorizes the Secretary of Health, Education, and Welfare to exempt members of 'a recognized religious sect' existing at all times since December 31, 1950, from the obligation to pay social security taxes if they are, by reason of the tenets of their sect, opposed to receipt of such benefits and agree to waive them, provided the Secretary finds that the sect makes reasonable provision for its dependent members. The history of the exemption shows it was enacted with the situation of the Old Order Amish specifically in view. H.R.Rep.No.213, 89th Cong., 1st Sess., 101—102 (1965).The record in this case establishes without contradiction that the Green County Amish had never been known to commit crimes, that none had been known to receive public assistance, and that none were unemployed.

223 It is neither fair nor correct to suggests that the Amish are opposed to education beyond the eighth grade level. What this record shows is that they are opposed to conventional formal education of the type provided by a certified high school because it comes at the child's crucial adolescent period

of religious development. Dr. Donald Erickson, for example, testified that their system of learning-by-doing was an 'ideal system' of education in terms of preparing Amish children for life as adults in the Amish community, and that 'I would be inclined to say they do a better job in this than most of the rest of us do.' As he put it, 'These people aren't purporting to be learned people, and it seems to me the self-sufficiency of the community is the best evidence I can point to—whatever is being done seems to function well.' [12]

> 12. Dr. Erickson had previously written: 'Many public educators would be elated if their programs were as successful in preparing students for productive community life as the Amish system seems to be. In fact, while some public schoolmen strive to outlaw the Amish approach, others are being forced to emulate many of its features.' Erickson, Showdown at an Amish Schoolhouse: A Description and Analysis of the Iowa Controversy, in Public Controls for Nonpublic Schools 15, 53 (D. Erickson ed. 1969). And see Littell, supra, n. 5, at 61.

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is ***224** 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life. The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings. Indeed, this argument of the State appears to rest primarily on the State's mistaken assumption, already noted, that the Amish do not provide any education for their children beyond the eighth grade, but ****1538** allow them to grow in 'ignorance.' To the contrary, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an 'ideal' vocational education for their children in the adolescent years.

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the ***225** State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.[13] When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ***226** ideal of a democratic society.[14] Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.

13. All of the children involved in this case are graduates of the eighth grade. In the county court, the defense introduced a study by Dr. Hostetler indicating that Amish children in the eighth grade achieved comparably to non-Amish children in the basic skills. Supp. App. 9—11. See generally Hostetler & Huntington, supra, n. 5, at 88—96.

14. While Jefferson recognized that education was essential to the welfare and liberty of the people, he was reluctant to directly force instruction of children 'in opposition to the will of the parent.' Instead he proposed that state citizenship be conditioned on the ability to 'read readily in some tongue, native or acquired.' Letter from Thomas Jefferson to Joseph Cabell, Sept. 9, 1817, in 17 Writings of Thomas Jefferson 417, 423—424 (Mem. ed. 1904). And it is clear that, so far as the mass of the people were concerned, he envisaged that a basic education in the 'three R's' would sufficiently meet the interests of the State. He suggested that after completion of elementary school, 'those destined for labor will engage in the business of agriculture, or enter into apprenticeships to such handicraft art as may be their choice.' Letter from Thomas Jefferson to Peter Carr, Sept. 7, 1814, in Thomas Jefferson and Education in a Republic 93—106 (Arrowood ed. 1930). See also id., at 60—64, 70, 83, 136—137.

The requirement for compulsory education beyond the eighth grade is a relatively recent development in our history. Less than 60 years ago, the educational requirements of almost all of the States were satisfied by completion of the elementary grades, at least where the child was regularly and lawfully employed.[15] *****1539*** The independence****227*** and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country are strong evidence that there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail.

15. See Dept. of Interior, Bureau of Education, Bulletin No. 47, Digest of State Laws Relating to Public Education 527—559 (1916); Joint Hearings on S. 2475 and H.R. 7200 before the Senate

Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., pt. 2, p. 416.Even today, an eighth grade education fully satisfies the educational requirements of at least six States. See Ariz. Rev. Stat. Ann. § 15—321, subsec. B, par. 4 (1956); Ark. Stat. Ann. § 80—1504 (1947); Iowa Code § 299.2 (1971); S.D. Comp. Laws Ann. § 13—27—1 (1967); Wyo. Stat. Ann. § 21.1—48 (Supp.1971). (Mississippi has no compulsory education law.) A number of other States have flexible provisions permitting children aged 14 or having completed the eighth grade to be excused from school in order to engage in lawful employment. E.g., Colo. Rev. Stat. Ann. §§ 123—20—5, 80—6—1 to 80—6—12 (1963); Conn. Gen. Stat. Rev. §§ 10—184, 10—189 (1964); D.C. Code Ann. §§ 31—202, 36—201 to 36—228 (1967); Ind. Ann. Stat. §§ 28—505 to 28—506, 28—519 (1948); Mass. Gen. Laws Ann., c. 76, § 1 (Supp. 1972) and c. 149, § 86 (1971); Mo. Rev. Stat. §§ 167.031, 294.051 (1969); Nev. Rev. Stat. § 392.110 (1968); N.M. Stat. Ann. § 77—10—6 (1968). An eighth grade education satisfied Wisconsin's formal education requirements until 1933. See Wis. Laws 1927, c. 425, § 97; Laws 1933, c. 143. (Prior to 1933, provision was made for attendance at continuation or vocational schools by working children past the eighth grade, but only if one was maintained by the community in question.) For a general discussion of the early development of Wisconsin's compulsory education and child labor laws, see F. Ensign, Compulsory School Attendance and Child Labor 203—230 (1921).

We should also note that compulsory education and child labor laws find their historical origin in common humanitarian instincts, and that the age limits of both laws have been coordinated to achieve their related objectives.[16] In the context of this case, such considerations,***228** if anything, support rather than detract from respondents' position. The origins of the requirement for school attendance to age 16, an age falling after the completion of elementary school but before completion of high school, are not entirely clear. But to some extent such laws reflected the movement to prohibit most child labor under age 16 that culminated in the provisions of the Federal Fair Labor Standards Act of 1938.[17] It is true, then, that the 16-year child labor age limit may to some degree derive from a contemporary impression that children should be in school until that age. But at the same time, it cannot be denied that, conversely, the 16-year education limit reflects, in substantial measure, the concern that children under that age not be employed under conditions hazardous to their health, or in work that should be performed by adults.

16. See, e.g., Joint Hearings, supra, n. 15, pt. 1, at 185—187 (statement of Frances Perkins, Secretary of Labor), pt. 2, at 381—387 (statement of Katherine Lenroot, Chief, Children's Bureau, Department of Labor); National Child Labor Committee, 40th Anniversary Report, The Long Road (1944); 1 G. Abbott, The Child and the State 259—269, 566 (Greenwood reprint 1968); L. Cremin, The Transformation of the School, c. 3 (1961); A. Steinhilber & C. Sokolowski, State Law on Compulsory Attendance 3—4 (Dept. of Health, Education, and Welfare 1966).

17. 52 Stat. 1060, as amended, 29 U.S.C. §§ 201—219.

The requirement of compulsory schooling to age 16 must therefore be viewed as aimed not merely at providing educational opportunities for children, but as an alternative to the equally undesirable consequence of unhealthful child labor displacing adult workers, or, on the other hand, forced

idleness.[18] The two kinds of statutes—compulsory school attendance and child labor laws—tend to keep children of certain ages off the labor market and in school; this regimen in *****1540*** turn provides opportunity to prepare for a livelihood of a higher order than that which children could pursue without education and protects their health in adolescence.

18. See materials cited n. 16, supra; Casad, Compulsory Education and Individual Rights, in 5 Religion and the Public Order 51, 82 (D. Giannella ed. (1969).

In these terms, Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance****229*** for children generally. For, while agricultural employment is not totally outside the legitimate concerns of the child labor laws, employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objectives of such laws.[19] There is no intimation that the Amish employment of their children on family farms is in any way deleterious to their health or that Amish parents exploit children at tender years. Any such inference would be contrary to the record before us. Moreover, employment of Amish children on the family farm does not present the undesirable economic aspects of eliminating jobs that might otherwise be held by adults.

19. See, e.g., Abbott, supra, n. 16 at 266. The Federal Fair Labor Standards Act of 1938 excludes from its definition of '(o)ppressive child labor' employment of a child under age 16 by 'a parent . . . employing his own child . . . in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being.' 29 U.S.C. § 203(l).

IV

Finally, the State, on authority of Prince v. Massachusetts, argues that a decision exempting Amish children from the State's requirement fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as parens patriae to extend the benefit of secondary education to children regardless of the wishes of their parents. Taken at its broadest sweep, the Court's language in Prince, might be read to give support to the State's position. However, the Court was not confronted in Prince with a situation comparable to that of the Amish as revealed in this record; this is shown by the ****230*** Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult. 321 U.S., at 169—170, 64 S.Ct., at 443—444. The Court later took great care to confine Prince to a narrow scope in Sherbert v. Verner, when it stated:

> 'On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, (it) is not totally free from legislative restrictions.' Braunfeld v. Brown, 366 U.S. 599, 603, 81 S.Ct. 1144, 1146, 6 L.Ed.2d 563. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244; Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; Prince v. Massachusetts, 321

U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 . . . .' 374 U.S., at 402—403, 83 S.Ct., at 1793.

This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.[20] The record is to the contrary, and *****1541*** any reliance on that theory would find no support in the evidence.

20. Cf. e.g., Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905); Wright v. DeWitt School District, 238 Ark. 906, 385 S.W.2d 644 (1965); Application of President and Directors of Georgetown College, Inc., 118 U.S. App. D.C. 80, 87—90, 331 F.2d 1000, 1007—1010 (1964) (in-chambers opinion), cert. denied, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964).

Contrary to the suggestion of the dissenting opinion of Mr. Justice DOUGLAS, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it ****231*** is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation. The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary. [21] The State's position from the outset has been that it is empowered to apply its compulsory-attendance law to Amish parents in the same manner as to other parents—that is, without regard to the wishes of the child. That is the claim we reject today.

21. The only relevant testimony in the record is to the effect that the wishes of the one child who testified corresponded with those of her parents. Testimony of Frieda Yoder, Tr. 92—94, to the effect that her personal religious beliefs guided her decision to discontinue school attendance after the eighth grade. The other children were not called by either side.

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here ****232*** and those presented in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). On this record we neither reach nor decide those issues.

The State's argument proceeds without reliance on any actual conflict between the wishes of parents

and children. It appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory-education law might allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world. The same argument could, of course, be made with respect to all church schools short of college. There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14—16 if they are placed in a church school of the parents' faith.

Indeed it seems clear that if the State is empowered, as parens patriae, to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in Prince, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate *****1542*** as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in Pierce v. Society of Sisters, in which the Court observed:

> 'Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1146, we think it entirely plain that the Act ****233*** of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' 268 U.S., at 534—535, 45 S.Ct., at 573.

The duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship. Pierce, of course, recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.

However read, the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince ****234*** if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in

this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

In the fact of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a parens patriae claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State.

V

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.[22] Our disposition of this case, *****1543*** however, in no way ****235*** alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life.

> 22. What we have said should meet the suggestion that the decision of the Wisconsin Supreme Court recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion. In Walz v. Tax Commission, the Court saw the three main concerns against which the Establishment Clause sought to protect as 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970). Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose. Such an accommodation 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.' Sherbert v. Verner, 374 U.S. 398, 409, 83 S.Ct. 1790, 1797, 10 L.Ed.2d 965 (1963).

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and

their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing***236** showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. Sherbert v. Verner, supra.

Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.[23]

> 23. Several States have now adopted plans to accommodate, Amish religious beliefs through the establishment of an 'Amish vocational school.' See n. 3, supra. These are not schools in the traditional sense of the word. As previously noted, respondents attempted to reach a compromise with the State of Wisconsin patterned after the Pennsylvania plan, but those efforts were not productive. There is no basis to assume that Wisconsin will be unable to reach a satisfactory accommodation with the Amish in light of what we now hold, so as to serve its interests without impinging on respondents' protected free exercise of their religion.

Affirmed.

*****1544*** Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

****237*** Mr. Justice STEWART, with whom Mr. Justice BRENNAN joins, concurring.

This case involves the constitutionality of imposing criminal punishment upon Amish parents for their religiously based refusal to compel their children to attend public high schools. Wisconsin has sought to brand these parents as criminals for following their religious beliefs, and the Court today rightly holds that Wisconsin cannot constitutionally do so.

This case in no way involves any questions regarding the right of the children of Amish parents to attend public high schools, or any other institutions of learning, if they wish to do so. As the Court points out, there is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents. Only one of the children testified. The last two

questions and answers on her cross-examination accurately sum up her testimony:

> 'Q. So I take it then, Frieda, the only reason you are not going to school, and did not go to school since last September, is because of your religion?
>
> 'A. Yes.
>
> 'Q. That is the only reason?
>
> 'A. Yes.' (Emphasis supplied.)

It is clear to me, therefore, that this record simply does not present the interesting and important issue discussed in Part II of the dissenting opinion of Mr. Justice DOUGLAS. With this observation, I join the opinion and the judgment of the Court.

Mr. Justice WHITE, with whom Mr. Justice BRENNAN and Mr. Justice STEWART join, concurring.

Cases such as this one inevitably call for a delicate balancing of important but conflicting interests. I join the opinion and judgment of the Court because I cannot ***238** say that the State's interest in requiring two more years of compulsory education in the ninth and tenth grades outweighs the importance of the concededly sincere Amish religious practice to the survival of that sect.

This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State. Since the Amish children are permitted to acquire the basic tools of literacy to survive in modern society by attending grades one through eight and since the deviation from the State's compulsory-education law is relatively slight, I conclude that respondents' claim must prevail, largely because 'religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society.' Braunfeld v. Brown, 366 U.S. 599, 612, 81 S.Ct. 1144, 1150, 6 L.Ed.2d 563 (1961) (Brennan, J., concurring and dissenting).

The importance of the state interest asserted here cannot be denigrated, however:

> 'Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.' Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954).

*****1545 *239*** As recently as last Term, the Court reemphasized the legitimacy of the State's concern for enforcing minimal educational standards. Lemon v. Kurtzman, 403 U.S., 602, 613, 91 S.Ct. 2105, 2111,

29 L.Ed.2d 745 (1971).[1] Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in Pierce, both the parochial and military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not pre-empt the educational process by requiring children to attend public schools. [2] In the present case, the State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children, whether Amish or non-Amish: to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance. It is possible that most Amish ***240** children will wish to continue living the rural life of their parents, in which case their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary. There is evidence in the record that many children desert the Amish faith when they come of age.[3] A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past. In the circumstances of this case, although the question is close, I am unable to say that the State has demonstrated that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire new academic skills later. The statutory minimum school attendance age set by the State is, after all, only 16.

1. The challenged Amish religious practice here does not pose a substantial threat to public safety, peace, or order; if it did, analysis under the Free Exercise Clause would be substantially different. See Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Cleveland v. United States, 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12 (1946); Application of President and Directors of Georgetown College, Inc., 118 U.S. App. D.C. 80, 331 F.2d 1000, cert. denied, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964).

2. 'No question is raised concerning the power of the State reasonably to regulate all schools, the inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.' Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925).

3. Dr. Hostetler testified that though there was a gradual increase in the total number of Old Order Amish in the United States over the past 50 years, 'at the same time the Amish have also lost members (of) their church' and that the turnover rate was such that 'probably two-thirds (of the present Amish) have been assimilated non-Amish people.' App. 110. Justice Heffernan, dissenting below, opined that '(l)arge numbers of young people voluntarily leave the Amish community each year and are thereafter forced to make their way in the world.' 49 Wis.2d 430, 451, 182 N.W.2d 539, 549 (1971).

Decision in cases such as this and the administration of an exemption for Old Order Amish from the State's compulsory school-attendance laws will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices, as is exemplified in today's opinion, which the Court has heretofore been anxious to avoid. But such entanglement does not create a forbidden *****1546*** establishment of religion where it is essential to implement free ****241*** exercise values threatened by an otherwise neutral program instituted to foster some permissible, nonreligious state objective. I join the Court because the sincerity of the Amish religious policy here is uncontested, because the potentially adverse impact of the state requirement is great, and because the State's valid interest in education has already been largely satisfied by the eight years the children have already spent in school.

Mr. Justice DOUGLAS, dissenting in part.

I

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.

It is argued that the right of the Amish children to religious freedom is not presented by the facts of the case, as the issue before the Court involves only the Amish parents' religious freedom to defy a state criminal statute imposing upon them an affirmative duty to cause their children to attend high school.

First, respondents' motion to dismiss in the trial court expressly asserts, not only the religious liberty of the adults, but also that of the children, as a defense to the prosecutions. It is, of course, beyond question that the parents have standing as defendants in a criminal prosecution to assert the religious interests of their ****242*** children as a defense.[1] Although the lower courts and a majority of this Court assume an identity of interest between parent and child, it is clear that they have treated the religious interest of the child as a factor in the analysis.

> 1. Thus, in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, a Jehovah's Witness was convicted for having violated a state child labor law by allowing her nine-year-old niece and ward to circulate religious literature on the public streets. There, as here, the narrow question was the religious liberty of the adult. There, as here, the Court analyzed the problem from the point of view of the State's conflicting interest in the welfare of the child. But, as Mr. Justice Brennan, speaking for the Court, has so recently pointed out, 'The Court (in Prince) implicitly held that the custodian had standing to assert alleged freedom of religion . . . rights of the child that were threatened in the very litigation before the Court and that the child had no effective way of asserting herself.' Eisenstadt v. Baird, 405 U.S. 438, 446 n. 6, 92 S.Ct. 1029, 1034, 31 L.Ed.2d 349. Here, as in Prince, the children have no effective alternate means to vindicate their rights. The question, therefore, is squarely before us.

Second, it is essential to reach the question to decide the case, not only because the question was squarely raised in the motion to dismiss, but also because no analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. As in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, it is an imposition resulting from this very litigation. As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.

*****1547 *243*** Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit. Frieda Yoder has in fact testified that her own religious views are opposed to high-school education. I therefore join the judgment of the Court as to respondent Jonas Yoder. But Frieda Yoder's views may not be those of Vernon Yutzy or Barbara Miller. I must dissent, therefore, as to respondents Adin Yutzy and Wallace Miller as their motion to dismiss also raised the question of their children's religious liberty.

II

This issue has never been squarely presented before today. Our opinions are full of talk about the power of the parents over the child's education. See Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042. And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child. See Prince v. Massachusetts, supra. Recent cases, however, have clearly held that the children themselves have constitutionally protectable interests.

These children are ‘persons' within the meaning of the Bill of Rights. We have so held over and over again. In Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224, we extended the protection of the Fourteenth Amendment in a state trial of a 15-year-old boy. In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527, we held that ‘neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.’ In In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment.

****244*** In Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, we dealt with 13-year-old, 15-year-old, and 16-year-old students who wore armbands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged.

> ‘Students in school as well as out of school are ‘persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.’ Id., at 511, 89 S.Ct., at 739.

In West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, we held that school-children, whose religious beliefs collided with a school rule requiring them to salute the flag, could not be required to do so. While the sanction included expulsion of the students and prosecution of the parents, id., at 630, 63 S.Ct., at 1181, the vice of the regime was its interference with the child's free exercise of religion. We said: 'Here . . . we are dealing with a compulsion of students to declare a belief.' Id., at 631, 63 S.Ct., at 1182. In emphasizing the important and delicate task of boards of education we said:

> 'That they 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.' Id., at 637, 63 S.Ct., at 1185.

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an *****1548*** oceanographer.****245*** To do so he will have to break from the Amish tradition. [2]

> 2. A significant number of Amish children do leave the Old Order. Professor Hostetler notes that '(t)he loss of members is very limited in some Amish districts and considerable in others.' J. Hostetler, Amish Society 226 (1968). In one Pennsylvania church, he observed a defection rate of 30%. Ibid. Rates up to 50% have been reported by others. Casad, Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber, 16 Kan. L. Rev. 423, 434 n. 51 (1968).

It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.[3] If he is harnessed to the Amish way of life ****246*** by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

> 3. The court below brushed aside the students' interests with the offhand comment that '(w)hen a child reaches the age of judgment, he can choose for himself his religion.' 49 Wis.2d 430, 440, 182 N.W.2d 539, 543. But there is nothing in this record to indicate that the moral and intellectual judgment demanded of the student by the question in this case is beyond his capacity. Children far younger than the 14- and 15-year-olds involved here are regularly permitted to testify in custody and other proceedings. Indeed, the failure to call the affected child in a custody hearing is often reversible error. See, e.g., Callicott v. Callicott, 364 S.W.2d 455 (Tex. Civ. App.) (reversible error for trial judge to refuse to hear testimony of eight-year-old in custody battle). Moreover, there is substantial agreement among child psychologists and

sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult. See, e.g., J. Piaget, The Moral Judgment of the Child (1948); D. Elkind, Children and Adolescents 75—80 (1970); Kohlberg, Moral Education in the Schools: A Development View, in R. Muuss, Adolescent Behavior and Society 193, 199—200 (1971); W. Kay, Moral Development 172—183 (1968); A. Gesell & F. Ilg, Youth: The Years From Ten to Sixteen 175—182 (1956). The maturity of Amish youth, who identify with and assume adult roles from early childhood, see M. Goodman, The Culture of Childhood 92—94 (1970), is certainly not less than that of children in the general population.

The views of the two children in question were not canvassed by the Wisconsin courts. The matter should be explicitly reserved so that new hearings can be held on remand of the case.[4]

4. Canvassing the views of all school-age Amish children in the State of Wisconsin would not present insurmountable difficulties. A 1968 survey indicated that there were at that time only 256 such children in the entire State. Comment, 1971 Wis. L. Rev. 832, 852 n. 132.

III

I think the emphasis of the Court on the 'law and order' record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. I am not at all sure how the Catholics, Episcopalians, the Baptists, Jehovah's Witnesses, the Unitarians, and my own Presbyterians would make out if subjected to such a test. It is, of course, true that if a group or society was organized to perpetuate crime and if that is its motive, we would have rather startling problems akin to those that were raised when some years back a particular sect was challenged here as operating on a fraudulent basis. United States v. Ballard, 322 U.S. 78, 64 S.Ct. 822, 88 L.Ed. 1148. But no such factors are present here, and the *****1549*** Amish, whether with a high or low criminal****247*** record,[5] certainly qualify by all historic standards as a religion within the meaning of the First Amendment.

5. The observation of Justice Heffernan, dissenting below, that the principal opinion in his court portrayed the Amish as leading a life of 'idyllic agrarianism,' is equally applicable to the majority opinion in this Court. So, too, is his observation that such a portrayal rests on a 'mythological basis.' Professor Hostetler has noted that '(d)rinking among the youth is common in all the large Amish settlements.' Amish Society 283. Moreover, '(i)t would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation.' Id., at 300. He also notes an unfortunate Amish 'preoccupation with filthy stories,' id., at 282, as well as significant 'rowdyism and stress.' Id., at 281. These are not traits peculiar to the Amish, of course. The point is that the Amish are not people set apart and different.

The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of Reynolds v. United States, 98 U.S. 145, 164, 25 L.Ed. 244, where it was said concerning the reach of the Free Exercise Clause of the First Amendment, 'Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.' In that case it was conceded that polygamy was a part of the religion of the

Mormons. Yet the Court said, 'It matters not that his belief (in polygamy) was a part of his professed religion: it was still belief and belief only.' Id., at 167, 25 L.Ed. 244.

Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time Reynolds will be overruled.

In another way, however, the Court retreats when in reference to Henry Thoreau it says his 'choice was philosophical***248** and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.' That is contrary to what we held in United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733, where we were concerned with the meaning of the words 'religious training and belief' in the Selective Service Act, which were the basis of many conscientious objector claims. We said:

> 'Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.' Id., at 176, 85 S.Ct., at 859.

Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308, was in the same vein, the Court saying: 'In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:

> "I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to 'defend' our 'way of life' profoundly change that way of life. I see that in our failure to *****1550 *249*** recognize the political, social, and economic realities of the world, we, as a nation, fail our responsibility as a nation." id., at 342, 90 S.Ct., at 1797.

The essence of Welsh's philosophy, on the basis of which we held he was entitled to an exemption, was in these words:

> "I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding 'duty' to abstain from violence toward another person) is not 'superior to those arising from any human relation.' On the contrary: it is essential to every human relation. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant."

Id., at 343, 90 S.Ct., at 1798.

I adhere to these exalted views of ‘religion’ and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race. United States v. Seeger, 380 U.S., at 192—193, 85 S.Ct., at 867—868 (concurring opinion).

Combs v. Homer-Center School District, 540 F.3d 231 (Federal Appeals Court, 3rd Circuit, 2008).

PER CURIAM.

At issue is whether certain parents who home-school their children must comply with the reporting and review requirements of Pennsylvania's compulsory education law. Compliance, the parents contend, would violate their sincerely held religious beliefs. The Commonwealth of Pennsylvania demurs, contending its compulsory education law neither substantially burdens the free exercise of religion nor transgresses neutral application to all citizens, and serves an important state interest in ensuring a minimal level of education for all children.

Plaintiffs appeal from the grant of summary judgment for defendants in an action seeking declaratory relief and an injunction prohibiting enforcement of 24 Pa. Stat. Ann. § 13–1327.1 ("Act 169") and prosecution under Pennsylvania's compulsory education laws. Defendants are school districts in Pennsylvania and superintendents named in their official capacity.[1] Plaintiffs are six families who home-school their children.[2]

1 We refer to Homer–Center School District, Joseph F. Marcoline, Norwin School District, Richard Watson, Franklin Regional School District, Stephen Vak, Bristol Township School District, Regina Cesario, Titusville Area School District, John D. Reagle, DuBois Area School District and Sharon Kirk collectively as the "school districts."

2 The "Parents" are Darrell and Kathleen Combs, Thomas and Timari Prevish, Mark and Maryalice Newborn, Thomas and Babette Hankin, Douglas and Shari Nelson, and Steven and Meg Weber.

The Commonwealth of Pennsylvania's education system, as enacted by the General Assembly, allows parents to satisfy the compulsory attendance requirement through "home education programs." Parents supervising the home education programs must provide instruction for a minimum number of days and hours in certain subjects and submit a portfolio of teaching logs and the children's work product for review. The local school district ***234** reviews the home education programs for compliance with the minimum hours of instruction and course requirements and determines whether each student demonstrates progress in the overall program. The school district does not review the educational content, textbooks, curriculum, instructional materials, or methodology of the program.

Parents, who home-school their children based on their sincerely held religious beliefs, have sued their respective school districts and school superintendents. Parents contend the Act 169 record-keeping requirements and the subsequent portfolio review place a substantial burden on their free exercise of religion. They seek an exemption from the Act 169 requirements and request declaratory and injunctive relief on the grounds that the provisions of Act 169 violate the First and Fourteenth Amendments of the Constitution of the United States and the Pennsylvania Religious Freedom Protection Act ("RFPA"), 71 Pa. Stat. Ann. §§ 2401–2407.

I.

Parents have home-schooled their children for many years. All six families are Christians, but of different denominations. They hold in common a religious belief that "education of their children, not merely the religious education, is religion" and that God has assigned religious matters to the exclusive jurisdiction of the family. Accordingly, because God has given Parents the sole responsibility for educating their children, the school districts' reporting requirements and "discretionary review" over their home education programs violate their free exercise of religion.

In 2002, the Commonwealth of Pennsylvania passed the Religious Freedom Protection Act. The statute requires the Commonwealth to justify substantial burdens on religious free exercise with a compelling interest and a showing that the least restrictive means has been employed to satisfy that interest. Prior to the passage of the Religious Freedom Protection Act, many of the Parents complied with the Act 169 home education program requirements.[3] Pre–RFPA, there is no evidence that the school districts ever questioned or interfered with Parents' home education programs' educational content, methodology, curriculum, or materials. On some occasions, the school districts required Parents to supplement their logs and portfolios with additional information. But Parents are unable to identify an instance in which the school districts rejected any part of their home education program.

[3] Thomas and Babette Hankin have never complied with Act 169.

Nevertheless, post-RFPA, Parents notified the school districts that Act 169 substantially burdens their free exercise of religion and sought an exemption from compliance.[4] The school districts refused to grant Parents an exemption from Act 169 and threatened or, in some cases, initiated criminal prosecutions for truancy.

[4] *See* 71 Pa. Stat. Ann. § 2405(b) (requiring, prior to bringing an action in court, the party to provide the agency with written notice); § 2405(d) (the agency "may remedy the substantial burden on the person's free exercise of religion" within 30 days of the written notice). Darrell and Kathleen Combs refused to submit the required affidavits and portfolios, thereby ceasing to comply with Act 169.

In response, Parents sued the school districts in various state and federal courts seeking declaratory and injunctive relief under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and RFPA. Ultimately, the cases ended up before the United States District Court for the Western District *235 of Pennsylvania, which consolidated the six cases for pre-trial and summary judgment purposes. Upon consent of the parties, discovery was limited to "threshold legal issues" such as whether Act 169 substantially burdened Parents' free exercise of religion under the RFPA and the proper standard of review for Parents' federal constitutional claims. The District Court engaged in two rounds of summary judgment motions.

The first round addressed facial challenges to Act 169. Parents filed a consolidated motion for summary judgment and the school districts filed a consolidated opposition, but did not file a cross-motion for summary judgment. The District Court denied Parents' motion. *Combs v. Homer Ctr. Sch. Dist.,* 2005 WL 3338885 (W.D. Pa. Dec.8, 2005). In the second round, the school districts filed a motion

for summary judgment addressing both Parents' facial and "as applied" challenges to Act 169. The District Court granted the school districts' motion, concluding that (1) Parents failed to prove a "substantial burden" on the free exercise of religion, as defined by RFPA, *Combs v. Homer Ctr. Sch. Dist.,* 468 F.Supp.2d 738, 771 (W.D.Pa.2006), and (2) Act 169 is a neutral law of general applicability, satisfying rational basis review,[5] *id.* at 777. As a result, the District Court did not decide issues of compelling governmental interest or least restrictive means.[6]

[5] The District Court also rejected Parents' claims based upon the Establishment Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment and the Free Speech Clause of the First Amendment. *Id.* at 778. The Statement of Issues in Parents' brief only addresses claims under RFPA and the Free Exercise Clause.

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), 1367 and 1441. We have jurisdiction over the appeal under 28 U.S.C. § 1291. "We review a district court's grant of summary judgment *de novo*." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253, 260 (3d Cir.2007) (citing *Gottshall v. Consol. Rail Corp.,* 56 F.3d 530, 533 (3d Cir.1995)). Summary judgment is only appropriate if there are no genuine issues of material fact and the school districts are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "In reviewing the District Court's grant of summary judgment, we view the facts in a light most favorable to the nonmoving party[:]" Parents. *Lighthouse Inst.,* 510 F.3d at 260.

[6] In a *dictum,* the District Court stated: "Even if this Court were to apply a 'hybrid rights' heightened or strict scrutiny test, however, Plaintiff's free exercise challenge to Act 169 on its face would still fail." *Id.* at 777.

II.

A.

The Pennsylvania Constitution mandates that the General Assembly "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const., Art. III, § 14. The General Assembly has carried out its constitutional charge by enacting the Public School Code. *See* 24 Pa. Stat. Ann. §§ 1–101 to 27–2702.[7]

[7] As noted by the District Court, "[a]n educated citizenry has been recognized as critical to the success and well-being of the Nation and its people from the time of its creation." *Combs,* 468 F.Supp.2d at 740–41. Pennsylvania's commitment to public education is firmly rooted in its history. *See id.* at 741–43. In 1682, the "Great Law" passed by the First General Assembly of Pennsylvania "included a provision for the creation of schools across Pennsylvania." *Id.* at 742. Furthermore, the various Pennsylvania constitutions have included provisions for public education. *Id.* (citing the 1776 provisional Pennsylvania Constitution, the Pennsylvania Constitution of 1874, and Art. II, § 14 of the Pennsylvania Constitution in its current form). The current Pennsylvania Code describes the purpose of public education as "prepar[ing] students for adult life" and creating "self-directed, life-long learners and responsible, involved citizens." 22 Pa. Code. § 4.11(b) (2008).

*236 The Public School Code requires "every child of compulsory school age having a legal residence in this Commonwealth ... to attend a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." 24 Pa. Stat. Ann. § 13–1327(a). "Compulsory school age" is defined as "the period of a child's life from the time the child's parents elect to have the child enter school, which shall be not later than at the age of eight (8) years, until the age of seventeen (17) years." *Id.* § 13–1326. *See also* 22 Pa. Code § 11.13 (2008). A student who "holds a certificate of graduation from a regularly accredited senior high school" satisfies the compulsory attendance requirement and is no longer of compulsory school age. 24 Pa. Stat. Ann. § 13–1326.

The Pennsylvania General Assembly currently permits parents to choose among four alternative categories of education to satisfy the compulsory attendance requirement: (1) a public school with certain trade school options, *id.* § 13–1327(a);[8] (2) a private academic day school or private tutoring, *id.;*[9] (3) a day school operated by a "bona fide church or other religious body," *id.* § 13–1327(b);[10] or (4) a "home education program," *id.* § 13–1327.1.

8 A child may satisfy the compulsory attendance requirement by attending a public day school. 24 Pa. Stat. Ann. § 13–1327(a). "In lieu of such school attendance" any child fifteen years of age who receives approval of the district superintendent and the Secretary of Education, or any child sixteen years of age who receives approval of the district superintendent, may enroll in a trade or business school. *Id.* Attendance at either public day school or a trade or business school satisfies the mandate that "every parent, guardian, or other person having control or charge of any child or children of compulsory school age is required to send such child or children to a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." *Id.*

9 A child may satisfy the compulsory attendance requirement by attending "an accredited or licensed private school," 22 Pa. Code § 11.32 (2008), "in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." 24 Pa. Stat. Ann. § 13–1327(a). "The certificate of any principal or teacher of a private school, or of any institution..." must "set[ ] forth that the work of said school is in compliance with the provisions of this act." *Id.* Also, regular daily instruction in the English language by a properly qualified private tutor satisfies the compulsory attendance requirement. *Id.* The Pennsylvania Administrative Code enumerates minimum hours of instruction and the required subjects at both the elementary and secondary school levels. 22 Pa. Code § 11.31 (2008).

10 A child may enroll in a day school "operated by a bona fide church or other religious body." 24 Pa. Stat. Ann. § 13–1327(b). The school must meet minimum standards for hours of instruction and teach the subjects enumerated in the statute. *See id.* ("[A] minimum of one hundred eighty (180) days of instruction or nine hundred (900) hours of instruction per year at the elementary level or nine hundred ninety (990) hours per year of instruction at the secondary level...."); *id.* § 13–1327(b)(1) (requiring at the elementary school level, the following courses: "English, to include spelling, reading and writing; arithmetic; science; geography; history of the United States and Pennsylvania; civics; safety education, including regular and continuous instruction in the

dangers and prevention of fires; health and physiology; physical education; music; and art"); *id.* § 13–1327(b)(2) ("At the secondary school level, the following courses [must be] offered: English, to include language, literature, speech and composition; science, to include biology and chemistry; geography; social studies, to include civics, economics, world history, history of the United States and Pennsylvania; a foreign language; mathematics, to include general mathematics and statistics, algebra and geometry; art; music; physical education; health and physiology; and safety education, including regular and continuous instruction in the dangers and prevention of fires.").

> Further, the principal must file a notarized affidavit with the Department of Education setting forth that the required subjects are offered in the English language, whether the school is a nonprofit organization, and that the school is otherwise in compliance with the provisions of the Public School Code. *Id.* § 13–1327(b).

> Although the statute requires religious schools to teach certain subjects, "[i]t is the policy of the Commonwealth to preserve the primary right and the obligation of the parent or parents ... to choose the education and training for such child." *Id.* Thus, "[n]othing contained in this act shall empower the Commonwealth, any of its officers, agencies or subdivisions to approve the course content, faculty, staff or disciplinary requirements of any religious school referred to in this section without the consent of said school." *Id.*

*237 Significant to this appeal, the Pennsylvania General Assembly permitted the fourth alternative in 1988. *See* Act 169 of 1988, P.L. 1321, No. 169, December 21, 1988, 24 Pa. Stat. Ann. § 13–1327.1. Under Act 169, a child instructed under a "home education program" satisfies the compulsory attendance requirement. *Id.* A home education program must satisfy the same minimum hours of instruction requirements and almost all of the same subject matter requirements as a school operated by a bona fide church or religious body.[11] *Id.* §§ 13–1327(b), 13–1327.1(c).

[11] Act 169 enumerates the following "minimum courses in grades nine through twelve" as a requirement for graduation from a home education program: four years of English; three years of mathematics; three years of science; three years of social studies; two years of arts and humanities. 24 Pa. Stat. Ann. § 13–1327.1(d). But, in contrast to § 13–1327(b), Act 169 leaves the decision whether to teach certain secondary level subjects—economics, biology, chemistry, foreign languages, trigonometry, or other age-appropriate courses as contained in 22 Pa. Code Ch. 4—to the discretion of the supervisor of the home education program. 24 Pa. Stat. Ann. § 13–1327.1(c)(2).

Prior to the commencement of a home education program, and thereafter on August 1 of each year, the parent or guardian of the child must file an affidavit with the district superintendent setting forth:

> the name of the supervisor of the home education program who shall be responsible for the provision of instruction; the name and age of each child who shall participate...; the address and telephone number of the ... site; that such subjects as required by law are offered in the English language, including an outline of proposed

> education objectives by subject area...; and that the home education program shall comply with the provisions of this section....

Id. § 13–1327.1(b)(1).[12]

[12] In addition, the affidavit must provide evidence that the child has been immunized and has received the health and medical services required for students of the child's age or grade level. 24 Pa. Stat. Ann. § 13–1327.1(b)(1). Further, "[t]he affidavit shall contain a certification to be signed by the supervisor that the supervisor, all adults living in the home and persons having legal custody of a child or children in a home education program have not been convicted of the criminal offenses enumerated in subsection (e) of section 111 within five years immediately preceding the date of the affidavit." *Id.* "Supervisor" is defined by Act 169 as "the parent or guardian or such person having legal custody of the child or children who shall be responsible for the provision of instruction, provided that such person has a high school diploma or its equivalent." *Id.* § 13–1327.1(a).

The superintendent of the public school district of the child's residence is charged with ensuring that each child is receiving "appropriate education," which is defined by Act 169 as "a program consisting of instruction in the required subjects for the time required in this act and in which the student demonstrates sustained progress in the overall program." *238 *Id.* § 13–1327.1(a). In order to demonstrate to the superintendent that "appropriate education" is taking place, at the end of each public school year the supervisor of the home education program must submit a file with two types of documentation.[13]

[13] "In addition, if the superintendent has a reasonable belief that, at any time during the school year, appropriate education may not be occurring in the home education program, he may ... require documentation ... to be submitted to the district...." 24 Pa. Stat. Ann. § 13–1327.1(h).

First, the file must contain a portfolio of records and materials:

> The portfolio shall consist of a log, made contemporaneously with the instruction, which designates by title the reading materials used, samples of any writings, worksheets, workbooks or creative materials used or developed by the student and in grades three, five and eight results of nationally normed standardized achievement tests in reading/language arts and mathematics or the results of Statewide tests administered in these grade levels. The department shall establish a list, with a minimum of five tests, of nationally normed standardized tests from which the supervisor of the home education program shall select a test to be administered if the supervisor does not choose the Statewide tests. At the discretion of the supervisor, the portfolio may include the results of nationally normed standardized achievement tests for other subject areas or grade levels. The supervisor shall ensure that the nationally normed standardized tests or the Statewide tests shall not be administered by the child's parent or guardian.

Id. § 13–1327.1(e)(1).

Second, the supervisor of the home education program must obtain an annual written evaluation of the child's work. *Id.* § 13–1327.1(e)(2). The supervisor may choose any person qualified under Act 169 to make the evaluation.[14]

[14] Act 169 permits evaluation by "a licensed clinical or school psychologist or a teacher certified by the Commonwealth or by a nonpublic school teacher or administrator." 24 Pa. Stat. Ann. § 13–1327.1(e)(2). "Any such nonpublic teacher or administrator shall have at least two years of teaching experience in a Pennsylvania public or nonpublic school within the last ten years." *Id.* Further, any nonpublic teacher or administrator or certified teacher must have the required "experience at the elementary level to evaluate elementary students or at the secondary level to evaluate secondary students." *Id.*

> A teacher or administrator who evaluates a portfolio at the elementary level (grades kindergarten through six) shall have at least two years of experience in grading any of the following subjects: English, to include spelling, reading and writing; arithmetic; science; geography; history of the United States and Pennsylvania; and civics.

Id. § 13–1327.1(e)(1)(i).

> A teacher or administrator who evaluates a portfolio at the secondary level (grades seven through twelve) shall have at least two years of experience in grading any of the following subjects: English, to include language, literature, speech, reading and composition; science, to include biology, chemistry and physics; geography; social studies, to include economics, civics, world history, history of the United States and Pennsylvania; foreign language; and mathematics, to include general mathematics, algebra, trigonometry, calculus and geometry.

Id. § 13–1327.1(e)(1)(ii). "[T]he term 'grading' shall mean evaluation of classwork, homework, quizzes, classwork-based tests and prepared tests related to classwork subject matter." *Id.* § 13–1327.1(e)(1)(iii).

"At the request of the supervisor, persons with other qualifications may conduct the evaluation with the prior consent of the district of residence superintendent. In no event shall the evaluator be the supervisor or their spouse." *Id.* § 13–1327.1(e)(2).

The evaluation measures:

> the student's educational progress.... The evaluation shall also be based on an *239 interview of the child and a review of the portfolio required in clause (1) and shall certify whether or not an appropriate education is occurring.

Id. Based upon the entire file—the portfolio of records and materials and the third-party evaluation—

the superintendent determines whether the home education program provides the child with an "appropriate education."[15]

> If the superintendent ... determines, based on the documentation provided ... that appropriate education is not taking place for the child in the home education program, the superintendent shall send a letter ... to the supervisor of the home education program stating that in his opinion appropriate education is not taking place for the child in the home education program and shall return all documentation, specifying what aspect or aspects of the documentation are inadequate.

Id. § 13–1327.1(i). Upon receipt of the letter, the supervisor has twenty days "to submit additional documentation demonstrating that appropriate education is taking place for the child in the home education program." *Id.* § 13–1327.1(j). If the additional documentation is not timely submitted, the home education program "shall be out of compliance" with the compulsory attendance requirements and the student must promptly enroll in either a public school, a nonpublic religious school, or a licensed private school. *Id.*

If the superintendent concludes that a timely amended file still fails to demonstrate appropriate education, he or she will notify the supervisor of his or her determination. Further, the supervisor will be given a "proper hearing by a duly qualified and impartial hearing examiner" within thirty days. *Id.* § 13–1327.1(k).[16] "If the hearing examiner finds that the documentation does not indicate that appropriate education is taking place in the home education program," the student must be promptly enrolled in either a public school, a nonpublic religious school, or a licensed private academic school.[17] *Id.* § 13–1327.1(*l*). "The decision of the [hearing] examiner may be appealed by either the supervisor of the home education program or the superintendent to the Secretary of Education or Commonwealth Court [of Pennsylvania]." *Id.* § 13–1327.1(k).

15 The superintendent may not rely upon the outline of proposed educational objectives provided at the beginning of the year when making his "appropriate education" determination. 24 Pa. Stat. Ann. § 13–1327.1(b)(1).

16 The "hearing examiner" "shall not be an officer, employe [sic] or agent of the Department of Education or of the school district or intermediate unit of residence of the child in the home education program." Id. § 13–1327.1(a).

17 In lieu of rendering a decision, the hearing examiner may "require the establishment of a remedial education plan mutually agreed to by the superintendent and supervisor of the home education program which shall continue the home education program." 24 Pa. Stat. Ann. § 13–1327.1(k).

In practice, the school districts engage in a limited level of oversight. The school districts require a minimum of two contacts with the State during the calendar year—the submission of an affidavit at the beginning of the year and the submission of the portfolio and evaluation at the end of the year.

Deposition testimony reveals that school officials do not check in on the progress of home education programs during the school year. Furthermore, all school officials deposed acknowledged that they never disagreed with or rejected an independent evaluator's assessment of the home education program. School officials *240 reviewed the disclosures for compliance with the statute and, if all the required disclosures were presented, the home education program would be approved.

B.

As noted, in 2002 the Pennsylvania General Assembly enacted the Religious Freedom Protection Act. 71 Pa. Stat. Ann. §§ 2401–2407. Titled "[a]n Act protecting the free exercise of religion; and prescribing the conditions under which government may substantially burden a person's free exercise of religion," *Id.* § 2401, the RFPA was based on two legislative findings:

> (1) Laws and governmental actions which are facially neutral toward religion, as well as laws and governmental actions intended to interfere with religious exercise, may have the effect of substantially burdening the free exercise of religion. However, neither State nor local government should substantially burden the free exercise of religion without compelling justification.
>
> (2) The General Assembly intends that all laws which it has heretofore enacted or will hereafter enact and all ordinances and regulations which have been or will be adopted by political subdivisions or executive agencies shall be construed so as to avoid the imposition of substantial burdens upon the free exercise of religion without compelling justification.

Id. § 2402.

Under RFPA, "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability," *id.* § 2404(a), unless "the agency proves, by a preponderance of the evidence, that the burden" is "[i]n furtherance of a compelling interest of the agency" and is "[t]he least restrictive means of furthering the compelling interest," *id.* § 2404(b).

The General Assembly provides definitions for several key terms in section 2404. First, "free exercise of religion" means "[t]he practice or observance of religion under section 3 of Article I of the Constitution of Pennsylvania."[18] *Id.* § 2403.

[18] Article I, Section 3 of the Pennsylvania Constitution provides:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Pa. Const., Art. I, § 3.

Second, “person” is defined as “[a]n individual or a church, association of churches or other religious order, body or institution which qualifies for exemption from taxation under section 501(c)(3) or (d) of the Internal Revenue Code of 1986 (Public Law 99–514, 26 U.S.C. § 501).” 71 Pa. Stat. Ann. § 2403. Third, RFPA defines “substantially burden” as “[a]n agency action which does any of the following:

> (1) Significantly constrains or inhibits conduct or expression mandated by a person’s sincerely held religious beliefs.
>
> (2) Significantly curtails a person’s ability to express adherence to the person’s religious faith.
>
> (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person’s religion.
>
> (4) Compels conduct or expression which violates a specific tenet of a person’s religious faith.

Id.

RFPA allows a “person whose free exercise of religion has been burdened or likely *241 will be burdened in violation of [§ 2404]” to bring a claim in a judicial proceeding. *Id.* § 2405(a). Prior to bringing a claim, the “person” must notify the agency, describing the agency action and the manner in which it burdens religion. *Id.* § 2405(b). A “person” who “proves, by clear and convincing evidence, that the person’s free exercise of religion has been burdened ... in violation of [§ 2404]” may receive declaratory or injunctive relief. *Id.* § 2405(f). Monetary damages are not available. *Id.*

With limited exceptions, 71 Pa. Stat. Ann. § 2406(a)-(b), RFPA applies “to any State or local law or ordinance and the implementation of that law or ordinance, whether statutory or otherwise and whether adopted or effective prior to or after the effective date of this act,” *id.* § 2406(a). Thus, RFPA applies to the Public School Code, 24 Pa. Stat. Ann. §§ 1–101 to 27–2702.

III.

We address Parents’ federal constitutional claim. Parents contend Act 169 imposes a substantial burden on the free exercise of religion as protected by the First and Fourteenth Amendments.[19] The Commonwealth asserts Act 169 is a neutral law of general applicability that is rationally related to the legitimate governmental interest in ensuring a minimal level of education for all children. Applying rational basis review, the District Court concluded that “Act 169 passes constitutional muster as a neutral law of general applicability and effect.” *Combs,* 468 F.Supp.2d at 777. Accordingly, the District Court denied Parents’ motion for summary judgment as to the facial challenge to Act 169 as a violation of the First Amendment of the United States Constitution and granted the school districts’ motion for summary judgment as to Parents’ as-applied challenges.

[19] The Free Exercise Clause applies to states and local governments through the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

A.

In *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 890, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court held “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *see also Smith,* 494 U.S. at 879, 110 S.Ct. 1595 (“[T]he right to free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”). The District Court concluded that “Act 169 is a neutral law of general applicability to all Pennsylvania home schoolers and their home education programs, with no reference or special impact on religious practices....” *Combs,* 468 F.Supp.2d at 772. As a result, the District Court applied the rational basis test to Parents’ challenge of Act 169 and upheld the provision. *Id.* at 777.

In *Blackhawk v. Pennsylvania,* 381 F.3d 202 (3d Cir.2004), we applied the standards for a neutral law of general applicability articulated by the Court in *Hialeah.* First, a law must be both facially and actually neutral. “A law is ‘neutral’ if it does not target religiously motivated conduct *242 either on its face or as applied in practice.” *Blackhawk,* 381 F.3d at 209; *see also Hialeah,* 508 U.S. at 534, 113 S.Ct. 2217 (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.”). Second, the government cannot advance its interests solely by targeting religiously motivated conduct. Instead, the regulation must be generally applicable.

> A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.

Blackhawk, 381 F.3d at 209; *see also Hialeah,* 508 U.S. at 543, 113 S.Ct. 2217 (“The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.”).

Act 169 is a neutral law of general applicability. It neither targets religious practice nor selectively imposes burdens on religiously motivated conduct. Instead, it imposes the same requirements on parents who home-school for secular reasons as on parents who do so for religious reasons. Furthermore, nothing in the record suggests Commonwealth school officials discriminate against religiously motivated home education programs (e.g., denying approval of home education programs because they include faith-based curriculum materials).

Parents contend Act 169 is not a law of general applicability and is tantamount to a licensing scheme for home-schooling. They cite *Blackhawk,* 381 F.3d at 209–10, for the proposition “that a statute with a waiver mechanism creates a regime of individualized, discretionary exemptions that triggers strict

scrutiny." Parents Reply Br. at 8–9. Parents' depiction of Act 169 is mistaken and their reliance on *Blackhawk* is misplaced.

As noted, there are four ways to fulfill the compulsory education requirement. None of the options is an exemption from the compulsory education law. All four require that a child be educated in the required subjects for the required period. Furthermore, all parents who choose the home education program alternative, whether for religious or secular reasons, are required to fulfill the Act 169 requirements. Parents cite no statutory waiver mechanism that gives the school districts the authority to waive or exempt some parents from the disclosure and review requirements.

In *Blackhawk,* the Pennsylvania Wildlife Code contained specific statutory exemptions authorizing the director of the Game Commission to waive a permit fee "where hardship or extraordinary circumstance warrants." *Id.* at 205. Further, the court stated: "[w]e are not presented here with a neutral and generally applicable [provision] that is uniformly imposed without allowing individualized exemptions. Under *Smith,* such a scheme ... would not trigger strict scrutiny, and a person seeking to be excused [from the provision's requirements] on religious grounds would be unlikely to prevail." *Id.* at 212. Act 169 is a neutral law of general applicability and does not allow individualized exemptions. *Blackhawk* is distinguishable.

Since Act 169 is a neutral law of general applicability, we will apply rational *243 basis review unless an exception to the *Smith* rule applies. "[R]ational basis review requires merely that the action be rationally related to a legitimate government objective." *Tenafly Eruv Ass'n, Inc. v. Tenafly,* 309 F.3d 144, 165 n. 24 (3d Cir.2002). "Under rational basis review, 'a statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not that basis has a foundation in the record.' " *Lighthouse Inst.,* 510 F.3d at 277 (quoting *Heller v. Doe,* 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)).

The Commonwealth has a legitimate interest in ensuring children taught under home education programs are achieving minimum educational standards and are demonstrating sustained progress in their educational program. *See, e.g., Bd. of Educ. v. Allen,* 392 U.S. 236, 245–47 & n. 7, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) ("[A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.... [I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 534, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (acknowledging the "power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils"). In *Brown v. Board of Education,* the Supreme Court noted the importance of education and the meaningful role the state plays in preparing a child for citizenship and adult life:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our

> democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Act 169's disclosure requirements and corresponding school district review rationally further these legitimate state interests. Accordingly, Act 169 survives rational basis review.

B.

Parents assert their claim falls within a "hybrid-rights" exception the Supreme Court discussed in *Smith:*

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, *see Cantwell v. Connecticut,* [310 U.S., at 304–307, 60 S.Ct. 900] (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause *244 he deemed nonreligious); *Murdock v. Pennsylvania,* [319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)] (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick,* [321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944)] (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters,* [268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)], to direct the education of their children, *see Wisconsin v. Yoder,* [406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)] (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

Smith, 494 U.S. at 881, 110 S.Ct. 1595. Parents contend Act 169 substantially burdens both their free exercise of religion and their fundamental right as parents, under the Fourteenth Amendment, to direct the education and upbringing of their children. Accordingly, they invoke the hybrid-rights exception of *Smith,* seeking strict scrutiny review. Alternatively, Parents contend that, notwithstanding our hybrid-rights determination, *Wisconsin v. Yoder* remains good law and the same constitutional test applies here.

1.

Although we have discussed the *Smith* hybrid-rights theory in prior opinions, its meaning and application remains an open question in our circuit. *See Blackhawk,* 381 F.3d at 207 (noting, while discussing *Smith,* "the Court did not overrule prior decisions in which 'hybrid claims' ... had prevailed against 'neutral, generally applicable laws,' " but deciding case on other grounds); *Tenafly,* 309 F.3d at

165 n. 26 (noting "[s]trict scrutiny may ... apply when a neutral, generally applicable law incidentally burdens" hybrid rights); *Salvation Army v. Dep't of Cmty. Affairs,* 919 F.2d 183, 200 (3d Cir.1990) (finding "[b]ecause the present controversy does not concern any state action directly addressed to religion, [The Salvation Army] cannot receive protection from the associational right derived from the free exercise clause"). We have never decided a case based on a hybrid-rights claim, let alone the type of a hybrid-rights claim invoked here—one based on the Free Exercise Clause and the companion right to direct a child's upbringing.

Smith's hybrid-rights theory has divided our sister circuits. Some characterize the theory as dicta and others use different standards to decide whether a plaintiff has asserted a cognizable hybrid-rights claim. The United States Courts of Appeals for the Second and Sixth Circuits have concluded the hybrid-rights language in *Smith* is dicta. *See Leebaert v. Harrington,* 332 F.3d 134, 143 (2d Cir.2003) (citing *Knight v. Connecticut Dep't of Pub. Health,* 275 F.3d 156, 167 (2d Cir.2001)); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Stratton,* 240 F.3d 553, 561–62 (6th Cir.2001), *rev'd on other grounds,* 536 U.S. 150, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002); *Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.,* 5 F.3d 177, 180 (6th Cir.1993). Furthermore, the United States Court of Appeals for the Sixth Circuit views the hybrid-rights exception as "completely illogical," *Kissinger,* 5 F.3d at 180, and the United States Court of Appeals for the Second Circuit "can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated," *Leebaert,* 332 F.3d at 144.[20] Accordingly, *245 when faced with a neutral law of general applicability, both appellate courts decline to allow the application of strict scrutiny to hybrid-rights claims and instead apply *Smith*'s rational basis standard. *See Leebaert,* 332 F.3d at 144 (" '[A]t least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard' to evaluate hybrid claims." (quoting *Kissinger,* 5 F.3d at 180)).

[20] Justice Souter, concurring in *Hialeah,* also criticized the hybrid-rights theory:

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith,* since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Hialeah, 508 U.S. at 567, 113 S.Ct. 2217 (Souter, J., concurring).

The United States Courts of Appeals for the First Circuit and District of Columbia have acknowledged that hybrid-rights claims may warrant heightened scrutiny, but have suggested that a plaintiff must meet a stringent standard: the free exercise claim must be conjoined with an independently viable companion right. *See Henderson v. Kennedy,* 253 F.3d 12, 19 (D.C.Cir.2001) (rejecting the "hybrid

claim" argument that "the combination of two untenable claims equals a tenable one"); *E.E.O.C. v. Catholic Univ. of Am.,* 83 F.3d 455, 467 (D.C.Cir.1996) (finding that the EEOC's violation of the Establishment Clause triggered the hybrid-rights exception); *Gary S. v. Manchester Sch. Dist.,* 374 F.3d 15, 18–19 (1st Cir.2004) (citing *Gary S. v. Manchester Sch. Dist.,* 241 F.Supp.2d 111, 121 (D.N.H.2003)) (affirming, for the same reasons, the district court's rejection of a hybrid-rights claim because the free exercise claim was not conjoined with an independently viable companion claim); *Brown v. Hot, Sexy & Safer Prods., Inc.,* 68 F.3d 525, 539 (1st Cir.1995) (rejecting a hybrid-rights claim because "[plaintiff's] free exercise challenge is ... not conjoined with an independently protected constitutional protection").[21]

[21] In *Parker v. Hurley,* 514 F.3d 87 (1st Cir.2008), the United States Court of Appeals for the First Circuit rejected plaintiff parents' claims that they must be given prior notice by a public school and an opportunity to exempt their young children from reading books the parents find religiously repugnant. In discussing hybrid-rights claims, the court stated that the strength of the companion constitutional claim required to establish a hybrid situation remains unsettled in the First Circuit because the *Brown* opinion did not "explicitly" decide the issue. *Id.* at 98 n. 9. It also noted that "the parental rights claim asserted in that case was found to be so weak that it was not a colorable claim, much less an independently viable one." *Id.* The *Parker* court chose not to "enter [ ] the fray over the meaning and application of *Smith*'s 'hybrid situations' language," and instead "approach[ed] the parents' claims as the Court did in *Yoder.* In that case, the Court did not analyze separately the due process and free exercise interests of the parent-plaintiffs, but rather considered the two claims interdependently, given that those two sets of interests inform one other." *Id.* at 98. The court ultimately found that plaintiffs did not describe "a constitutional burden on their rights" and affirmed the district court's dismissal for failure to state a claim. *Id.* at 99.

This stringent approach requiring an independently valid companion claim has received criticism, most notably that such a requirement would make the free exercise claim superfluous. *See Hialeah,* 508 U.S. at 567, 113 S.Ct. 2217 (Souter, J., concurring) ("[I]f a hybrid claim is one in which a *246 litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all."); *Axson–Flynn v. Johnson,* 356 F.3d 1277, 1296–97 (10th Cir.2004) ("[I]t makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary. If the plaintiff's additional constitutional claim is successful, he or she would typically not need the free exercise claim and the hybrid-rights exception would add nothing to the case.").

The United States Courts of Appeals for the Ninth and Tenth Circuits[22] recognize hybrid rights and require a plaintiff to raise a "colorable claim that a companion right has been violated." *San Jose Christian Coll. v. Morgan Hill,* 360 F.3d 1024, 1032 (9th Cir.2004); *see also Axson–Flynn,* 356 F.3d at 1297. They define colorable as "a fair probability or a likelihood, but not a certitude, of success on the merits." *San Jose Christian Coll.,* 360 F.3d at 1032; *Axson–Flynn,* 356 F.3d at 1297. They characterize this fact-driven, case-by-case inquiry as "a middle ground between two the extremes of painting hybrid-rights claims too generously and construing them too narrowly." *Axson–Flynn,* 356 F.3d at 1295.

A plaintiff cannot "simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force the government to demonstrate the presence of a compelling state interest."

[22] Although the United States Court of Appeals for the Seventh Circuit has not definitively articulated its approach, it has approvingly quoted the United States Court of Appeals for the Ninth Circuit. *See Civil Liberties for Urban Believers v. Chicago,* 342 F.3d 752, 765 (7th Cir.2003) (quoting *Miller v. Reed,* 176 F.3d 1202, 1207–08 (9th Cir.1999)); *but see id.* (citing *Brown,* 68 F.3d at 539 and *Kissinger,* 5 F.3d at 180). The United States Court of Appeals for the Eighth Circuit has recognized the existence of hybrid rights but has not defined the contours of the analysis. *See Cornerstone Bible Church v. Hastings,* 948 F.2d 464, 474 (8th Cir.1991) (reversing and remanding to district court to consider hybrid-rights claim).

Swanson v. Guthrie Indep. Sch. Dist. No. I–L, 135 F.3d 694, 700 (10th Cir.1998). Nor is one required to establish that the challenged law independently violates a companion constitutional right alone, without any recognition of the Free Exercise Clause.

By requiring a "colorable claim" that a companion right has been violated, the United States Courts of Appeals for the Ninth and Tenth Circuits examine "the claimed infringements on the party's claimed rights to determine whether either the claimed rights or the claimed infringements are genuine." *Swanson,* 135 F.3d at 699. Thus, in order to trigger heightened scrutiny, a hybrid-rights plaintiff must show a fair probability or likelihood, but not a certitude, of success on the merits of his companion constitutional claim.

In *Smith,* the Court asserted that the case before it "[did] not present ... a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." 494 U.S. at 882, 110 S.Ct. 1595. The criterion applicable to a free exercise claim combined with a companion constitutional right was left undefined. *See, e.g., Kissinger,* 5 F.3d at 180 (noting that the *Smith* Court "did not explain how the standards under the Free Exercise Clause would change depending on whether other constitutional rights are implicated"). Since *Smith,* a majority of the Court has not confirmed the viability *247 of the hybrid-rights theory.[23] Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta.

[23] As noted, Justice Souter, concurring in *Hialeah,* criticized the hybrid-rights theory. *Hialeah,* 508 U.S. at 566–67, 113 S.Ct. 2217 (Souter, J., concurring). Furthermore, in *Boerne v. P.F. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Court noted, without further discussion or explanation, that *Yoder* "implicated" the right to free exercise of religion and the right of parents to control their children's education. *Boerne,* 521 U.S. at 514, 117 S.Ct. 2157.

2.

Even if we were to apply the approaches used by our sister circuits—"colorable" claim approach and independently viable claim approach—we would find Parents' arguments unconvincing. Under either approach, we must determine whether Parents can establish a hybrid-rights claim by asserting combined violations of the Free Exercise Clause and the companion right of a parent under the

Fourteenth Amendment to direct a child's education. Parents have not presented an independent or colorable companion claim and, accordingly, cannot establish a valid hybrid-rights claim.

"The Due Process Clause guarantees more than fair process.... The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg,* 521 U.S. 702, 719–20, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). In *Glucksberg,* the Supreme Court articulated the fundamental rights protected by the Due Process Clause. *Id.* at 719–20, 117 S.Ct. 2258. Included in the list was the right "to direct the education and upbringing of one's children." *Id.* at 720, 117 S.Ct. 2258 (citing *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)); *see also Troxel v. Granville,* 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion) ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

Parents rely on three Supreme Court cases to generally identify a parent's constitutional right to direct a child's education. *See Meyer v. Nebraska,* 262 U.S. 390, 401–03, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (holding state law prohibiting foreign language instruction violated the "power of parents to control the education of their own"); *Pierce,* 268 U.S. at 535–36, 45 S.Ct. 571 (holding state compulsory education law requiring students to attend solely public schools "unreasonably interferes with the liberty of parents ... to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder,* 406 U.S. 205, 214, 234–36, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (finding a compulsory education system, as applied to the Amish, to violate the Free Exercise Clause and the "traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce,* 'prepare (them) for additional obligations' "). But the particular right asserted in this case—the right to be free from all reporting requirements and "discretionary" state oversight of a child's home-school education—has never been recognized.

Although Parents assert the fundamental nature of their general right, it is a limited one. We have noted "[t]he Supreme Court has never been called upon to define the precise boundaries of a parent's *248 right to control a child's upbringing and education. It is clear, however, that the right is neither absolute nor unqualified." *C.N. v. Ridgewood Bd. of Educ.,* 430 F.3d 159, 182 (3d Cir.2005). "The case law in this area establishes that parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject." *Swanson,* 135 F.3d at 699.[24] Furthermore,

> [t]he Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.

Runyon v. McCrary, 427 U.S. 160, 178, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976).[25]

[24] Federal courts addressing the issue have held that parents have no right to exempt their child from certain subjects, reading assignments, community-service requirements or assembly

programs they find objectionable. *See, e.g., Parker,* 514 F.3d at 107 (reading assignment); *Leebaert,* 332 F.3d at 144 (health education class); *Herndon v. Chapel Hill–Carrboro City Bd. of Educ.,* 89 F.3d 174 (4th Cir.1996) (community-service requirement); *Immediato v. Rye Neck Sch. Dist.,* 73 F.3d 454, 461–62 (2d Cir.1996) (community-service requirement); *Brown,* 68 F.3d at 539 (sexual education assembly); *see also Blau v. Fort Thomas Pub. Sch. Dist.,* 401 F.3d 381, 395–96 (6th Cir.2005) (finding that a parent "does not have a fundamental right to exempt his child from the school dress code").

[25] Parents who home-school their children may be subjected to standardized testing to ensure the children are receiving an adequate education. *See Murphy v. Arkansas,* 852 F.2d 1039, 1044 (8th Cir.1988) (upholding state standardized test requirement over home-schooling parents' First and Fourteenth Amendment objections).

In addition to *Yoder,* discussed *infra,* Parents rely on *Meyer* and *Pierce* for foundational support. Read together, the cases

> evince the principle that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education.

Brown, 68 F.3d at 533; *see also Runyon,* 427 U.S. at 177, 96 S.Ct. 2586 (stressing the "limited scope" of *Meyer* and *Pierce*). In the present case, Parents are given the freedom to choose a "different path of education"—home-schooling—subject only to the Act 169 requirements. The school districts do not have any role in selecting the program Parents wish to follow. Parents are unable to point to a single instance in which the school districts have limited or interfered with their religious teachings and/or materials.

In her deposition, Shari Nelson acknowledged that her local school district never questioned or rejected her affidavits and did not interfere with her religious content choices. Mrs. Nelson noted she was never concerned that the local school district would reject her children's portfolio if it contained work product with a religious subject matter. Similarly, Maryalice Newborn acknowledged that her local school district never questioned the appropriateness of her home education program or its content.

Parents nevertheless contend that the Commonwealth's "subjective" and "discretionary" review over the Act 169 disclosures violates their right to control their children's education. They insist any review *249 of the home education programs must be purely "objective." In other words, they contend the Commonwealth usurps the religious and parental rights of parents when an official makes a limited determination of whether a child has "sustained progress in the overall program." Parents have not articulated their definition of "objective" in their brief. When questioned during oral argument, Parents' counsel was unable or unwilling to provide a concrete explanation or example of an

"objective" review. Furthermore, it is difficult to accept Parents' assertion that review of a child's educational progress can truly be objective. The grading of an essay, even on a pass/fail scale, will always be imbued with some element of subjectivity.

As noted, there is no recognized right for parents to educate their children "unfettered by reasonable government regulation." *Runyon,* 427 U.S. at 178, 96 S.Ct. 2586. The Court in *Pierce* expressly acknowledged " 'the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils.' " *Id.* (quoting *Pierce,* 268 U.S. at 534, 45 S.Ct. 571); *see also Meyer,* 262 U.S. at 402, 43 S.Ct. 625 (noting "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools ... [was] not questioned" by the parties).[26] Furthermore, there is "a distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that ... are not of constitutional dimension." *C.N.,* 430 F.3d at 184. Parents identify the general right to control the education of one's child. But Parents do not have a constitutional right to avoid reasonable state regulation of their children's education. Act 169's reporting and superintendent review requirements ensure children taught in home education programs demonstrate progress in the educational program. The statute does not interfere, or authorize any interference, with Parents' religious teachings and/or use of religious materials. Parents' claim under the Fourteenth Amendment is of insufficient constitutional dimension to state either an independently viable or colorable claim. Accordingly, under both the stringent and colorable hybrid-rights approaches of our sister circuits, Parents have not asserted a "hybrid-rights claim."

[26] In a different context, the Supreme Court stated:

> Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters:* if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular education function.

Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245–47, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (examining validity of a New York statute requiring school districts to purchase and loan textbooks to students enrolled in parochial schools).

3.

Parents also contend that, notwithstanding the different standards articulated by the circuits regarding hybrid-rights claims, they raise the same type of claim as the parents in *Yoder.* They contend that since *Yoder* is still good law, parents claiming a religious-parental exemption to a neutral law of general applicability get the benefit *250 of the traditional Free Exercise test. Parents assert that "it is beyond

legitimate question that the same constitutional tests employed in *Yoder* must be used here to evaluate these Parents' religious-parental claims." Parents Br. at 27.

In *Yoder,* the Court granted a religious-based exception to a regulation of general applicability. *C.f.* John E. Nowak & Ronald D. Rotunda, Constitutional Law § 17.6 (7th ed. 2004) ("*Yoder* stands out as the one instance in which the Court required the government to grant to persons who could not comply with the law due to their religious beliefs an exemption from a law regulating the conduct of all persons...."). But the unique burden suffered by the Amish, combined with the Supreme Court's limiting language, distinguish *Yoder* from this case.

In response to objections by Amish citizens, the *Yoder* Court held that the First Amendment required a partial exemption from a Wisconsin compulsory high-school education law requiring children to attend public or private school until age 16. The Amish refused to send their children, ages 14 and 15, to school after completion of the eighth grade of schooling. The Court noted the Amish's "convincing showing:

> the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.

Yoder, 406 U.S. at 235, 92 S.Ct. 1526. The Court applied a heightened level of scrutiny and found the State's interest lacking. *Id.* at 235–36, 92 S.Ct. 1526.

Parents favor a broad reading of *Yoder* and insist that it applies to all citizens. But *Yoder*'s reach is restricted by the Court's limiting language and the facts suggesting an exceptional burden imposed on the plaintiffs. In *Yoder,* the religious beliefs of the Amish were completely integrated with their community and "mode of life."[27] *Yoder,* 406 U.S. at 235, 92 S.Ct. 1526. As a result, compulsory attendance would "substantially interfere[e] with the religious development of the Amish child and his integration into the way of life of the Amish faith community." *Id.* at 218, 92 S.Ct. 1526. Accordingly, the Wisconsin law carried "a very real threat of undermining the Amish community and religious practice," *id.,* and placed the continued survival of Amish communities in "danger," *id.* at 218 n. 9, 92 S.Ct. 1526. Compulsory attendance "prevented these Amish parents from making *fundamental* decisions regarding their children's religious upbringing and effectively overrode their ability to pass their religion on to their children, as their faith required." *Parker,* 514 F.3d at 99–100 (citing *Yoder,* 406 U.S. at 233–35, 92 S.Ct. 1526).

[27] This "mode of life" reference in *Yoder* has been interpreted to refer to a distinct community and way of life, not simply the centrality of one's belief to his or her faith. *See Parker,* 514 F.3d at 100.

Before applying a heightened level of scrutiny, the Court wanted to ensure that the "Amish religious faith and their mode of life are, as they claim, inseparable and interdependent." *Yoder,* 406 U.S. at 215,

92 S.Ct. 1526. Recognizing the exceptional nature of the Amish's showing, the Court held: "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity *251 of the State's requirement under the First Amendment." *Id.* at 233, 92 S.Ct. 1526; *see also Mozert v. Hawkins County Bd. of Educ.,* 827 F.2d 1058, 1067 (6th Cir.1987) ("*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule....").

The United States Court of Appeals for the Second Circuit has interpreted the central underpinning of *Yoder* to be the "threat to the Amish community's way of life, posed by a compulsory school attendance statute." *Leebaert,* 332 F.3d at 144. In *Leebaert,* a parent alleged a violation of the First and Fourteenth Amendments because a school refused to excuse his son from a mandatory health and education course. While not questioning the sincerity of the parent's beliefs, the Second Circuit found the claims were not governed by *Yoder. See id.* (plaintiff did not allege that "his community's entire way of life is threatened;" plaintiff "does not assert that there is an irreconcilable *Yoder-like* clash between the essence of [plaintiff's] religious culture and the mandatory health curriculum that he challenges"); *see also Brown,* 68 F.3d at 539 (distinguishing *Yoder* because a one-time compulsory attendance at a health program did not threaten "their entire way of life").

In the pre-*Smith* case *New Life Baptist Church Academy v. East Longmeadow,* 885 F.2d 940 (1st Cir.1989), a religious school asserted a remarkably similar claim to Parents' claim. The New Life Baptist Church Academy refused to comply with state rules and procedures for determining the adequacy of the secular education provided by the school because it believed "it is a sin to 'submit' [its] educational enterprise to a secular authority for approval." *Id.* at 941. Finding that "the weight of legal precedent is strongly against the Academy's position," *id.* at 950, the United States Court of Appeals for the First Circuit concluded that "this case differs significantly from [*Yoder*]," *id.* at 951.[28] It noted that the state's procedures

> do not threaten interference with religious practices, prayer, or religious teaching; and the record, while indicating a sincere religious scruple, does not suggest that enforcement of the [state] procedures would destroy a religious community's way of life. Nor does the record support the view that the Academy, left on its own, would provide "ideal" or even adequate secular education. All these factors make this case quite unlike *Yoder.*

Id. (citations omitted).

[28] As noted, *New Life Baptist Church Academy* was decided before *Smith.* Accordingly, the First Circuit applied the *Sherbert* test, *New Life Baptist Church Acad.,* 885 F.2d at 944 (citing *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)), and analyzed *Yoder* within the "less restrictive alternative" context. *New Life Baptist Church Acad.,* 885 F.2d at 948–52. Despite this, we find the First Circuit's discussion of *Yoder* to be informative.

Similarly, the claim raised by the Amish parents in *Yoder* can be distinguished from the claim raised by Parents here. Act 169 does not threaten Parents' or their community's entire mode of life. Even though

Parents are required to keep records and submit them for review, they are in complete control of the religious upbringing of their children. In fact, Parents are unable to point to even one occasion in which the school districts have questioned their religious beliefs, texts, or teachings.

The dispute in *Yoder* involved an additional one or two years of education at public schools versus "vocational" education at home. The Amish allowed their children to attend public schools until eighth grade and sought only a partial *252 exemption from the state's compulsory school attendance law. Furthermore, the Court in *Yoder* assumed the state would regulate the Amish's home education to ensure the satisfaction of educational standards. *See Yoder,* 406 U.S. at 236, 92 S.Ct. 1526 ("The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance...."). In contrast, Parents request a full exemption from Act 169, seeking to administer their children's entire primary and secondary education without any review by the Commonwealth. They cite *Yoder* to challenge the government's authority to engage in the regulation and discretionary review of their home education programs.[29] Parents' claim is distinguishable from the Amish parents' claim in *Yoder.*

[29] In *Duro v. Dist. Attorney, Second Judicial Dist.,* 712 F.2d 96 (4th Cir.1983), plaintiffs, who home-schooled their children, alleged that the state compulsory school attendance law infringed upon their religious beliefs. The district court, relying heavily upon *Yoder,* found the state law unconstitutional as applied to the plaintiffs. The Fourth Circuit reversed, distinguishing *Yoder. Duro,* 712 F.2d at 98–99.

> [I]n *Yoder,* the Amish children attended public school through the eighth grade and then obtained informal vocational training to enable them to assimilate into the self-contained Amish community. However, in the present case, [plaintiff] refuses to enroll his children in any public or nonpublic school for any length of time, but still expects them to be fully integrated and live normally in the modern world upon reaching the age of 18.

Id. at 98.

Although Parents contend they can "readily demonstrate" that their children will be self-sufficient even if they do not submit their children's work on an annual basis to a government official for his review, Parents Br. at 31, their claim remains distinguishable. The Amish allowed their children to attend public schools until the completion of 8th grade. Therefore, the State was assured that the Amish children received a state approved education and the Court found an additional one or two years of compulsory formal education to be insufficient to overcome the Amish's interests. In this case, Parents seek to home-school their children for their entire primary and secondary education.

C.

Since Act 169 survives rational basis review and since Parents have failed to establish that an exception

to *Smith*'s neutral law of general applicability rule applies, Parents' federal constitutional claims fail.

IV.

In addition to their federal constitutional claims, Parents assert a state statutory claim under the Religious Freedom Protection Act, 71 Pa. Stat. Ann. §§ 2401–2407. In order to obtain relief under RFPA, Parents must prove by clear and convincing evidence that their "free exercise of religion has been burdened or likely will be burdened in violation of [§ 2404]."[30] *Id.* § 2405(f). If Parents satisfy this burden, the school districts are *253 required to prove, by a preponderance of the evidence, that Act 169 furthers a compelling interest and is the least restrictive means of furthering the interest. 71 Pa. Stat. Ann. § 2404(a)-(b). Thus, as a threshold matter, Parents must prove, by clear and convincing evidence, that their free exercise of religion has or will likely be "substantially burdened."[31]

[30] Section 2404 states:

> (a) General rule. Except as provided in subsection (b), an agency shall not *substantially burden* a person's free exercise of religion, including any burden which results from a rule of general applicability.
>
> (b) Exceptions. An agency may *substantially burden* a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following:
>
> (1) In furtherance of a compelling interest of the agency.
>
> (2) The least restrictive means of furthering the compelling interest.

Id. § 2404 (emphases added).

[31] As noted, RFPA defines "substantially burden" as:

> An agency action which does any of the following: (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs. (2) Significantly curtails a person's ability to express adherence to the person's religious faith. (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion. (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

71 Pa. Stat. Ann. § 2403.

The District Court concluded Parents failed to establish by clear and convincing evidence that Act 169 substantially burdens their free exercise of religion. *Combs,* 468 F.Supp.2d at 771. It granted the school districts' motion for summary judgment on both the facial and as-applied challenges based on the RFPA. *Id.* Parents assert error, contending the District Court either failed to review or misapplied the actual text of the statute. Further, they argue that because the fourth definition of "substantially

burden" is clear and unambiguous, the District Court improperly resorted to extraneous sources like legislative history and federal cases interpreting the federal Free Exercise Clause and the federal Religious Freedom Restoration Act.

Parents invoke the fourth definition of "substantially burden"—"[c]ompels conduct or expression which violates a specific tenet of a person's religious faith." 71 Pa. Stat. Ann. § 2403. Parents contend Act 169 compels "conduct or expression" by requiring them to submit the content and records of their children's educational progress to the school districts. Because these submissions are subject to review and approval by the school districts, Parents contend Act 169 violates a "specific tenet" of their religious faith—that "education of their children, not merely the 'religious education,' is 'religion' and is assigned by God to the jurisdiction of the family." Parents Br. at 64.

The construction and application of RFPA's fourth definition of "substantially burden" is an issue of first impression[32] and a matter of Pennsylvania law. As noted, the District Court's jurisdiction was based upon 28 U.S.C. §§ 1331, 1343(a)(3), 1367 and 1441. Because we affirm the District Court's grant of summary judgment on all of Parents' federal claims, only their state law claim remains. Under 28 U.S.C. § 1367(c), "district courts may decline to exercise supplemental jurisdiction" over a state law claim if "the claim raises a novel or complex issue of State law ... [or] the district court has dismissed all claims over which it has original jurisdiction." *Id.* Section 1367(c) provides courts "the discretion to refuse to exercise supplemental jurisdiction when 'values of judicial economy, convenience, fairness, and comity' counsel that the district court remand state claims to a state forum." *254 *Hudson United Bank v. LiTenda Mortgage Corp.,* 142 F.3d 151, 157 (3d Cir.1998) (quoting *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156, 173, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997)). A decision to remand under section 1367 "reflects the court's judgment ... that at the present stage of litigation it would be best for supplemental jurisdiction to be declined so that state issues may be adjudicated by a state court." *Hudson United Bank,* 142 F.3d at 158 (citing *United Mine Workers v. Gibbs,* 383 U.S. 715, 726–27, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)).

[32] In 2007, the Commonwealth Court of Pennsylvania interpreted the third definition of substantially burden—"[d]enies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion." *Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park Borough (Ridley Park),* 920 A.2d 953, 957–61 (Pa.Commw.Ct.2007). The court concluded that because "daycare is not a fundamental religious activity of a church," the Zoning Hearing Board erroneously applied RFPA. *Id.* at 960.

Parents' only remaining claim involves the interpretation of a state statute on which there is no Pennsylvania precedent. Because all federal issues have been decided on summary judgment and since Parents' RFPA claim raises a novel and potentially complex issue of State law, we will decline to exercise supplemental jurisdiction over Parents' pendent state law claim. 28 U.S.C. § 1367(c).[33]

[33] *Shaffer v. Board of School Directors of Albert Gallatin Area School District,* 730 F.2d 910 (3d Cir.1984), a pre-section 1367 decision, supports this conclusion. In *Shaffer,* we found that "where the underlying issue of state law is a question of first impression with important implications for public education in Pennsylvania, factors weighing in favor of state court adjudication certainly

predominate." *Id.* at 913.

V.

For the foregoing reasons, we will affirm the District Court's grant of summary judgment in favor of the school districts on Parents' federal constitutional claims, vacate the District Court's holding regarding the pendent RFPA claim, and remand the case to the District Court with instructions to remand the RFPA claim to state court.

SCIRICA, Chief Judge, concurring.

Section 1367(c) provides: "The district courts may decline to exercise supplemental jurisdiction over a claim ... if (1) the claim raises a novel or complex issue of State law ... [or] (3) the district court has dismissed all claims over which it has original jurisdiction...." 28 U.S.C. § 1367(c). The District Court here exercised supplemental jurisdiction over Parents' state law Religious Freedom Protection Act claim. The claim was fully presented to and adjudicated by the District Court. I would decide the issue.

As noted, in order to obtain relief under RFPA, Parents must prove by clear and convincing evidence that their free exercise of religion has been substantially burdened or likely will be substantially burdened. *Id.* § 2404, 2405(f). If Parents satisfy this burden, the school districts are required to prove, by a preponderance of the evidence, that Act 169 furthers a compelling interest and is the least restrictive means of furthering the interest. 71 Pa. Stat. Ann. § 2404(a)-(b). Thus, as a threshold matter, Parents must prove, by clear and convincing evidence, that their free exercise of religion has or will likely be "substantially burdened."

Parents have made conflicting claims as to what conduct or review by the school districts constitutes a substantial burden. In their complaint, Parents challenge all state review of their home education programs.[34] But deposition testimony reveals *255 some variance by Parents on the permissible level of state oversight.[35] Nevertheless, in their District Court briefs, Parents again contended that "placing of authority in any state agency violates their sincerely held religious beliefs" and that "it is a specific tenet of their religious faith that the State lacks the jurisdiction over education and the family that Act 169 asserts." Parents Br. Opp'n to Def.'s Mot. Summ. J. at 9–10, Apr. 14, 2006.[36] At oral argument, however, Parents' counsel again shifted the focus of their claims and appeared to concede that the objectionable portion of Act 169 was not the record keeping, testing, or third party evaluation, but the school districts' independent, "discretionary" review of their children's educational progress. But assuming a proper concession, this possible alteration of the claim was not made before the District Court.

[34] *See, e.g.,* Combs Compl. ¶ 12 ("Mr. and Mrs. Combs' religious beliefs acknowledge that the civil government may require them to educate their children, but, according to their religious belief, the civil government lacks jurisdiction to approve or administratively supervise the education they provide."); Combs Compl. ¶ 14 ("It is a specific tenet of Mr. and Mrs. Combs' religious faith, rooted in their understanding of the Bible, that it would be sinful for them to engage in conduct or expression that would grant control over their children's education to the civil government."); Hankin Compl. ¶ 20 ("It is a specific tent of Mr. and Mrs. Hankin's religious faith, rooted in their

understanding of the Bible, that it would be sinful for them to have any association with the public school system.”).

[35] *See, e.g.,* Maryalice Newborn Dep. at 49, Aug. 30, 2005 (“Q: What level of state review would be acceptable to you? A: None.”); Thomas Hankin Dep. at 55, Sept. 6, 2005, (“I personally believe that if the discretion of the school district were removed, there would be a lot less trouble religiously with my beliefs; that is, if I submitted to the school district a statement that said ... I am educating my children and this is what I’m teaching them this year.”).

[36] *See also* Parents Br. Opp’n to Def.’s Mot. Summ. J. at 10, Apr. 14, 2006 (“Because Plaintiffs believe that *all* education is inherently religious, Caesar has no jurisdiction over it at all.”); *id.* at 11 (citing Herbert W. Titus, founding dean of Regent University School of Law, for the proposition that “[b]oth the Establishment and the Free Exercise clauses preclude the civil government from exercising jurisdiction over the education of the people.”).

I.

As noted, the construction and application of RFPA’s fourth definition of “substantially burden” is an issue of first impression. Because this is a matter of Pennsylvania law, “we must predict how the Pennsylvania Supreme Court, if faced with the identical issue, would construe the statute.” *Prudential Prop. & Cas. Ins. Co. v. Pendleton,* 858 F.2d 930, 934 (3d Cir.1988).[37]

[37] The Commonwealth’s rules of statutory construction, codified at 1 Pa. Cons. Stat. §§ 1901–1978, “shall be observed, unless the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly.” *Id.* § 1901. “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” *Id.* § 1921(a).

Words and phrases are construed “according to their common and approved usage,” whereas technical words which are defined will be construed according to their peculiar definitions. *Id.* § 1903. “When the words of the statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Id.* § 1921(b). The Pennsylvania Supreme Court “has repeatedly recognized that rules of construction, such as consideration of a statute’s perceived ‘object’ or ‘purpose,’ are to be resorted to only when there is an ambiguity.” *Commonwealth v. Taylor,* 576 Pa. 622, 841 A.2d 108, 112 (2004). However,

> [w]hen the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters: (1) The occasion and necessity for the statute. (2) The circumstances under which it was enacted. (3) The mischief to be remedied. (4) The object to be attained. (5) The former law, if any, including other statutes upon the same or similar subjects. (6) The consequences of a particular interpretation. (7) The contemporaneous legislative history. (8) Legislative and administrative interpretations of such statute.

1 Pa. Cons. Stat. § 1921(c).

*256 In construing the meaning of "substantially burden," the District Court relied on the plain language of the statute, the analysis of "substantially burden" in the "context of Free Exercise Clause and similar freedom of religion restoration acts," and the intent of the General Assembly to restore the "traditional (pre-*Smith*) free exercise of religion standards." *Combs,* 468 F.Supp.2d at 771. As noted, Parents contend the District Court either ignored or misapplied the plain language of the statute and improperly included legislative history and pre-*Smith* decisions in its analysis.

II.

Parents rely exclusively upon the RFPA's fourth definition of "substantially burden"—"an agency action which ... [c]ompels conduct or expression which violates a specific tenet of a person's religious faith." 71 Pa. Stat. Ann. § 2403. Parents contend they are compelled, under threat of truancy charges, to submit the portfolio of their children's work product to the school districts for discretionary review. Parents describe the act of turning over the portfolio for discretionary review as "conduct or expression." They point to the exercise of editorial judgment and creativity on the part of the home education supervisor as evidence of this expression.[38] Moreover, Parents assert a "specific tenet" based upon certain religious beliefs.

[38] I assume, without deciding, that Parents' actions are "conduct or expression" within the meaning of the RFPA.

First, Parents maintain their faith teaches that "education of their children, not merely the 'religious education,' is 'religion.' " Parents Br. at 64. Parents cite, *inter alia, Deuteronomy* 6:5–7(NIV) ("Love the Lord your God with all your heart and with all your soul and with all your strength. These commandments that I give you today are to be upon your hearts. Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up."), *Psalms* 145:4(NIV) ("One generation will commend your works to another; they will tell of your mighty acts."), *Ephesians* 6:4(NIV) ("Fathers, do not exasperate your children; instead, bring them up in the training and instruction of the Lord."), and *Proverbs* 22:6 ("Train up a child in the way he should go and when he is old, he will not depart from it."), for the proposition that God has directly called upon them to home educate their children.

Second, Parents contend God has assigned religious matters to the exclusive jurisdiction of the family, citing, *inter alia, Luke* 20:25 ("Then render to Caesar the things that are Caesar's, and to God the things that are God's."), *Psalms* 127:3(NIV) ("Sons are a heritage from the Lord, children a reward from him."), *Matthew* 7:6 ("Don't give what is holy to unholy people."), 1 *Corinthians* 10:31 ("Whatever you do, do it all for the glory of God."), 2 *Timothy* 2:15 ("Be diligent to present yourself approved to God."), 1 *Thessalonians* 2:4 ("We are not trying to please men but God, who tests our hearts."), and *Acts* 5:29 ("We must obey God rather than men."). Parents contend Act 169 replaces the headship of Christ over the family, and their headship over their children, with the headship of the state over the family, citing, *inter alia,* 1 *Corinthians* 11:3(NIV) ("Now I want you to realize that the head of every man is Christ, and the head of the woman is man, and the head of Christ is God."), *Ephesians* 5:23(NIV) ("For the husband is the head of the wife as Christ is *257 the head of the church, his body, of which he is the Savior."),

and *Ephesians* 6:1(NIV) ("Children, obey your parents in the Lord, for this is right.").[39] As a result of this "specific tenet," Parents assert a sincerely held religious belief that the school districts have no authority to compel reporting or to engage in discretionary review of their home education program.

[39] The Previshes also cite the Catechism of the Roman Catholic Church. *See, e.g., Catechism* 2223 ("Parents have the first responsibility for the education of their children. They bear witness to this responsibility first by creating a home where tenderness, forgiveness, respect, fidelity, and disinterested service are the rule. The home is well suited for education in the virtues. This requires an apprenticeship in self-denial, sound judgment, and self-mastery—the preconditions of all true freedom. Parents should teach their children to subordinate the 'material and instinctual dimensions to interior and spiritual ones.' "); *Catechism* 2229 ("As those first responsible for the education of their children, parents have the right to choose a school for them which corresponds to their own convictions. This right is fundamental. As far as possible parents have the duty of choosing schools that will best help them in their task as Christian educators. Public authorities have the duty of guaranteeing this parental right and of ensuring concrete conditions for its exercise.").

The term "specific tenet" is not defined in the Religious Freedom Protection Act or 1 Pa. Cons. Stat. § 1991.[40] The Oxford English Dictionary defines "specific" as "precise or exact in respect of fulfilment, conditions, or terms; definite, explicit" and "exactly named or indicated, or capable of being so; precise, particular." 2 Oxford English Dictionary 2949 (Compact ed.1971); *see also* Merriam–Webster's Dictionary 1132 (9th ed.1990) (defining "specific" as "sharing or being those properties of something that allow it to be referred to a particular category" or as "free from ambiguity"). "Tenet" is defined as "[a] doctrine, dogma, principle, or opinion, in religion, philosophy, politics or the like, held by a school, sect, party, or person." 2 Oxford English Dictionary 3260 (Compact ed.1971); *see also* Merriam–Webster's Dictionary 1215 (9th ed.1990) (defining "tenet" as "a principle, belief, or doctrine generally held to be true; especially: one held in common by members of an organization, group, movement, or profession").

In the religious context, the term "specific tenet" is difficult to define.[41] Even though a religious concept may be stated generally, it may, in the believer's mind, be a specific religious tenet. At one end of the spectrum, specificity may be relatively straightforward and easy to identify because the "specific tenet" is observed as an outward manifestation of a particular religious belief. For example, in *Fraternal Order of Police Newark Lodge No. 12 v. Newark,* 170 F.3d 359 (3d Cir.1999), two Sunni Muslim officers successfully challenged an internal order requiring all police officers to shave their beards. Plaintiffs *258 articulated a religious commandment to grow and wear a beard. *Id.* at 360–61; *see also Deveaux v. Philadelphia,* No. 3103 Feb. Term 2005, 2005 WL 1869666, at *1–2 (Pa.Com.Pl. July 14, 2005) (granting a preliminary injunction preventing the city from suspending a practicing Muslim firefighter without pay for refusing to shave his beard). In *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), a member of the Seventh-day Adventist Church challenged state unemployment compensation rules that conditioned the availability of benefits upon her willingness to work under conditions forbidden by her religion. The Court acknowledged that "the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible." *Id.* at 399 n. 1, 83 S.Ct. 1790.

[40] Section 1991 defines words and phrases for "any statute finally enacted on or after September 1, 1937."

[41] The words "specific," "specificity," and "particularity" are familiar terms in Pennsylvania and federal procedural law, and in that context, denote a heightened pleading standard as opposed to a more general (notice) standard. *See, e.g., Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick,* 526 Pa. 541, 587 A.2d 1346, 1352 (1991) ("Both Rule 1019(b) of the Pennsylvania Rules of Civil Procedure and case law require that fraud be plead with specificity. The appellees' complaint does not rise to the level of specificity that we require." (citation omitted)); *c.f. In re Advanta Corp. Sec. Litig.,* 180 F.3d 525, 534 (3d Cir.1999) (noting, in the Private Securities Litigation Reform Act ("PSLRA") fraud context, that the PSLRA "echoes precisely Fed. R. Civ. P. 9(b) and therefore requires plaintiffs to plead 'the who, what, when, where, and how ....' " (citation omitted)).

Furthermore, religious dietary laws would appear to qualify as specific tenets. In *Williams v. Bitner,* 455 F.3d 186 (3d Cir.2006), a Muslim inmate assigned to kitchen duty was disciplined for refusing to aid others in the consumption of pork. Citing the Koran ("He has forbidden you ... the flesh of swine") and Chapter Eleven of Leviticus in the Old Testament, Williams averred that handling and serving pork would violate his religious faith. *Id.* at 187. Our court held that "prison officials must respect and accommodate, when practicable, a Muslim inmate's religious beliefs regarding prohibitions on the handling of pork" and affirmed the denial of qualified immunity. *Id.* at 194. *See also DeHart v. Horn,* 390 F.3d 262, 272–75 (3d Cir.2004) (discussing a Buddhist prisoner's Religious Land Use and Institutionalized Persons Act claim based upon his request for a special diet).

At the other end of the spectrum are claims similar to Parents'. These claims cite more general and less obviously manifested concepts. This is not to undervalue these tenets which, as revelations, may be fundamental to one's religious beliefs. In these situations, however, it may be difficult to determine whether a litigant's citations to scripture or to general religious concepts articulate a "specific tenet." Also problematic in this analysis are religious tenets that may be viewed as both general and specific. *See, e.g., Exodus* 20:7 ("Thou shalt not take the name of the LORD thy God in vain, for the LORD will not hold him guiltless that taketh his name in vain."); *Exodus* 20:12 ("Honor thy father and thy mother that thy days may be long upon the land which the LORD thy God giveth thee.").

Furthermore, the RFPA definition of "substantially burden" appears to create some tension between state and federal law. The United States Supreme Court has cautioned against making religious interpretations in the First Amendment context. *See, e.g., Smith,* 494 U.S. at 887, 110 S.Ct. 1595 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *id.* at 886–87, 110 S.Ct. 1595 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."); *Thomas v. Review Bd. of the Indiana Employment Sec. Div.,* 450 U.S. 707, 715, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) ("Courts should not undertake to dissect religious beliefs ... because [the

believer's] beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."); *id.* at 716, 101 S.Ct. 1425 ("Courts are not arbiters of scriptural interpretation."). Additionally, the Religious *259 Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc–5, "does not permit a court to determine whether the belief or practice in question is 'compelled by, or central to, a system of religious belief.' " *Washington v. Klem,* 497 F.3d 272, 277 (3d Cir.2007) (quoting 42 U.S.C. § 2000cc–5(7)(A)).

Nevertheless, the Pennsylvania General Assembly's statutory definition of "substantially burden" appears to require courts to inquire into, *inter alia,* whether an activity is fundamental to a person's religion or whether a person is compelled to violate a specific tenet of their religious faith. *See* 71 Pa. Stat. Ann. § 2403 (defining substantially burden as "an agency action which ... [d]enies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion [or c]ompels conduct or expression which violates a specific tenet of a person's religious faith.").[42] Arguably, a violation of a general tenet might substantially burden one's religious faith. But that was not what the Pennsylvania General Assembly proscribed. The statutory language shifts the burden of establishing a compelling interest and least restrictive means to the state actor only after the violation of a specific tenet, which must mean something different from a general tenet. As noted, the dilemma is especially striking because, in the view of the believer, the violation of a general tenet may very well substantially burden one's religious faith.

[42] As noted, in *Ridley Park* the Pennsylvania Commonwealth Court examined the third definition of "substantially burden"—"denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion"—and concluded that while daycare "aided in carrying out the Church's religious mission, [it] is not a fundamental religious activity of a church." *Ridley Park,* 920 A.2d at 960. "For example, ministering to the sick can flow from a religious mission, but it is not a fundamental religious activity of a church because a hospital may be built to satisfy that mission." *Id.*

Nevertheless, given the normal usage of the term, it is difficult to see that Parents have cited a *specific* tenet that would prohibit reporting requirements and discretionary school district review of their children's educational progress. Instead, they reference general, but nonetheless important, religious tenets, *see, e.g., Luke* 20:25 ("Then render to Caesar the things that are Caesar's, and to God the things that are God's."); 2 *Timothy* 2:15 ("Be diligent to present yourself approved to God."), to assert that local school districts have no authority to conduct a limited review of their children's educational progress. In addition, under RFPA's fourth definition of "substantially burden," a party must establish a nexus between the specific tenet and the compelled violation, a nexus that Parents have not established here.

Furthermore, the inconsistencies in Parents' complaints, depositions, briefs and appellate oral argument suggest the difficulty in identifying a specific tenet (as opposed to a general tenet) and its attendant consequences. In their complaints, briefs to the district court, and some deposition testimony, Parents asserted a "specific tenet" that the state "lacks the jurisdiction" over their children's education, i.e., that no level of state review would be permissible.[43] *See* Parents Br. Opp'n to Def.'s Mot. Summ. J. at 9–10, Apr. 14, 2006. But at oral argument, Parents implied that their asserted

"tenet" might allow non-discretionary review of their home education programs. *See also* Parents Reply ***260** Br. at 8 ("Parents do not contend that the government may not establish any standards to govern home education. Rather, the Parents' core objection ... is that their religious beliefs forbid them from submitting their religious education of their children to the discretionary review of a governmental official."). Yet it is problematic whether this interpretation of "non-discretionary" review would amount to any review at all.

[43] Although it is not entirely clear, I understand Parents' argument to mean that the natural consequence of their asserted specific tenet is that the state has no jurisdiction over home-schooling.

Based upon the plain language of the RFPA, Parents have failed to prove by clear and convincing evidence that they have been compelled or will likely be compelled to violate a specific tenet of their religious faith. Accordingly, Parents cannot sustain their cause of action under the Pennsylvania RFPA.

III.

Even finding the term "specific tenet" in the RFPA to be ambiguous, the decision would be the same. As noted, the purpose of statutory interpretation "is to ascertain and effectuate the intention of the General Assembly." 1 Pa. Cons. Stat. § 1921(a). Under section 1921(c), when a statute's words are ambiguous, the intention of the General Assembly "may be ascertained" by considering an array of factors.[44]

[44] As noted, those factors include, but are not limited to: "(1) The occasion and necessity for the statute. (2) The circumstances under which it was enacted. (3) The mischief to be remedied. (4) The object to be attained. (5) The former law, if any, including other statutes upon the same or similar subjects. (6) The consequences of a particular interpretation. (7) The contemporaneous legislative history. (8) Legislative and administrative interpretations of such statute." 1 Pa. Cons. Stat. § 1921(c).

The historical background and legislative history of Pennsylvania's RFPA places it in context and assists in interpreting the statute. Much of this depends on the development of federal First Amendment jurisprudence and its influence on Pennsylvania law. Prior to 1990, legislation and government regulation burdening the free exercise of religion was subject to the *Sherbert* test. *See Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Under this rule, if the government substantially burdened a person's constitutional free exercise rights, then it was required to justify the burden with a compelling state interest and with proof that the least restrictive means was employed. *Id.* at 402–04, 83 S.Ct. 1790. *See also Jimmy Swaggart Ministries v. Bd. of Equalization of California.,* 493 U.S. 378, 384–85, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990) ("Our cases have established that 'the free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.' " (quoting *Hernandez v. Comm'r,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989))).

In 1990, the Supreme Court held that the Free Exercise Clause did not prohibit enforcement of a neutral law of general applicability supported by a rational basis. *Employment Div., Dept. of Human*

Res. of Oregon v. Smith, 494 U.S. 872, 890, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). The Court concluded that the state could deny unemployment benefits due to work-related misconduct based upon an employee's religiously motivated ingestion and use of a drug; specifically, in that case, the ceremonial use of peyote. *Id.* Declining to apply the *Sherbert* balancing test, the Court noted that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *261 " *Id.* at 879, 110 S.Ct. 1595 (quoting *United States v. Lee,* 455 U.S. 252, 263 n. 3, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982)). Thus, *Smith* and its progeny "establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (citing *Smith*).

The *Smith* Court noted that religious exemptions, while not constitutionally required, could be created through the political process. *Smith,* 494 U.S. at 890, 110 S.Ct. 1595 (citing several state statutes making "an exception to their drug laws for sacramental peyote use"). In 1993, Congress accepted the Court's invitation by enacting the Religious Freedom Restoration Act ("RFRA"), 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb–4 (amended 2000). Congress sought to restore the compelling interest test articulated in *Sherbert* and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), "and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb. Applicable to "all Federal and State law," Pub. L. No. 103–141, § 6, 107 Stat. 1488, 1489 (1993), RFRA prohibited both the federal and state governments[45] from "substantially burden[ing] a person's exercise of religion" except through the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000bb–1. In 1997, the Supreme Court struck down RFRA as applied to the states[46] because RFRA exceeded the scope of Congress' enforcement power under section 5 of the Fourteenth Amendment. *Boerne v. P.F. Flores,* 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). RFRA lacked a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520, 529–36, 117 S.Ct. 2157.

[45] At the time of enactment in 1993, "Government" was defined as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." Pub. L. No. 103–141, § 5, 107 Stat. 1488, 1489 (1993). As amended, "Government" is defined as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb–2(1). "Covered entity means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." *Id.* § 2000bb–2(2).

[46] RFRA continues to be enforced against the federal government. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (applying RFRA to regulations by the federal government under the Controlled Substances Act).

In part a reaction to *City of Boerne,* Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc–5, which addresses only land use regulations and the religious rights of institutionalized persons. *Id.* §§ 2000cc, 2000cc–1. RLUIPA prohibits both state and

federal governments from imposing a "substantial burden" on the religious exercise of an institutionalized person unless it is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc–1. Also, several states in addition to Pennsylvania passed their own religious freedom restoration or protection legislation.[47]

[47] *See* Ariz. Rev. Stat. Ann. §§ 41–1493; Conn. Gen.Stat. § 52–571b; Fla. Stat. § 761.01 to 761.05; Idaho Code Ann. §§ 73–401 to 73–404; 775 Ill. Comp. Stat. 35/1 to 35/99; Mo. Ann. Stat. §§ 1.302 & 1.307; N.M. Stat. §§ 28–22–1 to 28–22–5; Okla. Stat. tit. 51 §§ 251 to 258; R.I. Gen. Laws §§ 42–80.1–1 to 42–80.1–4; S.C. Code Ann. §§ 1–32–10 to 1–32–60; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to 110.012; Va. Code Ann. §§ 57–1 to 57–2.02; Utah Code Ann. §§ 63L–5–101 to 63L–5–403; *see also* Ala. Const. Art I, § 3.01. The Pennsylvania RFPA became effective December 9, 2002. Missouri, Utah and Virginia passed legislation after 2002.

Although there are differences among the various federal and state religious protection *262 statutes, most contain, at their core, the same fundamental structure and purpose. They recognize that neutral laws of general applicability may burden religious exercise as significantly as laws intended to interfere with religious exercise. The federal statutes, Pennsylvania's RFPA, and a majority of the state statutes also acknowledge the government need not justify every action having some effect on religious exercise. Under those statutes, only *substantial* burdens trigger heightened scrutiny.[48] RFPA's four definitions of "substantially burden" emphasize the importance of this threshold. *See* 71 Pa. Stat. Ann. § 2403 ("*significantly* constrains or inhibits"; "*significantly* curtails"; "denies ... a reasonable opportunity to engage in activities ... *fundamental* to the person's religion"; "violates a *specific tenet* of a person's religious faith.") (emphasis added).

[48] Alabama and Connecticut do not modify "burden." Ala. Const. Art I, § 3.01 ("Government shall not burden a person's freedom of religion...."); Conn. Gen. Stat. § 52–571b ("The state ... shall not burden a person's exercise of religion...."). Missouri, New Mexico, and Rhode Island prohibit the government from "restrict[ing] a person's free exercise of religion." Mo. Ann. Stat. § 1.302; N.M. Stat. §§ 28–22–3; R.I. Gen. Laws §§ 42–80.1–3.

In our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this, legislatures have sought a balance between protecting free exercise of religion and preserving an effective police power. The federal government, Pennsylvania, and several other states have identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action.[49] Furthermore, by requiring proof of a "substantial burden" by clear and convincing evidence, Pennsylvania appears to have set a higher threshold than other religious restoration statutes. *Compare* 71 Pa. Stat. Ann. §§ 2404, 2405 (requiring "clear and convincing evidence" of substantial burden), *with* 42 U.S.C. § 2000cc–2(b) ("plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice ... substantially burdens the plaintiff's exercise of religion"), *Warner,* 887 So.2d at 1034 ("[T]he plaintiff bears the initial burden *263 of showing that a regulation constitutes a substantial burden...."), *Diggs v. Snyder,* 333 Ill.App.3d 189, 266 Ill. Dec. 478, 775 N.E.2d 40, 45 (2002) (requiring, under the Illinois Religious Freedom Restoration Act, plaintiff "to make a threshold showing" of substantial burden).

[49] To illustrate, for the purposes of RLUIPA, we recognize that a "substantial burden" exists where:

> 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

Washington v. Klem, 497 F.3d 272, 280 (3d Cir.2007). Under the Florida Religious Freedom Restoration Act, "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Warner v. Boca Raton,* 887 So.2d 1023, 1033 (Fla.2004). "A plaintiff who claims that a governmental regulation constitutes a substantial burden must 'prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates.' " *Id.* at 1035 (citations omitted).

As noted, Parents have not cited a specific tenet that would prevent adherence to the reporting requirements or prohibit discretionary School District review of their children's educational progress. Instead, they reference general, but important, religious tenets to support their claim that local school districts have no authority to conduct limited review of their home education programs. Such a broad interpretation of the term "specific tenet" would appear to read "specific" out of the statute.

The occasion, necessity, and purpose of the RFPA do not support a finding, by clear and convincing evidence, that Parents are compelled or will likely be compelled to violate a specific tenet of their religious faith. Accordingly, Parents cannot prevail on their cause of action under the Pennsylvania RFPA.

III. Education and Privatization

Introduction

An important aspect of a country's education system is the degree to which the government will fund and control education and, correspondingly, the degree to which it will permit private and quasi-private entities to assume those roles. These issues arose in the prior section; both the *Yoder* and *Combs* decisions sought to balance the state's interest in educating students and its duty to do so, on one hand, with parents' rights to control the upbringing of their children, on the other hand. In the *Combs* case, from 2008, the debate occurred in the specific context of homeschooling regulation.

This section continues that conversation beginning with a 1925 decision from the US Supreme Court, *Pierce v. Society of Sisters*, in which the Court held that a state could not compel students to attend public schools, thus clearing the way for private schools to continue to exist and to satisfy states' requirements that children of certain ages attend school. Today, roughly one-tenth of school-age children in the US attend private schools. A little less than one-quarter of these students attend Catholic schools; almost half attend other religious schools (mainly Protestant); the remaining one-third attend schools the federal government classifies as non-sectarian, which presumably are non-religious. Similar to *Yoder* in the preceding section, *Pierce* may be of interest to European readers because it is known today as a parents' rights case, while the discussion of "education rights" in the US focuses almost exclusively on students' rights.

The second and third decisions in this section, also issued by the US Supreme Court, present more recent debates about state involvement in public schools. Notably, they have a different starting point than *Pierce*: rather than trying to close private schools, the legislation at issue in each case supported private schools. In *Agostini v. Felton*, decided in 1997, a state program permitted teachers who were employed (and thus paid) by the state to provide instruction in private schools, thus indirectly subsidizing religious schools. In *Zelman v. Simmons-Harris*, decided in 2002, the state made vouchers available to students to help defray the cost of tuition at private school of the family's choice, so state money went to fund religious schools after passing through parents' hands.

The US Constitution has two provisions regarding religion—the Free Exercise Clause and the Establishment Clause. The Free Exercise Clause is similar to constitutional provisions in many countries around the world which protect individuals' religious belief and expression; *Yoder* and *Combs* invoked free exercise arguments, among others. However, the Establishment Clause is relatively unique in the global context—it prohibits the state from advancing religion, and has given rise to a complex jurisprudence. *Agostini* and *Zelman* both are important Establishment Clause cases. They engage the jurisprudential history and effectively summarize much of it. Those interested in further information on these topics are recommended to read *Religion and the State in American Law* by Frank Ravitch, Scott Idleman, and Boris Bittker (2015).

Not all privatization debates in the US are about religion, though, and thus the last two decisions included in this section are about charter schools. In many other countries, charter

schools would be designated explicitly as quasi-public schools, but because these schools are open to all students free of charge, charter schools are generally considered to be one option among many in US public schools. The first charter school opened in 1992 in Minnesota; since then, charter schools have been one of the most popular education reform vehicles across the country. Today, 43 states and the District of Columbia authorize about 5,700 charter schools; roughly 5% of students in US public schools attend charter schools. Although some charter schools (about 13%) are run by for-profit companies, over two-thirds are run by stand-alone non-profit entities that operate only one school.

Charter schools often walk a fine line between acting as public entities and private entities, and in fact they would like to be considered a hybrid public-private actor. The private aspects are not insignificant: charters are not subject to state curricular requirements in the same way as traditional public schools and often are exempt from labor and employment regulations applicable to traditional public schools. Accordingly, the second-to-last judicial decision included in this section, *Caviness v. Horizon Community Learning Center* addresses the question of under what circumstances charters are, like traditional public schools, "state actors." This decision is from a prominent federal appeals court; federal appellate circuits are split on the issue addressed in *Caviness*.

Much as charters want to have the autonomy of private actors, they also depend on public funding and thus have a very strong interest remaining public actors (indeed, the state support, which enables a tuition-free education, and the open admissions policy are primarily what differentiate charters from traditional private schools). Interestingly, according to leading school finance scholars:

> Seven charter school states have constitutional provisions barring the funding of private schools with public funds: Alaska, Arizona, Hawaii, Michigan, New Mexico, South Carolina, and Wyoming. Seven states with charter schools have constitutional provisions limiting educational funds to public, free, or common schools: Connecticut, Georgia, Missouri, New Jersey, Rhode Island, Texas, and Washington. Two states with charter schools have constitutional provisions that prohibit the funding of any schools that are not under the exclusive control of the state: California and Massachusetts.

Preston C. Green, III, Bruce D. Baker & Joseph O. Oluwole, *Having it Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 Emory Law Journal 303, 305-06 (2013). In 2015, the Washington State Supreme Court issued a groundbreaking, controversial decision in this regard, holding that because charters are not "common schools," it is unconstitutional for them to receive state funding. This decision, *League of Women Voters of Washington v. State*, is the final decision included in this section. As noted above, the "common schools" restriction appears in only seven state constitutions, including Washington's; however, the potential that states with the same language could follow Washington's lead, and that this decision trends in the same direction as *Caviness* and other decisions, is a significant concern for charter school advocates.

Online resources about charter schools and related litigation include the National Alliance for Public Charter Schools' webpage: www.publiccharters.org. An increasing number of states also have charter school associations that provide online resources.

Pierce v. Society of Sisters, 268 U.S. 510 (1925).

***529** Mr. Justice McREYNOLDS delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary ****572*** orders restraining ***530** appellants from threatening or attempting to enforce the Compulsory Education Act[1] adopted November 7, 1922 (Laws Or. 1923, p. 9), under the initiative provision of her Constitution by the voters of Oregon. Judicial Code, § 266 (Comp. St. § 1243). They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.

The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides; and failure so to do is declared a misdemeanor. There are ***531** exemptions—not specially important here—for children who are not normal, or who have completed the eighth grade, or whose parents or private teachers reside at considerable distances from any public school, or who hold special permits from the county superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

Appellee the Society of Sisters is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal ***532** property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between 8 and 16. In its primary schools many children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. All courses of study, both temporal and religious, contemplate continuity of training under appellee's charge; the primary schools are essential to the system and the most profitable. It owns valuable buildings, especially constructed and equipped for school purposes. The business is remunerative—the annual income from primary schools exceeds $30,000—and the successful conduct of this requires long time contracts with teachers and parents. The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

After setting out the above facts, the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and

religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business ****573*** or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of the measure is enjoined the corporation's business and property will suffer irreparable injury.

Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged ***533*** in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of 5 and 21 years. The average attendance is 100, and the annual fees received for each student amount to some $800. The elementary department is divided into eight grades, as in the public schools; the college preparatory department has four grades, similar to those of the public high schools; the courses of study conform to the requirements of the state board of education. Military instruction and training are also given, under the supervision of an army officer. It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable. In order to conduct its affairs, long time contracts must be made for supplies, equipment, teachers, and pupils. Appellants, law officers of the state and county, have publicly announced that the Act of November 7, 1922, is valid and have declared their intention to enforce it. By reason of the statute and threat of enforcement appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn.

The Academy's bill states the foregoing facts and then alleges that the challenged act contravenes the corporation's rights guaranteed by the Fourteenth Amendment and that unless appellants are restrained from proclaiming its validity and threatening to enforce it irreparable injury will result. The prayer is for an appropriate injunction.

No answer was interposed in either cause, and after proper notices they were heard by three judges (Judicial Code, § 266 [Comp. St. § 1243]) on motions for preliminary injunctions upon the specifically alleged facts. The court ruled that the Fourteenth Amendment guaranteed appellees against the ***534*** deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. It declared the right to conduct schools was property and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also, that appellees' schools were not unfit or harmful to the public, and that enforcement of the challenged statute would unlawfully deprive them of patronage and thereby destroy appellees' business and property. Finally, that the threats to enforce the act would continue to cause irreparable injury; and the suits were not premature.

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children ***535** under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. v. Riggs, 203 U. S. 243, 255, 27 S. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104; Western Turf Association v. Greenberg, 204 U. S. 359, 363, 27 S. Ct. 384, 51 L. Ed. 520. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such ****574** action. Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 543, Ann. Cas. 1917B, 283; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375; Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255.

The courts of the state have not construed the act, and we must determine its meaning for ourselves. Evidently it was expected to have general application and cannot be construed as though merely intended to amend the charters of certain private corporations, as in Berea College v. Kentucky, 211 U. S. 45, 29 S. Ct. 33, 53 L. Ed. 81. No argument in favor of such view has been advanced.

Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived ***536** of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in

Truax v. Raich, Truax v. Corrigan, and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196; American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360; Nebraska District, etc., v. McKelvie, 262 U. S. 404, 43 S. Ct. 628, 67 L. Ed. 1047; Truax v. Corrigan, supra, and cases there cited.

The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity.

The decrees below are affirmed.

> 1. *Be it enacted by the people of the state of Oregon:* Section 1. That section 5259, Oregon Laws, be and the same is hereby amended so as to read as follows: Sec. 5259. *Children Between the Ages of Eight and Sixteen Years*.—Any parent, guardian or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases, children shall not be required to attend public schools:(a) *Children Physically Unable*.—Any child who is abnormal, subnormal or physically unable to attend school.(b) *Children Who Have Completed the Eighth Grade*.—Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.(c) *Distance from School*.—Children between the ages of eight and ten years, inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.(d) *Private Instruction*.—Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to

the public school the remainder of the school year. If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years, shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court. This act shall take effect and be and remain in force from and after the first day of September, 1926.

Agostini v. Felton, 521 U.S. 203 (US Supreme Court 1997).

Syllabus [*]

> * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

In *Aguilar v. Felton,* 473 U.S. 402, 413, 105 S.Ct. 3232, 3238, 87 L.Ed.2d 290, this Court held that New York City's program that sent public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 necessitated an excessive entanglement of church and state and violated the First Amendment's Establishment Clause. On remand, the District Court entered a permanent injunction reflecting that ruling. Some 10 years later, petitioners—the parties bound by the injunction—filed motions in the same court seeking relief from the injunction's operation under Federal Rule of Civil Procedure 60(b)(5). They emphasized the significant costs of complying with *Aguilar* and the assertions of five Justices in *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546, that *Aguilar* should be reconsidered, and argued that relief was proper under Rule 60(b)(5) and *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 388, 112 S.Ct. 748, 762, 116 L.Ed.2d 867, because *Aguilar* cannot be squared with this Court's intervening Establishment Clause jurisprudence and is no longer good law. The District Court denied the motion on the merits, declaring that *Aguilar* 's demise has "not yet occurred." The Second Circuit agreed and affirmed.

Held:

1. A federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees under a program containing safeguards such as those present in New York City's Title I program. Accordingly, *Aguilar,* as well as that portion of its companion case, *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267, addressing a "Shared Time" program, are no longer good law. Pp. 2006–2017.

(a) Under *Rufo, supra,* at 384, 112 S.Ct., at 760, Rule 60(b)(5)—which states that, "upon such terms as are just, the court may relieve a party ... from a final judgment ... [when] it is no longer equitable that the judgment ***204** should have prospective application"—authorizes relief from an injunction if the moving party shows a significant change either in factual conditions or in law. Since the exorbitant costs of complying with the injunction were known at the time *Aguilar* was decided, see, *e.g.,* 473 U.S., at 430–431, 105 S.Ct., at 3247–3248 (O'CONNOR, J., dissenting), they do not constitute a change in factual conditions sufficient to warrant relief, accord, *Rufo, supra,* at 385, 112 S.Ct., at 760–761. Also unavailing is the fact that five Justices in *Kiryas Joel* expressed the view that *Aguilar* should be reconsidered or overruled. Because the question of *Aguilar* 's propriety was not before the Court in that case, those Justices' views

cannot be said to have effected a change in Establishment Clause law. Thus, petitioners' ability to satisfy Rule 60(b)(5)'s prerequisites hinges on whether the Court's later Establishment Clause cases have so undermined *Aguilar* that it is no longer good law. Pp. 2006–2007.

(b) To answer that question, it is necessary to understand the rationale upon which *Aguilar* and *Ball* rested. One of the programs evaluated in *Ball* was the Grand Rapids, Michigan, Shared Time program, which is analogous to New York City's Title I program. Applying the three-part *Lemon v. Kurtzman,* 403 U.S. 602, 612–613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, test, the *Ball* Court acknowledged that the Shared Time *****2001*** program satisfied the test's first element in that it served a purely secular purpose, 473 U.S., at 383, 105 S.Ct., at 3222, but ultimately concluded that it had the impermissible effect of advancing religion, in violation of the test's second element, *id.,* at 385, 105 S.Ct., at 3223. That conclusion rested on three assumptions: (i) any public employee who works on a religious school's premises is presumed to inculcate religion in her work, see *id.,* at 385–389, 105 S.Ct., at 3223–3226; (ii) the presence of public employees on private school premises creates an impermissible symbolic union between church and state, see *id.,* at 389, 391, 105 S.Ct., at 3225–3226, 3226–3227; and (iii) any public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking, see *id.,* at 385, 393, 395–397, 105 S.Ct., at 3223, 3227–3228, 3228–3230. Additionally, *Aguilar* set forth a fourth assumption: that New York City's Title I program necessitates an excessive government entanglement with religion, in violation of the *Lemon* test's third element, because public employees who teach on religious school premises must be closely monitored to ensure that they do not inculcate religion. See 473 U.S., at 409, 412–414, 105 S.Ct., at 3236, 3237–3239. Pp. 2008–2010.

(c) The Court's more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied. Contrary to *Aguilar*'s conclusion, placing full-time government employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination. Subsequent cases have modified in two significant respects the approach the Court uses to assess****205*** whether the government has impermissibly advanced religion by inculcating religious beliefs. First, the Court has abandoned *Ball* 's presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion. *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 12–13, 113 S.Ct. 2462, 2468–2469, 125 L.Ed.2d 1. No evidence has ever shown that any New York City instructor teaching on parochial school premises attempted to inculcate religion in students. Second, the Court has departed from *Ball* 's rule that all government aid that directly aids the educational function of religious schools is invalid. *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 487, 106 S.Ct. 748, 751, 88 L.Ed.2d 846; *Zobrest, supra,* at 10, 12, 113 S.Ct., at 2467, 2468–2469. In all relevant respects, the provision of the instructional services here at issue is indistinguishable from the provision of a sign-language interpreter in *Zobrest. Zobrest* and *Witters* make clear that, under current law, the Shared Time program in *Ball* and New York City's Title I program will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Thus, both this Court's precedent and its experience require rejection of the premises upon which

Ball relied. Pp. 2010–2014.

(d) New York City's Title I program does not give aid recipients any incentive to modify their religious beliefs or practices in order to obtain program services. Although *Ball* and *Aguilar* completely ignored this consideration, other Establishment Clause cases before and since have examined the criteria by which an aid program identifies its beneficiaries to determine whether the criteria themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf., *e.g., Witters, supra,* at 488, 106 S.Ct., at 751–752; *Zobrest, supra,* at 10, 113 S.Ct., at 2467. Such an incentive is not present where, as here, the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion. See *Widmar v. Vincent,* 454 U.S. 263, 274, 102 S.Ct. 269, 276–277, 70 L.Ed.2d 440. New York City's Title I services are available to all children who meet the eligibility requirements, no matter what their religious beliefs or where they go to school. P. 2014.

*****2002*** (e) The *Aguilar* Court erred in concluding that New York City's Title I program resulted in an excessive entanglement between church and state. Regardless of whether entanglement is considered in the course of assessing if a program has an impermissible effect of advancing religion, *Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697, or as a factor separate and apart from "effect," *Lemon v. Kurtzman,* 403 U.S., at 612–613, 91 S.Ct., at 2111, the considerations used to assess its excessiveness****206*** are similar: The Court looks to the character and purposes of the benefited institutions, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. *Id.,* at 615, 91 S.Ct., at 2112. It is simplest to recognize why entanglement is significant and treat it—as the Court did in *Walz*—as an aspect of the inquiry into a statute's effect. The *Aguilar* Court's finding of "excessive" entanglement rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the government and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." 473 U.S., at 413–414, 105 S.Ct., at 3238–3239. Under the Court's current Establishment Clause understanding, the last two considerations are insufficient to create an "excessive entanglement" because they are present no matter where Title I services are offered, but no court has held that Title I services cannot be offered off campus. *E.g., Aguilar, supra.* Further, the first consideration has been undermined by *Zobrest.* Because the Court in *Zobrest* abandoned the presumption that public employees will inculcate religion simply because they happen to be in a sectarian environment, there is no longer any need to assume that *pervasive* monitoring of Title I teachers is required. There is no suggestion in the record that the system New York City has in place to monitor Title I employees is insufficient to prevent or to detect inculcation. Moreover, the Court has failed to find excessive entanglement in cases involving far more onerous burdens on religious institutions. See *Bowen v. Kendrick,* 487 U.S. 589, 615–617, 108 S.Ct. 2562, 2577–2579, 101 L.Ed.2d 520. Pp. 2014–2016.

(f) Thus, New York City's Title I program does not run afoul of any of three primary criteria the

Court currently uses to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement. Nor can this carefully constrained program reasonably be viewed as an endorsement of religion. P. 2016.

(g) The *stare decisis* doctrine does not preclude this Court from recognizing the change in its law and overruling *Aguilar* and those portions of *Ball* that are inconsistent with its more recent decisions. *E.g., United States v. Gaudin,* 515 U.S. 506, 521, 115 S.Ct. 2310, 2319, 132 L.Ed.2d 444. Moreover, in light of the Court's conclusion that *Aguilar* would be decided differently under current Establishment Clause law, adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply. Accord, *Davis v. United States,* 417 U.S. 333, 342, 94 S.Ct. 2298, 2303, 41 L.Ed.2d 109. Pp. 2016–2017.

***207** 2. The significant change in this Court's post-*Aguilar* Establishment Clause law entitles petitioners to relief under Rule 60(b)(5). The Court's general practice is to apply the rule of law it is announcing to the parties before it, *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 485, 109 S.Ct. 1917, 1922, 104 L.Ed.2d 526, even when it is overruling a case, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 237–238, 115 S.Ct. 2097, 2118, 132 L.Ed.2d 158. The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. *Rodriguez de Quijas, supra,* at 484, 109 S.Ct., at 1921–1922. Respondents' various arguments as to why relief should not be ****2003** granted in this litigation—that a different analysis is required because the Court is here reviewing for abuse of discretion the District Court's denial of relief; that petitioners' unprecedented use of Rule 60(b)(5) as a vehicle for *effecting* changes in the law, rather than as a means of *recognizing* them, will encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions; that petitioners' use of Rule 60(b) in this context will erode the Court's institutional integrity; and that the Court should wait for a "better vehicle" in which to evaluate *Aguilar*'s continuing vitality—are not persuasive. Pp. 2017–2019.

Justice O'CONNOR delivered the opinion of the Court.

In *Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, petitioners—the parties bound by that injunction—seek relief from its operation. Petitioners maintain that *Aguilar* cannot be ***209** squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners are entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the

operation of the District Court's prospective injunction.

I

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as modified, 20 U.S.C. § 6301 *et seq.,* to "provid[e] full educational opportunity to every child regardless of economic background." S. Rep. No. 146, 89th Cong., 1st Sess., 5 (1965), U.S. Code Cong. & Admin. News 1965, pp. 1446, 1450 (hereinafter Title I). Toward that end, Title I channels federal funds, through the States, to "local educational agencies" (LEA's). 20 U.S.C. §§ 6311, 6312.[*] The LEA's spend these funds to provide remedial education, guidance, and job counseling to eligible students. §§ 6315(c)(1)(A) (LEA's must use funds to "help participating children meet ... State student performance standards"), 6315(c)(1)(E) (LEA's may use funds to provide "counseling, mentoring, and other pupil services"); see also §§ 6314(b)(1)(B)(i), (iv). An eligible student is one (i) who resides within the attendance boundaries of a public *****2004*** school located in a low-income area, § 6313(a)(2)(B); and (ii) who is failing, or is at risk of failing, the State's student performance standards, § 6315(b)(1)(B). Title I funds must be made available to *all* eligible children, regardless of whether they attend public schools, § 6312(c)(1)(F), and the services provided to children attending private schools must ****210*** be "equitable in comparison to services and other benefits for public school children," § 6321(a)(3); see § 6321(a)(1); 34 C.F.R. §§ 200.10(a), 200.11(b) (1996).

* Title I has been reenacted, in varying forms, over the years, most recently in the Improving America's Schools Act of 1994, 108 Stat. 3518. We will refer to the current Title I provisions, which do not differ meaningfully for our purposes from the Title I program referred to in our previous decision in this litigation.

An LEA providing services to children enrolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a "school-wide" basis. Compare 34 C.F.R. § 200.12(b) (1996) with 20 U.S.C. § 6314 (allowing "school-wide" programs at public schools). In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. §§ 6321(c)(1), (2). The Title I services themselves must be "secular, neutral, and nonideological," § 6321(a)(2), and must "supplement, and in no case supplant, the level of services" already provided by the private school, 34 C.F.R. § 200.12(a) (1996).

Petitioner Board of Education of the City of New York (hereinafter Board), an LEA, first applied for Title I funds in 1966 and has grappled ever since with how to provide Title I services to the private school students within its jurisdiction. Approximately 10% of the total number of students eligible for Title I services are private school students. See App. 38, 620. Recognizing that more than 90% of the private schools within the Board's jurisdiction are sectarian, *Felton v. Secretary, United States Dept. of Ed.,* 739 F.2d 48, 51 (C.A.2 1984), the Board initially arranged to transport children to public schools for after-school Title I instruction. But this enterprise was largely unsuccessful. Attendance was poor, teachers and children were tired, and parents were

concerned for the safety of their children. *Ibid.* The Board then moved the after-school instruction onto private school ***211** campuses, as Congress had contemplated when it enacted Title I. See *Wheeler v. Barrera,* 417 U.S. 402, 422, 94 S.Ct. 2274, 2285–2286, 41 L.Ed.2d 159 (1974). After this program also yielded mixed results, the Board implemented the plan we evaluated in *Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985).

That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. *Id.,* at 406, 105 S.Ct., at 3234–3235. Assignments to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. *Ibid.;* 739 F.2d, at 53. As the Court of Appeals in *Aguilar* observed, a large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. 473 U.S., at 406, 105 S.Ct., at 3234–3235. The vast majority of Title I teachers also moved among the private schools, spending fewer than five days a week at the same school. *Ibid.*

Before any public employee could provide Title I instruction at a private school, she would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised. Specifically, employees would be told that (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only those children who met the eligibility criteria for Title I; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. *Ibid.* All religious symbols were to be removed from classrooms used ***212** for Title I services. *Id.,* at 407, 105 S.Ct., at 3235. ****2005** The rules acknowledged that it might be necessary for Title I teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. 739 F.2d, at 53. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month. 473 U.S., at 407, 105 S.Ct., at 3235.

In 1978, six federal taxpayers—respondents here—sued the Board in the District Court for the Eastern District of New York. Respondents sought declaratory and injunctive relief, claiming that the Board's Title I program violated the Establishment Clause. The District Court permitted the parents of a number of parochial school students who were receiving Title I services to intervene as codefendants. The District Court granted summary judgment for the Board, but the Court of Appeals for the Second Circuit reversed. While noting that the Board's Title I program had "done so much good and little, if any, detectable harm," 739 F.2d, at 72, the Court of Appeals nevertheless held that *Meek v. Pittenger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), and *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), compelled it to declare the program unconstitutional. In a 5–to–4 decision, this Court affirmed on the

ground that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits." 473 U.S., at 414, 105 S.Ct., at 3239. On remand, the District Court permanently enjoined the Board

> "from using public funds for any plan or program under [Title I] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City." App. to Pet. for Cert. in No. 96–553, pp. A25–A26.

***213** The Board, like other LEA's across the United States, modified its Title I program so it could continue serving those students who attended private religious schools. Rather than offer Title I instruction to parochial school students at their schools, the Board reverted to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional units (essentially vans converted into classrooms) parked near the sectarian school. The Board also offered computer-aided instruction, which could be provided "on premises" because it did not require public employees to be physically present on the premises of a religious school. App. 315.

It is not disputed that the additional costs of complying with *Aguilar*'s mandate are significant. Since the 1986–1987 school year, the Board has spent over $100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites. App. 333 ($93.2 million spent between 1986–1987 and 1993–1994 school years); *id.,* at 336 (annual additional costs average around $15 million). Under the Secretary of Education's regulations, those costs "incurred as a result of implementing alternative delivery systems to comply with the requirements of *Aguilar v. Felton* " and not paid for with other state or federal funds are to be deducted from the federal grant before the Title I funds are distributed to *any* student. 34 C.F.R. § 200.27(c) (1996). These "*Aguilar* costs" thus reduce the amount of Title I money an LEA has available for remedial education, and LEA's have had to cut back on the number of students who receive Title I benefits. From Title I funds available for New York City children between the 1986–1987 and the 1993–1994 school years, the Board had to deduct $7.9 million "off-the-top" for compliance with *Aguilar.* App. 333. When *Aguilar* was handed down, it was estimated that some 20,000 economically disadvantaged children in the city of New York, see 473 U.S., at 431, 105 S.Ct., at 3247–3248 ***214** O'CONNOR, J., dissenting), and some 183,000 children nationwide, see L. Levy, The Establishment Clause 176 (1986), would experience a decline in Title I services. See also S. Rep. No. 100–222, p. 14 (1987), U.S.Code Cong. & Admin.News 1988, pp. 101, 114 (estimating that *Aguilar* costs have "resulted in a decline *****2006*** of about 35 percent in the number of private school children who are served").

In October and December of 1995, petitioners—the Board and a new group of parents of parochial school students entitled to Title I services—filed motions in the District Court seeking relief under Federal Rule of Civil Procedure 60(b) from the permanent injunction entered by the District Court on remand from our decision in *Aguilar.* Petitioners argued that relief was proper under Rule 60(b)(5) and our decision in *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 388,

112 S.Ct. 748, 762, 762, 116 L.Ed.2d 867 (1992), because the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." Specifically, petitioners pointed to the statements of five Justices in *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994), calling for the overruling of *Aguilar.* The District Court denied the motion. The District Court recognized that petitioners, "at bottom," sought "a procedurally sound vehicle to get the [propriety of the injunction] back before the Supreme Court," App. to Pet. for Cert. in No. 96–553, p. A12, and concluded that "the Board ha[d] properly proceeded under Rule 60(b) to seek relief from the injunction." *Id.,* at A19. Despite its observations that "the landscape of Establishment Clause decisions has changed," *id.,* at A10, and that "[t]here may be good reason to conclude that *Aguilar* 's demise is imminent," *id.,* at A20, the District Court denied the Rule 60(b) motion on the merits because *Aguilar* 's demise had "not yet occurred." The Court of Appeals for the Second Circuit "affirmed substantially for the reasons stated in" the District Court's opinion. App. to Pet. for Cert. in No. 96-553, p. A5; judge. order reported at 101 F.3d 1394 (1996). We granted certiorari, 519 U.S. 1086, 117 S.Ct. 759, 136 L.Ed.2d 695 (1997), and now reverse.

***215** II

The question we must answer is a simple one: Are petitioners entitled to relief from the District Court's permanent injunction under Rule 60(b)? Rule 60(b)(5), the subsection under which petitioners proceeded below, states: "On motion and upon such terms as are just, the court may relieve a party ... from a final judgment [or] order ... [when] it is no longer equitable that the judgment should have prospective application."

In *Rufo v. Inmates of Suffolk County Jail, supra,* at 384, 112 S.Ct., at 760, we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." A court may recognize subsequent changes in either statutory or decisional law. See *Railway Employees v. Wright,* 364 U.S. 642, 652–653, 81 S.Ct. 368, 373–374, 5 L.Ed.2d 349 (1961) (consent decree should be vacated under Rule 60(b) in light of amendments to the Railway Labor Act); *Rufo, supra,* at 393, 112 S.Ct., at 764–765 (vacating denial of Rule 60(b)(5) motion and remanding so District Court could consider whether consent decree should be modified in light of *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)); *Pasadena City Bd. of Ed. v. Spangler,* 427 U.S. 424, 437–438, 96 S.Ct. 2697, 2705–2706, 49 L.Ed.2d 599 (1976) (injunction should have been vacated in light of *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)). A court errs when it refuses to modify an injunction or consent decree in light of such changes. See *Wright, supra,* at 647, 81 S.Ct., at 371 ("[T]he court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong" (internal quotation marks omitted)).

Petitioners point to three changes in the factual and legal landscape that they believe justify their claim for relief under Rule 60(b)(5). They first contend that the exorbitant costs of complying with the District Court's injunction constitute ***216** a significant factual development warranting modification of the injunction. See Brief for Petitioner Agostini et al. 38–40.

Petitioners also argue that there have been two significant legal developments since *Aguilar* was decided: a majority of Justices have expressed their *****2007*** views that *Aguilar* should be reconsidered or overruled, see *supra,* at 2006; and *Aguilar* has in any event been undermined by subsequent Establishment Clause decisions, including *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), and *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

Respondents counter that, because the costs of providing Title I services off site were known at the time *Aguilar* was decided, and because the relevant case law has not changed, the District Court did not err in denying petitioners' motions. Obviously, if neither the law supporting our original decision in this litigation nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) motion. Accordingly, we turn to the threshold issue whether the factual or legal landscape has changed since we decided *Aguilar.*

We agree with respondents that petitioners have failed to establish the significant change in factual conditions required by *Rufo.* Both petitioners and this Court were, at the time *Aguilar* was decided, aware that additional costs would be incurred if Title I services could not be provided in parochial school classrooms. See App. 66–68 (Defendants' Joint Statement of Material Facts Not In Dispute, filed in 1982, detailing costs of providing off-premises services); *Aguilar,* 473 U.S., at 430–431, 105 S.Ct., at 3247–3248 (O'CONNOR, J., dissenting) (observing that costs of complying with *Aguilar* decision would likely cause a decline in Title I services for 20,000 New York City students). That these predictions of additional costs turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5). Accord, ****217*** *Rufo, supra,* at 385, 112 S.Ct., at 760 ("Ordinarily ... modification should not be granted where a party relies upon events that actually were anticipated at the time [the order was entered]").

We also agree with respondents that the statements made by five Justices in *Kiryas Joel* do not, in themselves, furnish a basis for concluding that our Establishment Clause jurisprudence has changed. In *Kiryas Joel,* we considered the constitutionality of a New York law that carved out a public school district to coincide with the boundaries of the village of Kiryas Joel, which was an enclave of the Satmar Hasidic sect. Before the new district was created, Satmar children wishing to receive special educational services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.,* could receive those services at public schools located outside the village. Because Satmar parents rarely permitted their children to attend those schools, New York created a new public school district within the boundaries of the village so that Satmar children could stay within the village but receive IDEA services on public school premises from publicly employed instructors. In the course of our opinion, we observed that New York had created the special school district in response to our decision in *Aguilar,* which had required New York to cease providing IDEA services to Satmar children on the premises of their private religious schools. 512 U.S., at 692, 114 S.Ct., at 2485–2486. Five Justices joined opinions calling for reconsideration of *Aguilar.* See 512 U.S., at 718, 114 S.Ct., at 2498–2499 (O'CONNOR, J., concurring in part and concurring in judgment); *id.,* at 731, 114 S.Ct., at 2505

(KENNEDY, J., concurring in judgment); *id.,* at 750, 114 S.Ct., at 2514–2515 (SCALIA, J., joined by REHNQUIST, C.J., and THOMAS, J., dissenting). But the question of *Aguilar*'s propriety was not before us. The views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law.

In light of these conclusions, petitioners' ability to satisfy the prerequisites of Rule 60(b)(5) hinges on whether our later Establishment Clause cases have so undermined ***218** *Aguilar* that it is no longer good law. We now turn to that inquiry.

*****2008*** III

A

In order to evaluate whether *Aguilar* has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which *Aguilar,* as well as its companion case, *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), rested.

In *Ball,* the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district's Shared Time program, the one most analogous to Title I, provided remedial and "enrichment" classes, at public expense, to students attending nonpublic schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of nonpublic schools. The Shared Time courses were in subjects designed to supplement the "core curriculum" of the nonpublic schools. *Id.,* at 375–376, 105 S.Ct., at 3218–3219. Of the 41 nonpublic schools eligible for the program, 40 were " 'pervasively sectarian' " in character—that is, " 'the purpos[e] of [those] schools [was] to advance their particular religions.' " *Id.,* at 379, 105 S.Ct., at 3220.

The Court conducted its analysis by applying the three-part test set forth in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." 473 U.S., at 382–383, 105 S.Ct., at 3222 (quoting *Lemon, supra,* at 612–613, 91 S.Ct., at 2111) (citations and internal quotation marks omitted).

The Court acknowledged that the Shared Time program served a purely secular purpose, thereby satisfying the first ***219** part of the so-called *Lemon* test. 473 U.S., at 383, 105 S.Ct., at 3222. Nevertheless, it ultimately concluded that the program had the impermissible effect of advancing religion. *Id.,* at 385, 105 S.Ct., at 3223.

The Court found that the program violated the Establishment Clause's prohibition against "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith" in at least three ways. *Ibid.* First, drawing upon the analysis in *Meek v. Pittenger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), the Court observed that "the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." 473 U.S., at 385, 105 S.Ct., at 3223. *Meek* invalidated a

Pennsylvania program in which full-time public employees provided supplemental "auxiliary services"—remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services—to nonpublic school children at their schools. 421 U.S., at 367–373, 95 S.Ct., at 1764–1767. Although the auxiliary services themselves were secular, they were mostly dispensed on the premises of parochial schools, where "an atmosphere dedicated to the advancement of religious belief [was] constantly maintained." *Meek,* 421 U.S., at 371, 95 S.Ct., at 1766. Instruction in that atmosphere was sufficient to create "[t]he potential for impermissible fostering of religion." *Id.,* at 372, 95 S.Ct., at 1766. Cf. *Wolman v. Walter,* 433 U.S., at 248, 97 S.Ct., at 2605 (upholding programs employing public employees to provide remedial instruction and guidance counseling to nonpublic school children at sites away from the nonpublic school).

The Court concluded that Grand Rapids' program shared these defects. 473 U.S., at 386, 105 S.Ct., at 3223–3224. As in *Meek,* classes were conducted on the premises of religious schools. Accordingly, a majority found a " 'substantial risk' " that teachers—even those who were not employed by the private schools—might "subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught]." 473 U.S., at 388, 105 S.Ct., at 3225. The danger of "state-sponsored indoctrination" was only exacerbated by the school district's failure to ***220** monitor the courses for religious content. *Id.,* at 387, 105 S.Ct., at 3224. Notably, the Court disregarded the lack of evidence of any specific incidents of ****2009** religious indoctrination as largely irrelevant, reasoning that potential witnesses to any indoctrination—the parochial school students, their parents, or parochial school officials—might be unable to detect or have little incentive to report the incidents. *Id.,* at 388–389, 105 S.Ct., at 3225.

The presence of public teachers on parochial school grounds had a second, related impermissible effect: It created a "graphic symbol of the 'concert or union or dependency' of church and state," *id.,* at 391, 105 S.Ct., at 3226 (quoting *Zorach v. Clauson,* 343 U.S. 306, 312, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952)), especially when perceived by "children in their formative years," 473 U.S., at 390, 105 S.Ct., at 3226. The Court feared that this perception of a symbolic union between church and state would "conve[y] a message of government endorsement ... of religion" and thereby violate a "core purpose" of the Establishment Clause. *Id.,* at 389, 105 S.Ct., at 3225.

Third, the Court found that the Shared Time program impermissibly financed religious indoctrination by subsidizing "the primary religious mission of the institutions affected." *Id.,* at 385, 105 S.Ct., at 3223. The Court separated its prior decisions evaluating programs that aided the secular activities of religious institutions into two categories: those in which it concluded that the aid resulted in an effect that was "indirect, remote, or incidental" (and upheld the aid); and those in which it concluded that the aid resulted in "a direct and substantial advancement of the sectarian enterprise" (and invalidated the aid). *Id.,* at 393, 105 S.Ct., at 3228 (internal quotation marks omitted). In light of *Meek* and *Wolman,* Grand Rapids' program fell into the latter category. In those cases, the Court ruled that a state loan of instructional equipment and materials to parochial schools was an impermissible form of "direct aid" because it "advanced the primary, religion-oriented educational function of the sectarian school," 473 U.S., at 395,

105 S.Ct., at 3228 (citations and internal quotation marks omitted), by providing “in-kind”***221** aid (*e.g.,* instructional materials) that could be used to teach religion and by freeing up money for religious indoctrination that the school would otherwise have devoted to secular education. Given the holdings in *Meek* and *Wolman,* the Shared Time program—which provided teachers as well as instructional equipment and materials—was surely invalid. 473 U.S., at 395, 105 S.Ct., at 3228–3229. The *Ball* Court likewise placed no weight on the fact that the program was provided to the student rather than to the school. Nor was the impermissible effect mitigated by the fact that the program only supplemented the courses offered by the parochial schools. *Id.,* at 395–397, 105 S.Ct., at 3228–3230.

The New York City Title I program challenged in *Aguilar* closely resembled the Shared Time program struck down in *Ball,* but the Court found fault with an aspect of the Title I program not present in *Ball:* The Board had “adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools.” 473 U.S., at 409, 105 S.Ct., at 3236. Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the Court concluded, as it had in *Lemon* and *Meek,* that the level of monitoring necessary to be “certain” that the program had an exclusively secular effect would “inevitably resul[t] in the excessive entanglement of church and state,” thereby running afoul of *Lemon* 's third prong. 473 U.S., at 409, 105 S.Ct., at 3236; see *Lemon,* 403 U.S., at 619, 91 S.Ct., at 2114 (invalidating Rhode Island program on entanglement grounds because “[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that th[e] restrictions [against indoctrination] are obeyed”); *Meek, supra,* at 370, 95 S.Ct., at 1765–1766 (invalidating Pennsylvania program on entanglement grounds because excessive monitoring would be required for the State to be certain that public school officials do not inculcate religion). In the majority's view, New York City's Title I program suffered from the “same critical elements of entanglement” present in *Lemon* and *Meek:* the aid was provided “in a pervasively***222** sectarian environment ... in the form of teachers,” requiring “ongoing inspection ... to ensure the absence of a religious message.” 473 U.S., at 412, 105 S.Ct., at 3238. Such “pervasive ****2010** monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement.” *Id.,* at 413, 105 S.Ct., at 3238. The Court noted two further forms of entanglement inherent in New York City's Title I program: the “administrative cooperation” required to implement Title I services and the “dangers of political divisiveness” that might grow out of the day-to-day decisions public officials would have to make in order to provide Title I services. *Id.,* at 413–414, 105 S.Ct., at 3238–3239.

Distilled to essentials, the Court's conclusion that the Shared Time program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in *Aguilar* there was a fourth assumption: that New York City's Title I program necessitated an excessive

government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

B

Our more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing***223** or inhibiting religion, and the nature of that inquiry has remained largely unchanged. See *Witters,* 474 U.S., at 485–486, 106 S.Ct., at 750–751; *Bowen v. Kendrick,* 487 U.S. 589, 602–604, 108 S.Ct. 2562, 2570–2572, 101 L.Ed.2d 520 (1988) (concluding that Adolescent Family Life Act had a secular purpose); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 248–249, 110 S.Ct. 2356, 2370–2371, 110 L.Ed.2d 191 (1990) (concluding that Equal Access Act has a secular purpose); cf. *Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (striking down Louisiana law that required creationism to be discussed with evolution in public schools because the law lacked a legitimate secular purpose). Likewise, we continue to explore whether the aid has the "effect" of advancing or inhibiting religion. What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

1

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), we examined whether the IDEA, 20 U.S.C. § 1400 *et seq.,* was constitutional as applied to a deaf student who sought to bring his state-employed sign-language interpreter with him to his Roman Catholic high school. We held that this was permissible, expressly disavowing the notion that "the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school." 509 U.S., at 13, 113 S.Ct., at 2469. "Such a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." *Ibid.* We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by "add[ing] to [or] subtract[ing] from" the lectures *****2011*** translated. *Ibid.* In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. *Id.,* at 12, 113 S.Ct., at 2468–2469. Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place and we were able to conclude that "the provision of such assistance [was] not barred by the Establishment Clause." *Id.,* at 13, 113 S.Ct., at 2469. *Zobrest* therefore expressly rejected the notion—relied on in *Ball* and *Aguilar*—that, solely because of her presence on private

school property, a public employee will be presumed to inculcate religion in the students. *Zobrest* also implicitly repudiated another assumption on which *Ball* and *Aguilar* turned: that the presence of a public employee on private school property creates an impermissible "symbolic link" between government and religion.

Justice SOUTER contends that *Zobrest* did not undermine the "presumption of inculcation" erected in *Ball* and *Aguilar,* and that our conclusion to the contrary rests on a "mistaken reading" of *Zobrest. Post,* at 2022 (dissenting opinion). In his view, *Zobrest* held that the Establishment Clause tolerates the presence of public employees in sectarian schools "only...in...limited circumstances"— *i.e.,* when the employee "simply translates for one student the material presented to the class for the benefit of all students." *Post,* at 2023. The sign-language interpreter in *Zobrest* is unlike the remedial instructors in *Ball* and *Aguilar* because signing, Justice SOUTER explains, "[cannot] be understood as an opportunity to inject religious content in what [is] supposed to be secular instruction." *Post,* at 2023. He is thus able to conclude that *Zobrest* is distinguishable ***225** from—and therefore perfectly consistent with—*Ball* and *Aguilar.*

In *Zobrest,* however, we did not expressly or implicitly rely upon the basis Justice SOUTER now advances for distinguishing *Ball* and *Aguilar.* If we had thought that signers had no "opportunity to inject religious content" into their translations, we would have had no reason to consult the record for evidence of inaccurate translations. 509 U.S., at 13, 113 S.Ct., at 2469. The signer in *Zobrest* had the same opportunity to inculcate religion in the performance of her duties as do Title I employees, and there is no genuine basis upon which to confine *Zobrest* 's underlying rationale—that public employees will not be presumed to inculcate religion—to sign-language interpreters. Indeed, even the *Zobrest* dissenters acknowledged the shift *Zobrest* effected in our Establishment Clause law when they criticized the majority for "stray[ing] ... from the course set by nearly five decades of Establishment Clause jurisprudence." *Id.,* at 24, 113 S.Ct., at 2475 (Blackmun, J., dissenting). Thus, it was *Zobrest*—and not this litigation—that created "fresh law." *Post,* at 2023. Our refusal to limit *Zobrest* to its facts despite its rationale does not, in our view, amount to a "misreading" of precedent.

Second, we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid. In *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.' " *Id.,* at 487, 106 S.Ct., at 751 (quoting ***226** *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 782–783, n. 38, 93 S.Ct. 2955, 2970–2971, n. 38, 37 L.Ed.2d 948 (1973)). The grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee

would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions ****2012*** did so "only as a result of the genuinely independent and private choices of " individuals. 474 U.S., at 487, 106 S.Ct., at 751. The same logic applied in *Zobrest,* where we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction, because the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a "result of the private decision of individual parents" and "[could not] be attributed to *state* decisionmaking." 509 U.S., at 10, 113 S.Ct., at 2467 (emphasis added). Because the private school would not have provided an interpreter on its own, we also concluded that the aid in *Zobrest* did not indirectly finance religious education by "reliev[ing] [the] sectarian schoo[l] of costs [it] otherwise would have borne in educating [its] students." *Id.,* at 12, 113 S.Ct., at 2468.

Zobrest and *Witters* make clear that, under current law, the Shared Time program in *Ball* and New York City's Title I program in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in *Ball* to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students.****227*** *National Coalition for Public Ed. & Religious Liberty v. Harris,* 489 F.Supp. 1248, 1262, 1267 (S.D.N.Y.1980); *Felton v. Secretary, United States Dept. of Ed.,* 739 F.2d, at 53, aff'd. *sub nom. Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985). Thus, both our precedent and our experience require us to reject respondents' remarkable argument that we must presume Title I instructors to be "uncontrollable and sometimes very unprofessional." Tr. of Oral Arg. 39.

As discussed above, *Zobrest* also repudiates *Ball* 's assumption that the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a "symbolic union" between church and state. Justice SOUTER maintains that *Zobrest* is not dispositive on this point because *Aguilar* 's implicit conclusion that New York City's Title I program created a "symbolic union" rested on more than the presence of Title I employees on parochial school grounds. *Post,* at 2023. To him, Title I continues to foster a "symbolic union" between the Board and sectarian schools because it mandates "the involvement of public teachers in the instruction provided within sectarian schools," *ibid.,* and "fus[es] public and private faculties," *post,* at 2025. Justice SOUTER does not disavow the notion, uniformly adopted by lower courts, that Title I services may be provided to sectarian school students in off campus locations, *post,* at 2022, even though that notion necessarily presupposes that the danger of "symbolic union" evaporates once the services are provided off campus. Taking this view, the only difference between a constitutional program and an unconstitutional one is the location of the classroom, since the degree of cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided. We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a

student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on ***228** the location of the public employee is neither "sensible" nor "sound," *post,* at 2022, and the Court in *Zobrest* rejected it.

Nor under current law can we conclude that a program placing full-time public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients. ****2013** That aid is provided to students at whatever school they choose to attend. Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. Moreover, as in *Zobrest,* Title I services are by law supplemental to the regular curricula. 34 C.F.R. § 200.12(a) (1996). These services do not, therefore, "reliev[e] sectarian schools of costs they otherwise would have borne in educating their students." 509 U.S., at 12, 113 S.Ct., at 2468.

Justice SOUTER finds our conclusion that the IDEA and Title I programs are similar to be "puzzling," and points to three differences he perceives between the programs: (i) Title I services are distributed by LEA's "directly to the religious schools" instead of to individual students pursuant to a formal application process; (ii) Title I services "necessarily reliev[e] a religious school of 'an expense that it otherwise would have assumed' "; and (iii) Title I provides services to more students than did the programs in *Witters* and *Zobrest. Post,* at 2024–2025. None of these distinctions is meaningful. While it is true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed "directly to the religious schools," *post,* at 2024. In fact, they are not. No Title I funds ever reach the coffers of religious schools, cf. *Committee for Public Ed. and Religious Liberty v. Regan,* 444 U.S. 646, 657–659, 100 S.Ct. 840, 848–849, 63 L.Ed.2d 94 (1980) (involving a program giving "direct cash ***229** reimbursement" to *religious schools* for performing certain state-mandated tasks), and Title I services may not be provided to religious schools on a schoolwide basis, 34 C.F.R. § 200.12(b) (1996). Title I funds are instead distributed to a *public* agency (an LEA) that dispenses services directly to the eligible students within its boundaries, no matter where they choose to attend school. 20 U.S.C. §§ 6311, 6312. Moreover, we fail to see how providing Title I services directly to eligible students results in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application.

We are also not persuaded that Title I services supplant the remedial instruction and guidance counseling already provided in New York City's sectarian schools. Although Justice SOUTER maintains that the sectarian schools provide such services and that those schools reduce those services once their students begin to receive Title I instruction, see *post,* at 2021, 2024, 2025–2026, his claims rest on speculation about the impossibility of drawing any line between supplemental and general education, see *post,* at 2021, and not on any evidence in the record that the Board is in fact violating Title I regulations by providing services that supplant those

offered in the sectarian schools. See 34 C.F.R. § 200.12(a) (1996). We are unwilling to speculate that all sectarian schools provide remedial instruction and guidance counseling to their students, and are unwilling to presume that the Board would violate Title I regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I. Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school. Accord, ***230** *Mueller v. Allen,* 463 U.S. 388, 401, 103 S.Ct. 3062, 3070, 77 L.Ed.2d 721 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off campus, and *Aguilar* implied that providing the services off campus is entirely consistent with the Establishment Clause. Justice SOUTER resists the impulse to upset this implication, contending that it can be justified on the ground that Title I services are "less likely to supplant some of what would ****2014** otherwise go on inside [the sectarian schools] and to subsidize what remains" when those services are offered off campus. *Post,* at 2022. But Justice SOUTER does not explain why a sectarian school would not have the same incentive to "make patently significant cut backs" in its curriculum no matter where Title I services are offered, since the school would ostensibly be excused from having to provide the Title I-type services itself. See *ibid.* Because the incentive is the same either way, we find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on campus, but not when offered off campus. Accordingly, contrary to our conclusion in *Aguilar,* placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.

2

Although we examined in *Witters* and *Zobrest* the criteria by which an aid program identifies its beneficiaries, we did so solely to assess whether any use of that aid to indoctrinate religion could be attributed to the State. A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program ***231** subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. *Witters,* 474 U.S., at 488, 106 S.Ct., at 752 (upholding neutrally available program because it did not "creat[e a] financial incentive for students to undertake sectarian education"); *Zobrest, supra,* at 10, 113 S.Ct., at 2467 (upholding neutrally available IDEA aid because it "creates no financial incentive for parents to choose a sectarian school"); accord, *post,* at 2025 (SOUTER, J., dissenting) ("[E]venhandedness is a necessary but not a sufficient condition for an aid program to satisfy constitutional scrutiny"). This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular

beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion. See *Widmar v. Vincent,* 454 U.S. 263, 274, 102 S.Ct. 269, 277, 70 L.Ed.2d 440 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect").

In *Ball* and *Aguilar,* the Court gave this consideration no weight. Before and since those decisions, we have sustained programs that provided aid to *all* eligible children regardless of where they attended school. See, *e.g., Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 16–18, 67 S.Ct. 504, 511–513, 91 L.Ed. 711 (1947) (sustaining local ordinance authorizing all parents to deduct from their state tax returns the costs of transporting their children to school on public buses); *Board of Ed. of Central School Dist. No. 1 v. Allen,* 392 U.S. 236, 243–244, 88 S.Ct. 1923, 1926–1927, 20 L.Ed.2d 1060 (1968) (sustaining New York law loaning secular textbooks to all children); *Mueller v. Allen, supra,* at 398–399, 103 S.Ct., at 3068–3069 (sustaining Minnesota statute allowing all parents to deduct actual costs of tuition, textbooks, and transportation from state tax returns); *Witters, supra,* at 487–488, 106 S.Ct., at 751–752 (sustaining Washington law granting all eligible blind persons vocational assistance); *Zobrest,* 509 U.S., at 10, 113 S.Ct., at 2467–2468 (sustaining section of IDEA providing all "disabled" children with necessary aid).

***232** Applying this reasoning to New York City's Title I program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. 34 C.F.R. § 200.10(b) (1996); see *supra,* at 2003. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school, 20 U.S.C. § 6312(c)(1)(F). The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.

3

We turn now to *Aguilar*'s conclusion that New York City's Title I program resulted ****2015** in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, *Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970), and as a factor separate and apart from "effect," *Lemon v. Kurtzman,* 403 U.S., at 612–613, 91 S.Ct., at 2111. Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.,* at 615, 91 S.Ct., at 2112. Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited (*e.g.,* whether the religious institutions were "predominantly religious"), see *Meek,* 421 U.S., at 363–364, 95 S.Ct., at 1762–1763; cf. *Hunt v. McNair,* 413 U.S. 734, 743–744, 93 S.Ct. 2868, 2874–2875, 37 L.Ed.2d 923 (1973), and the nature of the aid that the State provided (*e.g.,* whether it was neutral and nonideological), see *Everson, supra,* at 18, 67 S.Ct., at 512–513; ***233** *Wolman,*

433 U.S., at 244, 97 S.Ct., at 2603. Indeed, in *Lemon* itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion. See, *e.g.,* 403 U.S., at 620, 91 S.Ct., at 2115 ("[W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion ..."). Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, see 403 U.S., at 614, 91 S.Ct., at 2112, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause. See, *e.g., Bowen v. Kendrick,* 487 U.S., at 615–617, 108 S.Ct., at 2577–2579 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); *Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 764–765, 96 S.Ct. 2337, 2353–2354, 49 L.Ed.2d 179 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion).

The pre-*Aguilar* Title I program does not result in an "excessive" entanglement that advances or inhibits religion. As discussed previously, the Court's finding of "excessive" entanglement in *Aguilar* rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the Board and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." 473 U.S., at 413–414, 105 S.Ct., at 3238–3239. Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive" ***234** entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off campus. *Aguilar, supra* (limiting holding to on-premises services); *Walker v. San Francisco Unified School Dist.,* 46 F.3d 1449 (C.A.9 1995) (same); *Pulido v. Cavazos,* 934 F.2d 912, 919–920 (C.A.8 1991); *Committee for Public Ed. & Religious Liberty v. Secretary, United States Dept. of Ed.,* 942 F.Supp. 842 (E.D.N.Y.1996) (same). Further, the assumption underlying the first consideration has been undermined. In *Aguilar,* the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk *pervasive* monitoring would ****2016** be required. But after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here. See *Bowen, supra,* at 615–617, 108 S.Ct., at 2577–2579.

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction***235** is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accord, *Witters,* 474 U.S., at 488–489, 106 S.Ct., at 752 ("[T]he mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion"); *Bowen, supra,* at 613–614, 108 S.Ct., at 2576–2577 (finding no " 'symbolic link' " when Congress made federal funds neutrally available for adolescent counseling). Accordingly, we must acknowledge that *Aguilar,* as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law.

C

The doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions. As we have often noted, " *[s]tare decisis* is not an inexorable command," *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), but instead reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right," *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 63, 116 S.Ct. 1114, 1127, 134 L.Ed.2d 252 (1996); *Payne, supra,* at 828, 111 S.Ct., at 2609–2610; *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 94, 56 S.Ct. 720, 744, 80 L.Ed. 1033 (1936) (Stone and Cardozo, JJ., concurring in result) ("The doctrine of *stare decisis* ... has only a limited application in the field of constitutional law"). Thus, we have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where ***236** there has been a significant change in, or subsequent development of, our constitutional law. *United States v. Gaudin,* 515 U.S. 506, 521, 115 S.Ct. 2310, 2319, 132 L.Ed.2d 444 (1995) (*stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court"); *Alabama v. Smith,* 490 U.S. 794, 803, 109 S.Ct. 2201, 2207, 104 L.Ed.2d 865 (1989) (noting that a "later development of ... constitutional law" is a basis for overruling a decision); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 857, 112 S.Ct. 2791, 2810, 120 L.Ed.2d 674 (1992) (observing that a decision is properly overruled where "development of constitutional law since the case was decided has implicitly or explicitly left ****2017** [it] behind as a mere survivor of obsolete constitutional thinking"). As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided *Ball* and *Aguilar,* so our decision to overturn those cases rests on far more than "a present doctrinal disposition to come

out differently from the Court of [1985].” *Casey, supra,* at 864, 112 S.Ct., at 2813–2814. We therefore overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.

Nor does the “law of the case” doctrine place any additional constraints on our ability to overturn *Aguilar.* Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. *Messenger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912). The doctrine does not apply if the court is “convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.” *Arizona v. California,* 460 U.S. 605, 618, n. 8, 103 S.Ct. 1382, 1391, n. 8, 75 L.Ed.2d 318 (1983). In light of our conclusion that *Aguilar* would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a “manifest injustice,” such that the law of the case doctrine does not apply. Accord, *Davis v. United States,* 417 U.S. 333, 342, 94 S.Ct. 2298, 2303, 41 L.Ed.2d 109 (1974) (Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent).

***237** IV

We therefore conclude that our Establishment Clause law has “significant[ly] change[d]” since we decided *Aguilar.* See *Rufo,* 502 U.S., at 384, 112 S.Ct., at 760. We are only left to decide whether this change in law entitles petitioners to relief under Rule 60(b)(5). We conclude that it does. Our general practice is to apply the rule of law we announce in a case to the parties before us. *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 485, 109 S.Ct. 1917, 1922, 104 L.Ed.2d 526 (1989) (“The general rule of long standing is that the law announced in the Court's decision controls the case at bar”). We adhere to this practice even when we overrule a case. In *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), for example, the District Court and Court of Appeals rejected the argument that racial classifications in federal programs should be evaluated under strict scrutiny, relying upon our decision in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). When we granted certiorari and overruled *Metro Broadcasting,* we did not hesitate to vacate the judgments of the lower courts. In doing so, we necessarily concluded that those courts relied on a legal principle that had not withstood the test of time. 515 U.S., at 237–238, 115 S.Ct., at 2117–2118. See also *Hubbard v. United States,* 514 U.S. 695, 715, 115 S.Ct. 1754, 1765, 131 L.Ed.2d 779 (1995) (overruling decision relied upon by Court of Appeals and reversing the lower court's judgment that relied upon the overruled case).

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas, supra,* at 484, 109 S.Ct., at 1921–1922. Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine***238** its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to

recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.

Respondents and Justice GINSBURG urge us to adopt a different analysis because we are reviewing the District Court's denial of petitioners' Rule 60(b)(5) motion for an abuse of discretion. See *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 263, n. 7, 98 S.Ct. 556, 560, n. 7, 54 L.Ed.2d 521 (1978). *****2018*** It is true that the trial court has discretion, but the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained. See *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 2460–2461, 110 L.Ed.2d 359 (1990). The standard of review we employ in this litigation does not therefore require us to depart from our general practice. See *Adarand, supra; Hubbard, supra.*

Respondents nevertheless contend that we should not grant Rule 60(b)(5) relief here, in spite of its propriety in other contexts. They contend that petitioners have used Rule 60(b)(5) in an unprecedented way—not as a means of *recognizing* changes in the law, but as a vehicle for *effecting* them. If we were to sanction this use of Rule 60(b)(5), respondents argue, we would encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions premised on nothing more than the claim that various judges or Justices have stated that the law has changed. See also *post,* at 2028 (GINSBURG, J., dissenting) (contending that granting Rule 60(b)(5) relief in this litigation will encourage "invitations to reconsider old cases based on 'speculat[ions] on chances from changes in [the Court's membership]"). We think their fears are overstated. As we noted above, a judge's stated belief that a case should be overruled does not make it so. See *supra,* at 2007.

Most importantly, our decision today is intimately tied to the context in which it arose. This litigation involves a ****239*** party's request under Rule 60(b)(5) to vacate a continuing injunction entered some years ago in light of a bona fide, significant change in subsequent law. The clause of Rule 60(b)(5) that petitioners invoke applies by its terms only to "judgment [s] hav[ing] prospective application." Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6), the only remaining avenue for relief on this basis from judgments lacking any prospective component. See, J. Moore et al., Moore's Federal Practice, § 60.48[5][b], p. 60–181 (3d ed.1997) (collecting cases). Our decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue. Cf. *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (applying a more stringent standard for recognizing changes in the law and "new rules" in light of the "interests of comity" present in federal habeas corpus proceedings). Given that Rule 60(b)(5) specifically contemplates the grant of relief in the circumstances presented here, it can hardly be said that we have somehow warped the Rule into a means of "allowing an 'anytime' rehearing." See *post,* at 2028 (GINSBURG, J., dissenting).

Respondents further contend that "[p]etitioners' [p]roposed [u]se of Rule 60(b) [w]ill [e]rode the [i]nstitutional [i]ntegrity of the Court." Brief for Respondents 26. Respondents do not explain how a proper application of Rule 60(b)(5) undermines our legitimacy. Instead,

respondents focus on the harm occasioned if we were to overrule *Aguilar.* But as discussed above, we do no violence to the doctrine of *stare decisis* when we recognize bona fide changes in our decisional law. And in those circumstances, we do no violence to the legitimacy we derive from reliance on that doctrine. *Casey,* 505 U.S., at 865–866, 112 S.Ct., at 2814–2815.

As a final matter, we see no reason to wait for a "better vehicle" in which to evaluate the impact of subsequent cases on *Aguilar*'s continued vitality. To evaluate the ***240** Rule 60(b)(5) motion properly before us today in no way undermines "integrity in the interpretation of procedural rules" or signals any departure from "the responsive, non-agenda-setting character of this Court." *Post,* at 2028 (GINSBURG, J., dissenting). Indeed, under these circumstances, it would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by ****2019** means of a program that is perfectly consistent with the Establishment Clause.

For these reasons, we reverse the judgment of the Court of Appeals and remand the cases to the District Court with instructions to vacate its September 26, 1985, order.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, and with whom Justice BREYER joins as to Part II, dissenting.

In this novel proceeding, petitioners seek relief from an injunction the District Court entered 12 years ago to implement our decision in *Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985). For the reasons given by Justice GINSBURG, see *post,* the Court's holding that petitioners are entitled to relief under Federal Rule of Civil Procedure 60(b) is seriously mistaken. The Court's misapplication of the Rule is tied to its equally erroneous reading of our more recent Establishment Clause cases, which the Court describes as having rejected the underpinnings of *Aguilar* and portions of *Aguilar*'s companion case, *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985). The result is to repudiate the very reasonable line drawn in *Aguilar* and *Ball,* and to authorize direct state aid to religious institutions on an unparalleled ***241** scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government.

I respectfully dissent.

I

In both *Aguilar* and *Ball,* we held that supplemental instruction by public school teachers on the premises of religious schools during regular school hours violated the Establishment Clause. *Aguilar,* of course, concerned the very school system before us here and the same Title I program at issue now, see *ante,* at 2004–2005, under which local educational agencies receive public funds to provide remedial education, guidance, and job counseling to eligible students,

including those attending religious schools. Immediately before *Aguilar,* New York City used Title I funds to provide guidance services and classes in remedial reading, remedial mathematics, and English as a second language to students at religious schools, as it did by sending employees of the public school system, including teachers, guidance counselors, psychologists, and social workers, into the religious schools. See *Aguilar, supra,* at 406, 105 S.Ct., at 3234–3235. *Ball* involved a program similar in many respects to Title I called Shared Time,[1] under which the local school district provided religious school students with "supplementary" classes in their religious schools, taught by teachers who were full-time employees of the public schools, in subjects including remedial math and reading, art, music, and physical education. See 473 U.S., at 375, 105 S.Ct., at 3218.

1. *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), also invalidated a separate program called Community Education that is distinct from the Title I program at issue today. I do not understand the Court's discussion to implicate *Ball's* evaluation of the Community Education program.

We held that both schemes ran afoul of the Establishment Clause. The Shared Time program had the impermissible effect of promoting religion in three ways: first, state-paid teachers conducting classes in a sectarian environment might ***242** inadvertently (or intentionally) manifest sympathy with the sectarian aims to the point of using public funds for religious educational purposes, *id.,* at 388, 105 S.Ct., at 3225; second, the government's provision of secular instruction in religious schools produced a symbolic union of church and state that tended to convey a message to students and to the public that the State supported religion, *id.,* at 390–392, 105 S.Ct., at 3226–3227; and, finally, the Shared Time program subsidized the religious functions of the religious schools by assuming responsibility for teaching secular subjects the schools would otherwise be required to provide, *id.,* at 395–396, 105 S.Ct., at 3228–3229. Our decision in *Aguilar* noted the similarity between the Title I and Shared Time programs, and held that the system New York City had adopted to monitor the religious content of Title I classes held in religious schools would ****2020** necessarily result in excessive entanglement of church and state, and violate the Establishment Clause for that reason. See 473 U.S., at 412–414, 105 S.Ct., at 3237–3239.

As I will indicate as I go along, I believe *Aguilar* was a correct and sensible decision, and my only reservation about its opinion is that the emphasis on the excessive entanglement produced by monitoring religious instructional content obscured those facts that independently called for the application of two central tenets of Establishment Clause jurisprudence. The State is forbidden to subsidize religion directly and is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement. See, *e.g., Ball,* 473 U.S., at 385, 105 S.Ct., at 3223 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *id.,* at 389, 105 S.Ct., at 3225 ("Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines") (citing *Lynch v. Donnelly,* 465 U.S. 668, 688, 104 S.Ct.

1355, 1367, 79 L.Ed.2d 604 (1984) (O'CONNOR, J., concurring)).

***243** As is explained elsewhere, the flat ban on subsidization antedates the Bill of Rights and has been an unwavering rule in Establishment Clause cases, qualified only by the conclusion two Terms ago that state exactions from college students are not the sort of public revenues subject to the ban. See *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 868–876, 115 S.Ct. 2510, 2535–2539, 132 L.Ed.2d 700 (1995) (SOUTER, J., dissenting); see also *id.,* at 850, 115 S.Ct., at 2527 (O'CONNOR, J., concurring). The rule expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion. "When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being 'taint[ed] ... with a corrosive secularism.' The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." *Lee v. Weisman,* 505 U.S. 577, 608, 112 S.Ct. 2649, 2666, 120 L.Ed.2d 467 (1992) (Blackmun, J., concurring) (quoting *Ball, supra,* at 385, 105 S.Ct., at 3223); see also Memorial and Remonstrance against Religious Assessments 1785, in The Complete Madison 299, 309 (S. Padover ed. 1953) ("Religion flourishes in greater purity, without than with the aid of Gov[ernment]"); M. Howe, The Garden and the Wilderness 6 (1965) (noting Roger Williams's view that "worldly corruptions ... might consume the churches if sturdy fences against the wilderness were not maintained"). The ban against state endorsement of religion addresses the same historical lessons. Governmental approval of religion tends to reinforce the religious message (at least in the short run) and, by the same token, to carry a message of exclusion to those of less favored views. See, *e.g., Ball, supra,* at 390, 105 S.Ct., at 3226 ("[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently ***244** likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices"); *Lee, supra,* at 606–607, 112 S.Ct., at 2665 (Blackmun, J., concurring) ("When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some"); *Engel v. Vitale,* 370 U.S. 421, 429, 82 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1962) ("[A]nguish, hardship and bitter strife" result "when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval"). The human tendency, ****2021** of course, is to forget the hard lessons, and to overlook the history of governmental partnership with religion when a cause is worthy, and bureaucrats have programs. That tendency to forget is the reason for having the Establishment Clause (along with the Constitution's other structural and libertarian guarantees), in the hope of stopping the corrosion before it starts.

These principles were violated by the programs at issue in *Aguilar* and *Ball,* as a consequence of several significant features common to both Title I, as implemented in New York City before *Aguilar,* and the Grand Rapids Shared Time program: each provided classes on the premises of the religious schools, covering a wide range of subjects including some at the core of primary

and secondary education, like reading and mathematics; while their services were termed "supplemental," the programs and their instructors necessarily assumed responsibility for teaching subjects that the religious schools would otherwise have been obligated to provide, cf. *Wolman v. Walter,* 433 U.S. 229, 243, 97 S.Ct. 2593, 2602–2603, 53 L.Ed.2d 714 (1977) (provision of diagnostic tests to religious schools provides only an incidental benefit); the public employees carrying out the programs had broad responsibilities involving the exercise of considerable discretion, cf. *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 13, 113 S.Ct. 2462, 2469, 125 L.Ed.2d 1 (1993) (sign-language interpreter ***245** must transmit exactly what is said); *Lemon v. Kurtzman,* 403 U.S. 602, 616–617, 91 S.Ct. 2105, 2113, 29 L.Ed.2d 745 (1971) (distinguishing, for Establishment Clause purposes, books provided by the State to students from teachers paid by the State); while the programs offered aid to nonpublic school students generally (and Title I went to public school students as well), participation by religious school students in each program was extensive, cf. *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 488, 106 S.Ct. 748, 751–752, 88 L.Ed.2d 846 (1986) (only one student sought state tuition assistance for religious education); and, finally, aid under Title I and Shared Time flowed directly to the schools in the form of classes and programs, as distinct from indirect aid that reaches schools only as a result of independent private choice, cf. *Zobrest, supra,* at 12, 113 S.Ct., at 2469 ("[A]ny attenuated financial benefit that parochial schools do ultimately receive ... is attributable to 'the private choices of individual parents' ") (quoting *Mueller v. Allen,* 463 U.S. 388, 400, 103 S.Ct. 3062, 3070, 77 L.Ed.2d 721 (1983)); *Witters, supra,* at 487, 106 S.Ct., at 751 (aid issued to students reached religious institution "only as a result of the genuinely independent and private choices of aid recipients"); *Mueller, supra,* at 399–400, 103 S.Ct., at 3069–3070 (same).

What, therefore, was significant in *Aguilar* and *Ball* about the placement of state-paid teachers into the physical and social settings of the religious schools was not only the consequent temptation of some of those teachers to reflect the schools' religious missions in the rhetoric of their instruction, with a resulting need for monitoring and the certainty of entanglement. See *Aguilar,* 473 U.S., at 412–414, 105 S.Ct., at 3237–3239 (monitoring); *Ball,* 473 U.S., at 388, 105 S.Ct., at 3225 (risk of indoctrination). What was so remarkable was that the schemes in issue assumed a teaching responsibility indistinguishable from the responsibility of the schools themselves. The obligation of primary and secondary schools to teach reading necessarily extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not distinguish their subjects***246** from the schools' basic subjects, however inadequately the schools may have been addressing them.

What was true of the Title I scheme as struck down in *Aguilar* will be just as true when New York reverts to the old practices with the Court's approval after today. There is simply no line that can be drawn between the instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious. While it would be an obvious sham, say, to channel cash to religious schools to be credited only against the expense of "secular" instruction, the line between "supplemental" and general education is likewise impossible to draw. If a State may constitutionally enter the schools ****2022** to teach in the manner in question, it must in constitutional principle be free to assume, or assume payment for, the

entire cost of instruction provided in any ostensibly secular subject in any religious school. This Court explicitly recognized this in *Ball, supra,* at 394, 396, 105 S.Ct., at 3228, 3229, and although in *Aguilar* the Court concentrated on entanglement it noted the similarity to *Ball,* see *Aguilar, supra,* at 409, 105 S.Ct., at 3236, and Judge Friendly's opinion for the Second Circuit made it expressly clear that there was no stopping place in principle once the public teacher entered the religious schools to teach their secular subjects. See *Felton v. Secretary, U.S. Dept. of Education,* 739 F.2d 48, 66–67 (C.A.2 1984), aff'd *sub nom. Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985).

It may be objected that there is some subsidy in remedial education even when it takes place off the religious premises, some subsidy, that is, even in the way New York City has administered the Title I program after *Aguilar.* In these circumstances, too, what the State does, the religious school need not do; the schools save money and the program makes it easier for them to survive and concentrate their resources on their religious objectives. This argument may, of course, prove too much, but if it is not thought strong enough to bar even off-premises aid in teaching the basics to religious school pupils (an issue not before the Court in *Aguilar* or ****247*** today), it does nothing to undermine the sense of drawing a line between remedial teaching on and off premises. The off-premises teaching is arguably less likely to open the door to relieving religious schools of their responsibilities for secular subjects simply because these schools are less likely (and presumably legally unable) to dispense with those subjects from their curriculums or to make patently significant cutbacks in basic teaching within the schools to offset the outside instruction; if the aid is delivered outside of the schools, it is less likely to supplant some of what would otherwise go on inside them and to subsidize what remains. On top of that, the difference in the degree of reasonably perceptible endorsement is substantial. Sharing the teaching responsibilities within a school having religious objectives is far more likely to telegraph approval of the school's mission than keeping the State's distance would do. This is clear at every level. As the Court observed in *Ball,* "[t]he symbolism of a union between church and state [effected by placing the public school teachers into the religious schools] is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." 473 U.S., at 390, 105 S.Ct., at 3226. When, moreover, the aid goes overwhelmingly to one religious denomination, minimal contact between state and church is less likely to feed the resentment of other religions that would like access to public money for their own worthy projects.

In sum, if a line is to be drawn short of barring all state aid to religious schools for teaching standard subjects, the *Aguilar*–*Ball* line was a sensible one capable of principled adherence. It is no less sound, and no less necessary, today.

II

The Court today ignores this doctrine and claims that recent cases rejected the elemental assumptions underlying *Aguilar* and much of *Ball.* But the Court errs. Its holding ****248*** that *Aguilar* and the portion of *Ball* addressing the Shared Time program are "no longer good law," *ante,* at 2016, rests on mistaken reading.

A

Zobrest v. Catalina Foothills School Dist., 509 U.S., at 13–14,, 113 S.Ct., at 2469–2470 held that the Establishment Clause does not prevent a school district from providing a sign-language interpreter to a deaf student enrolled in a sectarian school. The Court today relies solely on *Zobrest* to support its contention that we have "abandoned the presumption erected in *Meek* [*v. Pittenger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975),] and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and *****2023*** religion." *Ante,* at 2010. *Zobrest,* however, is no such sanction for overruling *Aguilar* or any portion of *Ball.*

In *Zobrest,* the Court did indeed recognize that the Establishment Clause lays down no absolute bar to placing public employees in a sectarian school, 509 U.S., at 13, and n. 10, 113 S.Ct., at 2469 and n. 10, but the rejection of such a *per se* rule was hinged expressly on the nature of the employee's job, sign-language interpretation (or signing) and the circumscribed role of the signer. On this point (and without reference to the facts that the benefited student had received the same aid before enrolling in the religious school and the employee was to be assigned to the student, not to the school) the Court explained itself this way: "[T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor.... Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to 'transmit everything that is said in exactly the same way it was intended.' " *Id.,* at 13, 113 S.Ct., at 2469. The signer could thus be seen as more like a hearing aid than a teacher, and the signing could not be understood as an opportunity to inject religious content ****249*** in what was supposed to be secular instruction. *Zobrest* accordingly holds only that in these limited circumstances where a public employee simply translates for one student the material presented to the class for the benefit of all students, the employee's presence in the sectarian school does not violate the Establishment Clause. *Id.,* at 13–14, 113 S.Ct., at 2469–2470. Cf. *Lemon v. Kurtzman,* 403 U.S., at 617, 91 S.Ct., at 2113 ("[T]eachers have a substantially different ideological character from books [and][i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not").

The Court, however, ignores the careful distinction drawn in *Zobrest* and insists that a full-time public employee such as a Title I teacher is just like the signer, asserting that "there is no reason to presume that, simply because she enters a parochial school classroom, [this] teacher will depart from her assigned duties and instructions and embark on religious indoctrination...." *Ante,* at 2012. Whatever may be the merits of this position (and I find it short on merit), it does not enjoy the authority of *Zobrest.* The Court may disagree with *Ball*'s assertion that a publicly employed teacher working in a sectarian school is apt to reinforce the pervasive inculcation of religious beliefs, but its disagreement is fresh law.

The Court tries to press *Zobrest* into performing another service beyond its reach. The Court says that *Ball* and *Aguilar* assumed "that the presence of a public employee on private school

property creates an impermissible 'symbolic link' between government and religion," *ante,* at 2011, and that *Zobrest* repudiated this assumption, *ibid.*. First, *Ball* and *Aguilar* said nothing about the "mere presence" of public employees at religious schools. It was *Ball* that specifically addressed the point and held only that when teachers employed by public schools are placed in religious schools to provide instruction to students during the schoolday a symbolic union of church and state is created and will reasonably ***250** be seen by the students as endorsement, see *Ball,* 473 U.S., at 390–392, 105 S.Ct., at 3226–3227; *Aguilar* adopted the same conclusion by reference, see 473 U.S., at 409, 105 S.Ct., at 3236. *Zobrest* did not, implicitly or otherwise, repudiate the view that the involvement of public teachers in the instruction provided within sectarian schools looks like a partnership or union and implies approval of the sectarian aim. On the subject of symbolic unions and the strength of their implications, the lesson of *Zobrest* is merely that less is less.

B

The Court next claims that *Ball* rested on the assumption that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking." *Ante,* at 2010. After ****2024** *Ball,* the opinion continues, the Court departed from the rule that "all government aid that directly assists the educational function of religious schools is invalid." *Ante,* at 2011. But this mischaracterizes *Ball*'s discussion on the point, and misreads *Witters* and *Zobrest* as repudiating the more modest proposition on which *Ball* in fact rested.

Ball did not establish that "any and all" such aid to religious schools necessarily violates the Establishment Clause. It held that the Shared Time program subsidized the religious functions of the parochial schools by taking over a significant portion of their responsibility for teaching secular subjects. See 473 U.S., at 396–397, 105 S.Ct., at 3229–3230. The Court noted that it had "never accepted the mere possibility of subsidization ... as sufficient to invalidate an aid program," and instead enquired whether the effect of the proffered aid was " 'direct and substantial' " (and, so, unconstitutional) or merely "indirect and incidental" (and, so, permissible), emphasizing that the question " 'is one of degree.' " *Id.,* at 394, 105 S.Ct., at 3228 (quoting *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 784–785, n. 39, 93 S.Ct. 2955, 2971–2972, n. 39, 37 L.Ed.2d 948 (1973), and ***251** *Zorach v. Clauson,* 343 U.S. 306, 314, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952)). *Witters* and *Zobrest* did nothing to repudiate the principle, emphasizing rather the limited nature of the aid at issue in each case as well as the fact that religious institutions did not receive it directly from the State. In *Witters,* the Court noted that the State would issue the disputed vocational aid directly to one student who would then transmit it to the school of his choice, and that there was no record evidence that "any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." 474 U.S., at 488, 106 S.Ct., at 752. *Zobrest* also presented an instance of a single beneficiary, see 509 U.S., at 4, 113 S.Ct., at 2464, and emphasized that the student (who had previously received the interpretive services in a public school) determined where the aid would be used, that the aid at issue was limited, and that the religious school was "not relieved of an expense that it otherwise would have assumed in educating its students,"

id., at 12, 113 S.Ct., at 2469.

It is, accordingly, puzzling to find the Court insisting that the aid scheme administered under Title I and considered in *Aguilar* was comparable to the programs in *Witters* and *Zobrest.* Instead of aiding isolated individuals within a school system, New York City's Title I program before *Aguilar* served about 22,000 private school students, all but 52 of whom attended religious schools. See App. 313–314.[2] Instead of serving individual blind or deaf students, as such, Title I as administered in New York City before *Aguilar* (and as now to be revived) funded instruction in core subjects (remedial reading, reading skills, remedial mathematics, English ***252** as a second language) and provided guidance services. See *Aguilar, supra,* at 406, 105 S.Ct., at 3234–3235. Instead of providing a service the school would not otherwise furnish, the Title I services necessarily relieved a religious school of "an expense that it otherwise would have assumed," *Zobrest, supra,* at 12, 113 S.Ct., at 2469, and freed its funds for other, and sectarian, uses.

> 2. The Court's refusal to recognize the extent of student participation as relevant to the constitutionality of an aid program, see *ante*, at 2013, ignores the contrary conclusion in *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), on this very point. See *id.,* at 488, 106 S.Ct., at 752 (noting, among relevant factors, that '[n]o evidence ha[d] been presented indicating that any other person ha[d] ever sought to finance religious education or activity pursuant to the State's program').

Finally, instead of aid that comes to the religious school indirectly in the sense that its distribution results from private decisionmaking, a public educational agency distributes Title I aid in the form of programs and services directly to the religious schools. In *Zobrest* and *Witters,* it was fair to say that individual students were themselves applicants for individual benefits on a scale that could not amount to a systemic supplement. But under Title I, a local educational agency (which in New York City is the Board of Education) may receive federal funding by proposing programs approved to serve individual*****2025** students who meet the criteria of need, which it then uses to provide such programs at the religious schools, see App. 28–29, 38, 60, 242–243; students eligible for such programs may not apply directly for Title I funds.[3] The aid, accordingly, is not even formally aid to the individual students (and even formally individual aid must be seen as aid to a school system when so many individuals receive it that it becomes a significant feature of the system, see *Wolman v. Walter,* 433 U.S., at 264, 97 S.Ct., at 2614 (opinion of Powell, J.)).

> 3. For this reason, the Court's attempted analogy between Title I and the Individuals with Disabilities Education Act fails, see *ante*, at 2012; James Zobrest, unlike students receiving Title I services, applied individually for the interpretative services at issue in *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 4, 113 S.Ct. 2462, 2464, 125 L.Ed.2d 1 (1993).

In sum, nothing since *Ball* and *Aguilar* and before this litigation has eroded the distinction between "direct and substantial" and "indirect and incidental." That principled line is being

breached only here and now.

***253** C

The Court notes that aid programs providing benefits solely to religious groups may be constitutionally suspect, while aid allocated under neutral, secular criteria is less likely to have the effect of advancing religion. *Ante,* at 2014. The opinion then says that *Ball* and *Aguilar* "gave this consideration no weight," *ante,* at 2014, and accordingly conflict with a number of decisions. But what exactly the Court thinks *Ball* and *Aguilar* inadequately considered is not clear, given that evenhandedness is a necessary but not a sufficient condition for an aid program to satisfy constitutional scrutiny. Title I services are available to all eligible children regardless, whether they go to religious or public schools, but, as I have explained elsewhere and am not alone in recognizing, see, *e.g., Rosenberger,* 515 U.S., at 846–847, 115 S.Ct., at 2525 (O'CONNOR, J., concurring); *id.,* at 879–885, 115 S.Ct., at 2541–2544 (SOUTER, J., dissenting); see also *Bowen v. Kendrick,* 487 U.S. 589, 614, 621, 108 S.Ct. 2562, 2580–2581, 101 L.Ed.2d 520 (1988), that fact does not define the reach of the Establishment Clause. If a scheme of government aid results in support for religion in some substantial degree, or in endorsement of its value, the formal neutrality of the scheme does not render the Establishment Clause helpless or the holdings in *Aguilar* and *Ball* inapposite.

III

Finally, there is the issue of precedent. *Stare decisis* is no barrier in the Court's eyes because it reads *Aguilar* and *Ball* for exaggerated propositions that *Witters* and *Zobrest* are supposed to have limited to the point of abandoned doctrine. Cf. *Patterson v. McLean Credit Union,* 491 U.S. 164, 173–174, 109 S.Ct. 2363, 2370–2371, 105 L.Ed.2d 132 (1989). The Court's dispensation from *stare decisis* is, accordingly, no more convincing than its reading of those cases. Since *Aguilar* came down, no case has held that there need be no concern about a risk that publicly paid school teachers may further religious doctrine; no case has repudiated the distinction between direct and substantial aid ***254** and aid that is indirect and incidental; no case has held that fusing public and private faculties in one religious school does not create an impermissible union or carry an impermissible endorsement; and no case has held that direct subsidization of religious education is constitutional or that the assumption of a portion of a religious school's teaching responsibility is not direct subsidization.

The continuity of the law, indeed, is matched by the persistence of the facts. When *Aguilar* was decided everyone knew that providing Title I services off the premises of the religious schools would come at substantial cost in efficiency, convenience, and money. Title I had begun off the premises in New York, after all, and dissatisfaction with the arrangement was what led the city to put the public school teachers into the religious schools in the first place. See *Felton v. Secretary, U.S. Dept. of Education,* 739 F.2d, at 51. When *Aguilar* required the end of that arrangement, conditions reverted to those of the past and they have remained unchanged: teaching conditions are often poor, it is difficult to move children around, and it costs a lot of money. That is, the facts ****2026** became once again what they were once before, as everyone including the Members of this Court knew they would be. No predictions have gone so awry as to excuse the litigation from the claim of precedent, see *Burnet v. Coronado Oil & Gas Co.,* 285

U.S. 393, 412, 52 S.Ct. 443, 449–450, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting), let alone excuse the Court from adhering to its own prior decision in this very litigation.

That is not to deny that the facts just recited are regrettable; the object of Title I is worthy without doubt, and the cost of compliance is high. In the short run there is much that is genuinely unfortunate about the administration of the scheme under *Aguilar*'s rule. But constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government.

***255** Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

The Court today finds a way to rehear a legal question decided in respondents' favor in this very case some 12 years ago. See *Aguilar v. Felton,* 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985). Subsequent decisions, the majority says, have undermined *Aguilar* and justify our immediate reconsideration. This Court's Rules do not countenance the rehearing here granted. For good reason, a proper application of those Rules and the Federal Rules of Civil Procedure would lead us to defer reconsideration of *Aguilar* until we are presented with the issue in another case.

We have a rule on rehearing, Rule 44, but it provides only for petitions filed within 25 days of the entry of the judgment in question. See this Court's Rule 44.1. Although the Court or a Justice may "shorte[n] or exten[d]" this period, I am aware of no case in which we have extended the time for rehearing years beyond publication of our adjudication on the merits. Cf. *Reid v. Covert,* 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (original decision issued June 11, 1956; rehearing granted Nov. 5, 1956); *Jones v. Opelika,* 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943) *(per curiam)* (original decision issued October Term 1941; rehearing granted October Term 1942). Moreover, nothing in our procedures allows us to grant rehearing, timely or not, "except ... at the instance of a Justice who concurred in the judgment or decision." This Court's Rule 44.1. Petitioners have not been so bold (or so candid) as to style their plea as one for rehearing in this Court, and the Court has not taken up the petition at the instance of Justice STEVENS, the only still-sitting Member of the *Aguilar* majority.

Lacking any rule or practice allowing us to reconsider the *Aguilar* judgment directly, the majority accepts as a substitute a rule governing relief from judgments or orders of the federal trial courts. See Fed. Rule Civ. Proc. 60(b)(5). The service to which Rule 60(b) has been impressed is unprecedented, and neither the Court nor those urging reconsideration of ***256** *Aguilar* contend otherwise. See, *e.g., ante,* at 2017–2018; Tr. of Oral Arg. 11 (acknowledgment by counsel for the United States that "we do not know of another instance in which Rule 60(b) has been used in this way"). The Court makes clear, fortunately, that any future efforts to expand today's ruling will not be favored. See *ante,* at 2018. I therefore anticipate that the extraordinary action taken in this case will remain aberrational.

Rule 60(b) provides, in relevant part: “On motion and upon such terms as are just, the [district] court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) ... it is no longer equitable that the judgment should have prospective application.”

Under that Rule, a district court may, in its discretion, grant relief from a final judgment with prospective effect if the party seeking modification can show “a significant change either in factual conditions or in law” that renders continued operation of the judgment inequitable. *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384, 112 S.Ct. 748, 760, 116 L.Ed.2d 867 (1992) (addressing modification of consent decree in institutional-*****2027*** reform setting); see 12 J. Moore, Moore's Federal Practice § 60.47 [2] [c], pp. 60–163 to 60–166 (3d ed.1997); 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2863, pp. 336–347 (2d ed.1995) (hereinafter Wright, Miller, & Kane).

Appellate courts review denials of Rule 60(b) motions for abuse of discretion. See *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 263, n. 7, 98 S.Ct. 556, 560, n. 7, 54 L.Ed.2d 521 (1978); *Railway Employees v. Wright,* 364 U.S. 642, 648–650, 81 S.Ct. 368, 371–373, 5 L.Ed.2d 349 (1961). As we recognized in our unanimous opinion in *Browder,* “an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.” 434 U.S., at 263, n. 7, 98 S.Ct., at 560, n. 7. For in this context, “[w]e are not framing a decree. We are asking ourselves whether anything has happened that will justify ****257*** us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.” *United States v. Swift & Co.,* 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932). Cf. *Illinois v. Illinois Central R. Co.,* 184 U.S. 77, 91–92, 22 S.Ct. 300, 305–306, 46 L.Ed. 440 (1902) (cautioning against entertaining successive appeals of legal questions open to dispute in an initial appeal, and observing that tolerance of such appeals would allow parties, *inter alia,* to “ ‘speculate on chances from changes in [a court's] members' ”) (quoting *Roberts v. Cooper,* 20 How. 467, 481, 15 L.Ed. 969 (1858)).

In short, relitigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom. See 11 Wright, Miller, & Kane § 2863, p. 340 (Rule 60(b) “does not allow relitigation of issues that have been resolved by the judgment.”); see also *Fortin v. Commissioner, Mass. Dept. of Public Welfare,* 692 F.2d 790, 799 (C.A.1 1982) (warning against transformation of Rule 60(b) “modification procedure into an impermissible avenue of collateral attack”). Thus, under settled practice, the sole question legitimately presented on appeal of the District Court's decision denying petitioners' Rule 60(b)(5) motion to modify the *Aguilar* injunction would be: Did the District Court abuse its discretion when it concluded that neither the facts nor the law had so changed as to warrant alteration of the injunction?

The majority acknowledges that there has been no significant change in factual conditions. See *ante,* at 2006–2007. The majority also recognizes that *Aguilar* had not been overruled, but remained the governing Establishment Clause law, until this very day. See *ante,* at 2007, 2016–

2017. Because *Aguilar* had not been overruled at the time the District Court acted, the law the District Court was bound to respect had not changed. The District Court therefore did ***258** not abuse its discretion in denying petitioners' Rule 60(b) motion.

We have declared that lower courts lack authority to determine whether adherence to a judgment of this Court is inequitable. Those courts must "follow the [Supreme Court] case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 1921–1922, 104 L.Ed.2d 526 (1989); see also *ante,* at 2017–2018. The District Court would have disobeyed the plain command of *Shearson/American Express* had it granted petitioners' Rule 60(b) motion based upon a view that our more recent Establishment Clause decisions are in tension with *Aguilar.*

Without the teaching of *Shearson/American Express,* Rule 60(b) might have been employed in a case of this kind. Before that firm instruction, lower courts sometimes inquired whether an earlier ruling of this Court had been eroded to the point that it was no longer good law. See, *e.g., Rowe v. Peyton,* 383 F.2d 709, 714 (C.A.4 1967), aff'd, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968); *Perkins v. Endicott Johnson Corp.,* 128 F.2d 208, 217–218 (C.A.2 1942), aff'd, 317 U.S. 501, 63 S.Ct. 339, 87 L.Ed. 424 (1943); *Healy v. Edwards,* 363 F.Supp. 1110, 1117 (E.D.La.1973), vacated and remanded for ****2028** consideration of mootness, 421 U.S. 772, 95 S.Ct. 2410, 44 L.Ed.2d 571 (1975) *(per curiam); Browder v. Gayle,* 142 F.Supp. 707, 716–717 (M.D. Ala.), summarily aff'd, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956). *Shearson/American Express* now controls, however, so the District Court and Court of Appeals in this case had no choice but to follow *Aguilar.* Of course, "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 2460, 110 L.Ed.2d 359 (1990) (cited *ante,* at 2018), but the District Court made no legal error in determining that *Aguilar* had not been overruled. And our appellate role here is limited to reviewing that determination.

The Court says that the District Court was right to "entertai[n]" the Rule 60(b) motion and also right to reject it, ***259** leaving to this Court the option of overruling our previously binding decision. See *ante,* at 2018. The Court thus acknowledges that Rule 60(b)(5) had no office to perform in the District Court, given the no-competence instruction of *Shearson/American Express.* All the lower courts could do was pass the case up to us. The Court thus bends Rule 60(b) to a purpose—allowing an "anytime" rehearing in this case—unrelated to the governance of district court proceedings to which the Rule, as part of the Federal Rules of Civil Procedure, is directed. See Fed. Rule Civ. Proc. 1.

In an effort to make today's use of Rule 60(b) appear palatable, the Court describes its decision not as a determination of whether *Aguilar should be* overruled, but as an exploration whether *Aguilar already has been* "so undermined ... that it is no longer good law." *Ante,* at 2007; see also *ante,* at 2010–2016. But nothing can disguise the reality that, until today, *Aguilar* had not been overruled. Good or bad, it was in fact the law.

Despite the problematic use of Rule 60(b), the Court "see[s] no reason to wait for a 'better vehicle.' " *Ante,* at 2018. There are such vehicles in motion, and the Court does not say otherwise. See, *e.g., Committee for Public Ed. and Religious Liberty v. Secretary, U.S. Dept. of Ed.,* 942 F.Supp. 842 (E.D.N.Y.1996) (*PEARL II*) *; Helms v. Cody,* 856 F.Supp. 1102 (E.D.La.1994); cf. Brief for U.S. Secretary of Education 45 (noting that a school district other than New York City could bring an action against the Secretary to challenge an *Aguilar*-based Title I funding decision). The *Helms* case, which has been appealed to the Fifth Circuit, involves an Establishment Clause challenge to Louisiana's special education program. In *PEARL II,* the District Court upheld aspects of New York City's current Title I program that were challenged under the Establishment Clause. The plaintiffs filed a notice of appeal in that case, but the parties later stipulated to withdraw the appeal, without prejudice to reinstatement, pending our decision in this case. ***260** See Stipulation of Withdrawal of Appeal in *Committee for Public Ed. and Religious Liberty v. Secretary, U.S. Dept. of Ed.,* No. 96–6329 (C.A.2) (filed Mar. 20, 1997).

Unlike the majority, I find just cause to await the arrival of *Helms, PEARL II,* or perhaps another case in which our review appropriately may be sought, before deciding whether *Aguilar* should remain the law of the land. That cause lies in the maintenance of integrity in the interpretation of procedural rules, preservation of the responsive, non-agenda-setting character of this Court, and avoidance of invitations to reconsider old cases based on "speculat[ions] on chances from changes in [the Court's membership]." *Illinois Central R. Co.,* 184 U.S., at 92, 22 S.Ct., at 305.

Zelman v. Simmons-Harris, 536 U.S. 639 (US Supreme Court 2002).

Syllabus *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Ohio's Pilot Project Scholarship Program gives educational choices to families in any Ohio school district that is under state control pursuant to a federal-court order. The program provides tuition aid for certain students in the Cleveland City *****2461*** School District, the only covered district, to attend participating public or private schools of their parent's choosing and tutorial aid for students who choose to remain enrolled in public school. Both religious and nonreligious schools in the district may participate, as may public schools in adjacent school districts. Tuition aid is distributed to parents according to financial need, and where the aid is spent depends solely upon where parents choose to enroll their children. The number of tutorial assistance grants provided to students remaining in public school must equal the number of tuition aid scholarships. In the 1999–2000 school year, 82% of the participating private schools had a religious affiliation, none of the adjacent public schools participated, and 96% of the students participating in the scholarship program were enrolled in religiously affiliated schools. Sixty percent of the students were from families at or below the poverty line. Cleveland schoolchildren also have the option of enrolling in community schools, which are funded under state law but run by their own school boards and receive twice the per-student funding as participating private schools, or magnet schools, which are public schools emphasizing a particular subject area, teaching method, or service, and for which the school district receives the same amount per student as it does for a student enrolled at a traditional public school. Respondents, Ohio taxpayers, sought to enjoin the program on the ground that it violated the Establishment Clause. The Federal District Court granted them summary judgment, and the Sixth Circuit affirmed.

Held: The program does not offend the Establishment Clause. Pp. 2465–2473.

****640*** a) Because the program was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, the question is whether the program nonetheless has the forbidden effect of advancing or inhibiting religion. See *Agostini v. Felton,* 521 U.S. 203, 222–223, 117 S.Ct. 1997, 138 L.Ed.2d 391. This Court's jurisprudence makes clear that a government aid program is not readily subject to challenge under the Establishment Clause if it is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice. See, *e.g., Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721. Under such a program, government aid reaches religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the

perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients, not the government, whose role ends with the disbursement of benefits. Pp. 2465–2467.

(b) The instant program is one of true private choice, consistent with the *Mueller* line of cases, and thus constitutional. It is neutral in all respects toward religion, and is part of Ohio's general and multifaceted undertaking to provide educational opportunities to children in a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion and permits participation of all district schools—religious or nonreligious—and adjacent public schools. The only preference in the program is for low-income families, who receive greater assistance and have priority for admission. Rather than creating financial incentives that skew it toward religious schools, the program creates financial disincentives: Private schools receive only half the government assistance given to community schools and one-third that given to magnet schools, and adjacent public schools would receive two to three times that given to private schools. Families too have a financial disincentive, for they have to copay a portion of private school tuition, but pay nothing at a community, magnet, or traditional*****2462*** public school. No reasonable observer would think that such a neutral private choice program carries with it the *imprimatur* of government endorsement. Nor is there evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options: Their children may remain in public school as before, remain in public school with funded tutoring aid, obtain a scholarship and choose to attend a religious school, obtain a scholarship and choose to attend a nonreligious private school, enroll in a community school, or enroll in a magnet school. The Establishment Clause question whether Ohio is coercing parents into sending their children to religious schools must be answered by evaluating *all* options ****641*** Ohio provides Cleveland schoolchildren, only one of which is to obtain a scholarship and then choose a religious school. Cleveland's preponderance of religiously affiliated schools did not result from the program, but is a phenomenon common to many American cities. Eighty-two percent of Cleveland's private schools are religious, as are 81% of Ohio's private schools. To attribute constitutional significance to the 82% figure would lead to the absurd result that a neutral school-choice program might be permissible in parts of Ohio where the percentage is lower, but not in Cleveland, where Ohio has deemed such programs most sorely needed. Likewise, an identical private choice program might be constitutional only in States with a lower percentage of religious private schools. Respondents' additional argument that constitutional significance should be attached to the fact that 96% of the scholarship recipients have enrolled in religious schools was flatly rejected in *Mueller.* The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are religious, or most recipients choose to use the aid at a religious school. Finally, contrary to respondents' argument, *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948—a case that expressly reserved judgment on the sort of program challenged here—does not govern neutral educational assistance programs that offer aid directly to a broad class of individuals defined without regard to religion. Pp. 2467–2473.

****643*** Chief Justice REHNQUIST delivered the opinion of the Court.

The State of Ohio has established a pilot program designed to provide educational choices to families with children who ***644** reside in the Cleveland City School District. The question presented is whether ****2463** this program offends the Establishment Clause of the United States Constitution. We hold that it does not.

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. See *Reed v. Rhodes,* No. 1:73 CV 1300 (ND Ohio, Mar. 3, 1995). Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." Cleveland City School District Performance Audit 2–1 (Mar.1996). The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974–3313.979 (Anderson 1999 and Supp.2000) (program). The program provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and operational***645** management of the district by the state superintendent." § 3313.975(A). Cleveland is the only Ohio school district to fall within that category.

The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. §§ 3313.975(B) and (C)(1). Second, the program provides tutorial aid for students who choose to remain enrolled in public school. § 3313.975(A).

The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. § 313.976(A)(3). Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." § 3313.976(A)(6). Any public school located in a school district adjacent to the covered district

may also participate in the program. § 3313.976(C). Adjacent public schools are eligible to receive a $2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. §§ 3313.976(C), 3317.03(I)(1).[1] ****2464*** All participating schools, ****646*** whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent. §§ 3313.977(A)(1)(a)-(c).

> 1. Although the parties dispute the precise amount of state funding received by suburban school districts adjacent to the Cleveland City School District, there is no dispute that any suburban district agreeing to participate in the program would receive a $2,250 tuition grant *plus* the ordinary allotment of per-pupil state funding for each program student enrolled in a suburban public school. See Brief for Respondents Simmons–Harris et al. 30, n. 11 (suburban schools would receive "on average, approximately, $4,750" per program student); Brief for Petitioners in No. 00–1779, p. 39 (suburban schools would receive "about $6,544" per program student).

Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250. §§ 3313.978(A) and (C)(1). For these lowest income families, participating private schools may not charge a parental copayment greater than $250. § 3313.976(A)(8). For all other families, the program pays 75% of tuition costs, up to $1,875, with no copayment cap. §§ 3313.976(A)(8), 3313.978(A). These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate.[2] Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school. § 3313.979.

> 2. The number of available scholarships per covered district is determined annually by the Ohio Superintendent for Public Instruction. §§ 3313.978(A)-(B).

The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school. Parents arrange for registered tutors to provide assistance to their children and then submit bills for those services to the State for payment. §§ 3313.976(D), 3313.979(C). Students from low-income families receive 90% of the amount charged for such assistance up to $360. All other students receive 75% of that amount. § 3313.978(B). The number of tutorial assistance grants offered to students in a covered district must equal the number of tuition aid scholarships provided to students****647*** enrolled at participating private or adjacent public schools. § 3313.975(A).

The program has been in operation within the Cleveland City School District since the 1996–1997 school year. In the 1999–2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty

percent of these students were from families at or below the poverty line. In the 1998–1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999–2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren in response to the 1995 takeover. That undertaking includes programs governing community and magnet schools. Community schools are funded under state law but are run by their own school boards, not by local school districts. §§ 3314.01(B), 3314.04. These schools enjoy academic independence to hire their own teachers and to determine their own curriculum. They can have no religious affiliation and are required to accept students by lottery. During the 1999–2000 school year, there were 10 startup community schools in the Cleveland City School District with more than 1,900 students enrolled. For each child enrolled in a community school, the school receives state funding of $4,518, twice the funding a participating program school may receive.

Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching *****2465*** method, or service to students. For each student enrolled in a magnet school, the school district receives $7,746, including state funding of $4,167, the same amount received ****648*** per student enrolled at a traditional public school. As of 1999, parents in Cleveland were able to choose from among 23 magnet schools, which together enrolled more than 13,000 students in kindergarten through eighth grade. These schools provide specialized teaching methods, such as Montessori, or a particularized curriculum focus, such as foreign language, computers, or the arts.

In 1996, respondents, a group of Ohio taxpayers, challenged the Ohio program in state court on state and federal grounds. The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution. *Simmons–Harris v. Goff,* 86 Ohio St.3d 1, 8–9, 711 N.E.2d 203, 211 (1999). The state legislature immediately cured this defect, leaving the basic provisions discussed above intact.

In July 1999, respondents filed this action in United States District Court, seeking to enjoin the reenacted program on the ground that it violated the Establishment Clause of the United States Constitution. In August 1999, the District Court issued a preliminary injunction barring further implementation of the program, 54 F.Supp.2d 725 (N.D. Ohio), which we stayed pending review by the Court of Appeals, 528 U.S. 983, 120 S.Ct. 443, 145 L.Ed.2d 346 (1999). In December 1999, the District Court granted summary judgment for respondents. 72 F.Supp.2d 834. In December 2000, a divided panel of the Court of Appeals affirmed the judgment of the District Court, finding that the program had the "primary effect" of advancing religion in violation of the Establishment Clause. 234 F.3d 945 (C.A.6). The Court of Appeals stayed its mandate pending disposition in this Court. App. to Pet. for Cert. in No. 00–1779, p. 151. We granted certiorari, 533 U.S. 976, 122 S.Ct. 23, 150 L.Ed.2d 805 (2001), and now reverse the Court of Appeals.

The Establishment Clause of the First Amendment, applied to the States through the

Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" ***649** or "effect" of advancing or inhibiting religion. *Agostini v. Felton,* 521 U.S. 203, 222–223, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the 'effect' of advancing or inhibiting religion" (citations omitted)). There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden "effect" of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, *Mitchell v. Helms,* 530 U.S. 793, 810–814, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality opinion); *id.,* at 841–844, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment); *Agostini, supra,* at 225–227, 117 S.Ct. 1997; *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 842, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (collecting cases), and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals, *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983); *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993). While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two ****2466** decades, *Agostini, supra,* at 236, 117 S.Ct. 1997, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

In *Mueller,* we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition***650** costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. We began by focusing on the class of beneficiaries, finding that because the class included " *all* parents," including parents with "children [who] attend nonsectarian private schools or sectarian private schools," 463 U.S., at 397, 103 S.Ct. 3062 (emphasis in original), the program was "not readily subject to challenge under the Establishment Clause," *id.,* at 399, 103 S.Ct. 3062 (citing *Widmar v. Vincent,* 454 U.S. 263, 274, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect")). Then, viewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children." 463 U.S., at 399–400, 103 S.Ct. 3062. This, we said, ensured that "no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.,* at 399, 103 S.Ct. 3062 (quoting *Widmar, supra,* at 274, 102 S.Ct. 269). We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools, saying: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral

law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U.S., at 401, 103 S.Ct. 3062.

That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.

In *Witters,* we used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. Looking at the program as a whole, we observed that "[a]ny aid ... that ultimately***651** flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S., at 487, 106 S.Ct. 748. We further remarked that, as in *Mueller,* "[the] program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 474 U.S., at 487, 106 S.Ct. 748 (internal quotation marks omitted). In light of these factors, we held that the program was not inconsistent with the Establishment Clause. *Id.,* at 488–489, 106 S.Ct. 748.

Five Members of the Court, in separate opinions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. 474 U.S., at 490–491, 106 S.Ct. 748 (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring) (citing *Mueller, supra,* at 398–399, 103 S.Ct. 3062); 474 U.S., at 493, 106 S.Ct. 748 (O'CONNOR, J., concurring in part and concurring in judgment); *id.,* at 490, 106 S.Ct. 748 (White, J., concurring). Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to *****2467*** schools or institutions of their own choosing.

Finally, in *Zobrest,* we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. Reviewing our earlier decisions, we stated that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge." 509 U.S., at 8, 113 S.Ct. 2462. Looking once again to the challenged program as a whole, we observed that the program "distributes benefits neutrally to any child qualifying as 'disabled.' " *Id.,* at 10, 113 S.Ct. 2462. Its "primary beneficiaries," we said, were "disabled children, not sectarian schools." *Id.,* at 12, 113 S.Ct. 2462.

****652*** We further observed that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.,* at 10, 113 S.Ct. 2462. Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools. *Id.,* at 10–11, 113 S.Ct. 2462. See, *e.g., Agostini,* 521 U.S., at 229, 117 S.Ct. 1997 (" *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language

interpreter to attend a parochial school"). Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.

Mueller, Witters, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. As a plurality of this Court recently observed:

"[I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special ***653** favors that might lead to a religious establishment." *Mitchell,* 530 U.S., at 810, 120 S.Ct. 2530.

See also *id.,* at 843, 113 S.Ct. 2462 (O'CONNOR, J., concurring in judgment) ("[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, 'no reasonable observer is likely to draw from the facts ... an inference that the State itself is endorsing a religious practice or belief' " (quoting *Witters,* 474 U.S., at 493, 106 S.Ct. 748 (O'CONNOR, J., concurring in part and concurring in judgment))). It is precisely for these reasons that we have never found a program of true private choice to offend the Establishment Clause.

We believe that the program challenged here is a program of true private choice, consistent with *Mueller, Witters,* and *Zobrest,* and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children*****2468** of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.,* any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

There are no "financial incentive[s]" that "ske[w]" the program toward religious schools. *Witters, supra,* at 487–488, 106 S.Ct. 748. Such incentives "[are] not present ... where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is

made available to both religious ***654** and secular beneficiaries on a nondiscriminatory basis." *Agostini, supra,* at 231, 117 S.Ct. 1997. The program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates ... financial incentive[s] for parents to choose a sectarian school." *Zobrest,* 509 U.S., at 10, 113 S.Ct. 2462.[3]

> 3. Justice SOUTER suggests the program is not "neutral" because program students cannot spend scholarship vouchers at traditional public schools. *Post,* at 2491–2492 (dissenting opinion). This objection is mistaken: Public schools in Cleveland already receive $7,097 in public funding per pupil—$4,167 of which is attributable to the State. App. 56a. Program students who receive tutoring aid and remain enrolled in traditional public schools therefore direct almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school. *Ibid.* Justice SOUTER does not seriously claim that the program differentiates based on the religious status of beneficiaries or providers of services, the touchstone of neutrality under the Establishment Clause. *Mitchell v. Helms,* 530 U.S. 793, 809, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality opinion); *id.,* at 838, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment).

Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a "public perception that the State is endorsing religious practices and beliefs." Brief for Respondents Simmons–Harris et al. 37–38. But we have repeatedly recognized ***655** that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. *Mueller,* 463 U.S., at 399–399, 103 S.Ct. 3062; *Witters, supra,* at 488–489, 106 S.Ct. 748; *Zobrest, supra,* at 10–11, 113 S.Ct. 2462; *e.g., Mitchell, supra,* at 842–843, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment) ("In terms of public perception, a government program of direct aid to religious schools ... differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools"). The argument is particularly misplaced here since "the reasonable observer in the endorsement ****2469** inquiry must be deemed aware" of the "history and context" underlying a challenged program. *Good News Club v. Milford Central School,* 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) (internal quotation marks omitted). See also *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 780, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). Any objective observer familiar

with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing***656*** parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

Justice SOUTER speculates that because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools. *Post,* at 2494–2495 (dissenting opinion).[4] But Cleveland's preponderance of religiously affiliated***657*** private schools certainly did not arise as a result of the ****2470*** program; it is a phenomenon common to many American cities. See U.S. Dept. of Ed., National Center for Education Statistics, Private School Universe Survey: 1999–2000, pp. 2–4 (NCES 2001–330, 2001) (hereinafter Private School Universe Survey) (cited in Brief for United States as *Amicus Curiae* 24). Indeed, by all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious. It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. See Brief for State of Florida et al. as *Amici Curiae* 16 (citing Private School Universe Survey). To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, see Ohio Educational Directory (Lodging of Respondents Gatton et al., available in Clerk of Court's case file), and Reply Brief for Petitioners in No. 00–1751, p. 12, n. 1, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater. Cf. Brief for State of Florida et al. as *Amici Curiae* 17 ("[T]he percentages of sectarian to nonsectarian private schools within Florida's 67 school districts ... vary from zero to 100 percent"). Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less ***658*** than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools. *Id.,* at 15–16 (citing Private School Universe Survey).

4. Justice SOUTER appears to base this claim on the unfounded assumption that capping the amount of tuition charged to low-income students (at $2,500) favors participation by religious schools. *Post,* at 2495 (dissenting opinion). But elsewhere he claims that the

program spends *too much* money on private schools and chides the state legislature for even proposing to raise the scholarship amount for low-income recipients. *Post,* at 2491–2492, 2498, 2500–2501. His assumption also finds no support in the record, which shows that nonreligious private schools operating in Cleveland also seek and receive substantial third-party contributions. App. 194a–195a; App. to Pet. for Cert. in No. 00–1777, p. 119a. Indeed, the actual operation of the program refutes Justice SOUTER's argument that few but religious schools can afford to participate: Ten secular private schools operated within the Cleveland City School District when the program was adopted. Reply Brief for Petitioners in No. 00–1777, p. 4 (citing Ohio Educational Directory, 1999–2000 School Year, Alphabetic List of Nonpublic Schools, Ohio Dept. of Ed.). All 10 chose to participate in the program and have continued to participate to this day. App. 281a–286a. And while no religious schools have been created in response to the program, several *nonreligious* schools have been created, *id.,* at 144a–148a, 224a–225a, in spite of the fact that a principal barrier to entry of new private schools is the uncertainty caused by protracted litigation which has plagued the program since its inception, *post,* at 2478 (O'CONNOR, J., concurring) (citing App. 225a, 227a). See also 234 F.3d 945, 970 (C.A.6 2000) (Ryan, J., concurring in part and dissenting in part) ("There is not a scintilla of evidence in this case that any school, public or private, has been discouraged from participating in the school voucher program because it cannot 'afford' to do so"). Similarly mistaken is Justice SOUTER's reliance on the low enrollment of scholarship students in nonreligious schools during the 1999–2000 school year. *Post,* at 2495 (citing Brief for California Alliance for Public Schools as *Amicus Curiae* 15). These figures ignore the fact that the number of program students enrolled in nonreligious schools has widely varied from year to year, *infra,* at 2471; *e.g.,* n. 5, *infra,* underscoring why the constitutionality of a neutral choice program does not turn on annual tallies of private decisions made in any given year by thousands of individual aid recipients, *infra,* at 2470–2471 (citing *Mueller v. Allen,* 463 U.S. 388, 401, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983)).

Respondents and Justice SOUTER claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller,* where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. Indeed, we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools. See *Agostini,* 521 U.S., at 229, 117 S.Ct. 1997 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid" (citing *Mueller,* 463 U.S., at 401, 103 S.Ct. 3062)); see also *Mitchell,* 530 U.S., at 812, n. 6, 120 S.Ct. 2530 (plurality opinion) (" *[Agostini]* held that the proportion of aid benefiting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the constitutional inquiry"); *id.,* at 848, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment) (same) (quoting *Agostini, supra,* at 229, 117 S.Ct. 1997). The

constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in *Mueller,* "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." 463 U.S., at 401, 103 S.Ct. 3062.

***659** This point is aptly illustrated here. The 96% figure upon which respondents and Justice SOUTER rely discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial ****2471** assistance. See *supra,* at 2464–2465. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999–2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. See also J. Greene, The Racial, Economic, and Religious Context of Parental Choice in Cleveland 11, Table 4 (Oct. 8, 1999), App. 217a (reporting that only 16.5% of nontraditional schoolchildren in Cleveland choose religious schools). The 96% figure also represents but a snapshot of one particular school year. In the 1997–1998 school year, by contrast, only 78% of scholarship recipients attended religious schools. See App. to Pet. for Cert. in No. 00–1751, p. 5a. The difference was attributable to two private nonreligious schools that had accepted 15% of all scholarship students electing instead to register as community schools, in light of larger per-pupil funding for community schools and the uncertain future of the scholarship program generated by this litigation. See App. 59a–62a, 209a, 223a–227a.[5] Many of the students enrolled in these schools ***660** as scholarship students remained enrolled as community school students, *id.,* at 145a–146a, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect, *e.g.,* Ohio Rev. Code Ann. § 3314.11 (Anderson 1999) (establishing a single "office of school options" to "provide services that facilitate the management of the community schools program and the pilot project scholarship program"). In spite of repeated questioning from the Court at oral argument, respondents offered no convincing justification for their approach, which relies entirely on such arbitrary classifications. Tr. of Oral Arg. 52–60.[6]

5. The fluctuations seen in the Cleveland program are hardly atypical. Experience in Milwaukee, which since 1991 has operated an educational choice program similar to the Ohio program, demonstrates that the mix of participating schools fluctuates significantly from year to year based on a number of factors, one of which is the uncertainty caused by persistent litigation. See App. 218a, 229a–236a; Brief for State of Wisconsin as *Amicus Curiae* 10–13 (hereinafter Brief for Wisconsin) (citing Wisconsin Dept. of Public Instruction, Milwaukee Parental Choice Program Facts and Figures for 2001–2002). Since the Wisconsin Supreme Court declared the Milwaukee program constitutional in 1998, *Jackson v. Benson,* 218 Wis.2d 835, 578 N.W.2d 602, several nonreligious private schools have entered the Milwaukee market, and now represent 32% of all participating schools. Brief for Wisconsin 11–12. Similarly, the number of program students attending nonreligious private schools increased from 2,048 to 3,582; these students now

represent 33% of all program students. *Id.,* at 12–13. There are currently 34 nonreligious private schools participating in the Milwaukee program, a nearly five-fold increase from the 7 nonreligious schools that participated when the program began in 1990. See App. 218a; Brief for Wisconsin 12. And the total number of students enrolled in nonreligious schools has grown from 337 when the program began to 3,582 in the most recent school year. See App. 218a, 234a236a; Brief for Wisconsin 12–13. These numbers further demonstrate the wisdom of our refusal in *Mueller v. Allen,* 463 U.S., at 401, 103 S.Ct. 3062, to make the constitutionality of such a program depend on "annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."

6. Justice SOUTER and Justice STEVENS claim that community schools and magnet schools are separate and distinct from program schools, simply because the program itself does not include community and magnet school options. *Post,* at 2492–2493 (SOUTER, J., dissenting); *post,* at 2484–2485 (STEVENS, J., dissenting). But none of the dissenting opinions explain how there is any perceptible difference between scholarship schools, community schools, or magnet schools from the perspective of Cleveland parents looking to choose the best educational option for their school-age children. Parents who choose a program school in fact receive from the State precisely what parents who choose a community or magnet school receive—the opportunity to send their children largely at state expense to schools they prefer to their local public school. See, *e.g.,* App. 147a, 168a–169a; App. in Nos. 00–3055, etc. (CA6), pp. 1635–1645 and 1657–1673 (Cleveland parents who enroll their children in schools other than local public schools typically explore all state-funded options before choosing an alternative school).

*****2472 *661*** Respondents finally claim that we should look to *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973), to decide these cases. We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes, *id.,* at 773–774, 93 S.Ct. 2955, we found that its "function" was " *unmistakably* to provide desired financial support for nonpublic, sectarian institutions," *id.,* at 783, 93 S.Ct. 2955 (emphasis added). Its genesis, we said, was that private religious schools faced "increasingly grave fiscal problems." *Id.,* at 795, 93 S.Ct. 2955. The program thus provided direct money grants to religious schools. *Id.,* at 762–764, 93 S.Ct. 2955. It provided tax benefits "unrelated to the amount of money actually expended by any parent on tuition," ensuring a windfall to parents of children in religious schools. *Id.,* at 790, 93 S.Ct. 2955. It similarly provided tuition reimbursements designed explicitly to "offe[r] ... an incentive to parents to send their children to sectarian schools." *Id.,* at 786, 93 S.Ct. 2955. Indeed, the program flatly prohibited the participation of any public school, or parent of any public school enrollee. *Id.,* at 763–765, 93 S.Ct. 2955. Ohio's program shares none of these features.

Second, were there any doubt that the program challenged in *Nyquist* is far removed from the

program challenged here, we expressly reserved judgment with respect to "a case involving some form of public assistance (*e.g.,* scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.,* at 782–783, n. 38, 93 S.Ct. 2955. That, of course, is the very question now before us, and it has since been answered, first in *Mueller,* 463 U.S., at 398–399, 103 S.Ct. 3062 ("[A] program ... that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause" (citing *Nyquist, supra,* at 782–783, n. 38, 93 S.Ct. 2955)), ***662** then in *Witters,* 474 U.S., at 487, 106 S.Ct. 748 ("Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited' " (quoting *Nyquist, supra,* at 782–783, n. 38, 93 S.Ct. 2955)), and again in *Zobrest,* 509 U.S., at 12–13, 113 S.Ct. 2462 ("[T]he function of the [program] is hardly 'to provide desired financial support for nonpublic, sectarian institutions' " (quoting *Nyquist, supra,* at 782–783, n. 38, 93 S.Ct. 2955)). To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.[7]

7. Justice BREYER would raise the invisible specters of "divisiveness" and "religious strife" to find the program unconstitutional. *Post,* at 2503, 2506–2508 (dissenting opinion). It is unclear exactly what sort of principle Justice BREYER has in mind, considering that the program has ignited no "divisiveness" or "strife" other than this litigation. Nor is it clear where Justice BREYER would locate this presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find "divisive." We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs. *Mitchell v. Helms,* 530 U.S., at 825, 120 S.Ct. 2530 (plurality opinion) ("The dissent resurrects the concern for political divisiveness that once occupied the Court but that post- *Aguilar* cases have rightly disregarded") (citing cases); *id.,* at 825–826, 120 S.Ct. 2530 (" 'It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit' " (quoting *Aguilar v. Felton,* 473 U.S. 402, 429, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) (O'CONNOR, J., dissenting))).

*****2473*** In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of ***663** decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice O'CONNOR, concurring.

The Court holds that Ohio's Pilot Project Scholarship Program, Ohio Rev. Code Ann. §§ 3313.974–3313.979 (Anderson 1999 and Supp.2000) (voucher program), survives respondents' Establishment Clause challenge. While I join the Court's opinion, I write separately for two reasons. First, although the Court takes an important step, I do not believe that today's decision, when considered in light of other longstanding government programs that impact religious organizations and our prior Establishment Clause jurisprudence, marks a dramatic break from the past. Second, given the emphasis the Court places on verifying that parents of voucher students in religious schools have exercised "true private choice," I think it is worth elaborating on the Court's conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents. To do otherwise is to ignore how the educational system in Cleveland actually functions.

I

These cases are different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds. The share of public resources that reach religious schools is not, however, as significant as respondents suggest. See, *e.g.,* Brief for Respondents Simmons–Harris et al. 1–2. Data from the 1999–2000 school year indicate that 82 percent of schools participating in the voucher program were religious and that 96 percent of participating students enrolled in religious ***664** schools, see App. in Nos. 00–3055, etc. (CA6), p. 1679 (46 of 56 private schools in the program are religiously affiliated; 3,637 of 3,765 voucher students attend religious private schools), but these data are incomplete. These statistics do not take into account all of the reasonable educational choices that may be available to students in Cleveland public schools. When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent. If magnet schools are included in the mix, this percentage falls to 16.5 percent. See J. Greene, The Racial, Economic, and Religious Context of Parental Choice in Cleveland 11, Table 4 (Oct. 8, 1999), App. 217a (reporting 2,087 students in community schools and 16,184 students in magnet schools).

Even these numbers do not paint a complete picture. The Cleveland program provides voucher applicants from low-income families with up to $2,250 in tuition assistance and provides the remaining applicants with up to $1,875 in tuition assistance. §§ 3313.976(A)(8), 3313.978(A) and (C)(1). In contrast, the State provides community schools $4,518 per pupil and magnet schools, on average, $7,097 per pupil. Affidavit of Caroline M. Hoxby ¶ ¶ 4b, 4c, App. 56a. Even if one assumes that all voucher students came from low-income families and that each voucher student used up the entire $2,250 voucher, at most $8.2 million of public funds flowed to religious schools under the voucher program in 1999–2000. Although just over one-half as many students attended community*****2474** schools as religious private schools on the state fisc, the State spent over $1 million more—$9.4 million—on students in community schools than on students in religious private schools because per-pupil aid to community schools is more than double the per-pupil aid to private schools under the voucher program. Moreover, the amount spent on religious private schools is minor compared to the $114.8 million the

State spent on students in the Cleveland magnet schools.

***665** Although $8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions. Religious organizations may qualify for exemptions from the federal corporate income tax, see 26 U.S.C. § 501(c)(3); the corporate income tax in many States, see, *e.g.,* Cal. Rev. & Tax. Code Ann. § 23701d (West 1992); and property taxes in all 50 States, see Turner, Property Tax Exemptions for Nonprofits, 12. Probate & Property 25 (Sept./Oct. 1998); and clergy qualify for a federal tax break on income used for housing expenses, 26 U.S.C. § 1402(a)(8). In addition, the Federal Government provides individuals, corporations, trusts, and estates a tax deduction for charitable contributions to qualified religious groups. See §§ 170, 642(c). Finally, the Federal Government and certain state governments provide tax credits for educational expenses, many of which are spent on education at religious schools. See, *e.g.,* § 25A (Hope tax credit); Minn. Stat. § 290.0674 (Supp.2001).

Most of these tax policies are well established, see, *e.g., Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (upholding Minnesota tax deduction for educational expenses); *Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (upholding an exemption for religious organizations from New York property tax), yet confer a significant relative benefit on religious institutions. The state property tax exemptions for religious institutions alone amount to very large sums annually. For example, available data suggest that Colorado's exemption lowers that State's tax revenues by more than $40 million annually, see Rabey, Exemptions a Matter of Faith: No Proof Required of Tax–Free Churches, Colorado Springs Gazette Telegraph, Oct. 26, 1992, p. B1; Colorado Debates Church, Nonprofit Tax–Exempt Status, Philadelphia Enquirer, Oct. 4, 1996, p. 8; Maryland's exemption lowers revenues by more than $60 million, see Maryland Dept. of Assessment and Taxation, 2001 SDAT Annual Report (Apr. 25, 2002), http://www.dat.state.md.us/sdatweb/stats/01ar_rpt.html***666** (Internet sources available in Clerk of Court's case file); Wisconsin's exemption lowers revenues by approximately $122 million, see Wisconsin Dept. of Revenue, Division of Research and Analysis, Summary of Tax Exemption Devices 2001, Property Tax (Apr. 25, 2002), http://www.dor.state.wi.us/ ra/sum00pro.html ($5.688 billion in exempt religious property; statewide average property tax rate of $21.46 per $1,000 of property); and Louisiana's exemption, looking just at the city of New Orleans, lowers revenues by over $36 million, see Bureau of Governmental Research, Property Tax Exemptions and Assessment Administration in Orleans Parish: Summary and Recommendations 2 (Dec. 1999) ($22.6 million for houses of worship and $14.1 million for religious schools). As for the Federal Government, the tax deduction for charitable contributions reduces federal tax revenues by nearly $25 billion annually, see U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 344 (2000) (hereinafter Statistical Abstract), and it is reported that over 60 percent of household charitable contributions go to religious charities, *id.,* at 397. Even the relatively minor exemptions lower federal tax receipts by substantial amounts. The parsonage exemption, for example, lowers revenues by around $500 million. See Diaz, Ramstad Prepares Bill ****2475** to Retain Tax Break for Clergy's Housing, Star Tribune (Minneapolis–St. Paul), Mar. 30, 2002, p. 4A.

These tax exemptions, which have "much the same effect as [cash grants] ... of the amount of tax [avoided]," *Regan v. Taxation With Representation of Wash.,* 461 U.S. 540, 544, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983); see also *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 859–860, 115 S.Ct. 2510, 132 L.Ed.2d 700, esp. n. 4 (1995) (THOMAS, J., concurring), are just part of the picture. Federal dollars also reach religiously affiliated organizations through public health programs such as Medicare, 42 U.S.C. §§ 1395–1395ggg, and Medicaid, § 1396 *et seq.,* through educational programs such as the Pell Grant program, 20 U.S.C. § 1070a, and the G.I. Bill of Rights, 38 U.S.C. §§ 3451, 3698; and ****667*** through childcare programs such as the Child Care and Development Block Grant Program (CCDBG), 42 U.S.C. § 9858 (1994 ed., Supp. V). Medicare and Medicaid provide federal funds to pay for the healthcare of the elderly and the poor, respectively, see 1 B. Furrow, T. Greaney, S. Johnson, T. Jost, & R. Schwartz, Health Law 545–546 (2d ed.2000); 2 *id.,* at 2; the Pell Grant program and the G.I. Bill subsidize higher education of low-income individuals and veterans, respectively, see Mulleneaux, The Failure to Provide Adequate Higher Education Tax Incentives for Lower–Income Individuals, 14 Akron Tax J. 27, 31 (1999); and the CCDBG program finances child care for low-income parents, see Pitegoff, Child Care Policy and the Welfare Reform Act, 6 J. Affordable Housing & Community Dev. L. 113, 121–122 (1997). These programs are well-established parts of our social welfare system, see, *e.g., Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 782–783, n. 38, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973), and can be quite substantial, see Statistical Abstract 92 (Table 120) ($211.4 billion spent on Medicare and nearly $176.9 billion on Medicaid in 1998), *id.,* at 135 (Table 208) ($9.1 billion in financial aid provided by the Department of Education and $280.5 million by the Department of Defense in 1999); Bush On Welfare: Tougher Work Rules, More State Control, Congress Daily, Feb. 26, 2002, p. 8 ($4.8 billion for the CCDBG program in 2001).

A significant portion of the funds appropriated for these programs reach religiously affiliated institutions, typically without restrictions on its subsequent use. For example, it has been reported that religious hospitals, which account for 18 percent of all hospital beds nationwide, rely on Medicare funds for 36 percent of their revenue. Merger Watch, New Study Details Public Funding of Religious Hospitals (Jan.2002), http:// www.mergerwatch.org/ inthenews/publicfunding.html. Moreover, taking into account both Medicare and Medicaid, religious hospitals received nearly $45 billion from the federal fisc in 1998. *Ibid.* Federal aid ****668*** to religious schools is also substantial. Although data for all States are not available, data from Minnesota, for example, suggest that a substantial share of Pell Grant and other federal funds for college tuition reach religious schools. Roughly one-third or $27.1 million of the federal tuition dollars spent on students at schools in Minnesota were used at private 4–year colleges. Minnesota Higher Education Services Office, Financial Aid Awarded, Fiscal Year 1999: Grants, Loans, and Student Earning from Institution Jobs (Jan. 24, 2001). The vast majority of these funds—$23.5 million—flowed to religiously affiliated institutions. *Ibid.*

Against this background, the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs. While this observation is not intended to justify the Cleveland voucher program under the Establishment

Clause, see *post,* at 2498, n. 19 (SOUTER, J., dissenting), it places in broader perspective alarmist claims about implications of the Cleveland program and the Court's decision in these cases. See *post,* at 2485 ***2476** (STEVENS, J., dissenting); *post,* at 2501 (SOUTER, J., dissenting); *post,* p. 2502 (BREYER, J., dissenting).

II

Nor does today's decision signal a major departure from this Court's prior Establishment Clause jurisprudence. A central tool in our analysis of cases in this area has been the *Lemon* test. As originally formulated, a statute passed this test only if it had "a secular legislative purpose," if its "principal or primary effect" was one that "neither advance[d] nor inhibit[ed] religion," and if it did "not foster an excessive government entanglement with religion." *Lemon v. Kurtzman,* 403 U.S. 602, 612–613, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (internal quotation marks omitted). In *Agostini v. Felton,* 521 U.S. 203, 218, 232–233, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, see *ibid.,* and the degree of entanglement***669** has implications for whether a statute advances or inhibits religion, see *Lynch v. Donnelly,* 465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'CONNOR, J., concurring). The test today is basically the same as that set forth in *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (citing *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *McGowan v. Maryland,* 366 U.S. 420, 442, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)), over 40 years ago.

The Court's opinion in these cases focuses on a narrow question related to the *Lemon* test: how to apply the primary effects prong in indirect aid cases? Specifically, it clarifies the basic inquiry when trying to determine whether a program that distributes aid to beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion, *Lemon v. Kurtzman, supra,* at 613–614, 91 S.Ct. 2105, or, as I have put it, of "endors[ing] or disapprov[ing] ... religion," *Lynch v. Donnelly, supra,* at 691–692, 104 S.Ct. 1355 (concurring opinion); see also *Wallace v. Jaffree,* 472 U.S. 38, 69–70, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'CONNOR, J., concurring in judgment). See also *ante,* at 2467. Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down under the Establishment Clause. See *ante,* at 2467–2468.

Justice SOUTER portrays this inquiry as a departure from *Everson.* See *post,* at 2485–2486 (dissenting opinion). A fair reading of the holding in that case suggests quite the opposite. Justice Black's opinion for the Court held that the "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson, supra,* at 18, 67 S.Ct. 504; see also *Schempp, supra,* at 218, 222, 83 S.Ct. 1560. ***670** How else could the Court have upheld a state program to provide students transportation to public and religious schools alike? What the Court clarifies in these

cases is that the Establishment Clause also requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries. Such a refinement of the *Lemon* test surely does not betray *Everson.*

III

There is little question in my mind that the Cleveland voucher program is neutral *****2477*** as between religious schools and nonreligious schools. See *ante,* at 2468. Justice SOUTER rejects the Court's notion of neutrality, proposing that the neutrality of a program should be gauged not by the opportunities it presents but rather by its effects. In particular, a “neutrality test ... [should] focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction.” *Post,* at 2491 (dissenting opinion). Justice SOUTER doubts that the Cleveland program is neutral under this view. He surmises that the cap on tuition that voucher schools may charge low-income students encourages these students to attend religious rather than nonreligious private voucher schools. See *post,* at 2495. But Justice SOUTER's notion of neutrality is inconsistent with that in our case law. As we put it in *Agostini,* government aid must be “made available to both religious and secular beneficiaries on a nondiscriminatory basis.” 521 U.S., at 231, 117 S.Ct. 1997.

I do not agree that the nonreligious schools have failed to provide Cleveland parents reasonable alternatives to religious schools in the voucher program. For nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of parents. The District Court record demonstrates that nonreligious schools were able to compete effectively ****671*** with Catholic and other religious schools in the Cleveland voucher program. See *ante,* at 2469, n. 4. The best evidence of this is that many parents with vouchers selected nonreligious private schools over religious alternatives and an even larger number of parents send their children to community and magnet schools rather than seeking vouchers at all. *Supra,* at 2473. Moreover, there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program, let alone a community or magnet school. See 234 F.3d 945, 969 (C.A.6 2000) (Ryan, J., concurring in part and dissenting in part); Affidavit of David L. Brennan ¶ 8, App. 147a.

To support his hunch about the effect of the cap on tuition under the voucher program, Justice SOUTER cites national data to suggest that, on average, Catholic schools have a cost advantage over other types of schools. See *post,* at 2495–2496, n. 15 (dissenting opinion). Even if national statistics were relevant for evaluating the Cleveland program, Justice SOUTER ignores evidence which suggests that, at a national level, nonreligious private schools may target a market for different, if not a higher, quality of education. For example, nonreligious private schools are smaller, see U.S. Dept. of Ed., National Center for Education Statistics, Private School Universe Survey, 1997–1998 (Oct.1999) (Table 60) (87 and 269 students per private nonreligious and Catholic elementary school, respectively); have smaller class sizes, see *ibid.* (9.4 and 18.8 students per teacher at private nonreligious and Catholic elementary schools, respectively); have more highly educated teachers, see U.S. Dept. of Ed., National Center for Education Statistics, Private Schools in the United States: A Statistical Profile, 1993–1994 (NCES 97–459,

July 1997) (Table 3.4) (37.9 percent of nonreligious private school teachers but only 29.9 percent of Catholic school teachers have Master's degrees); and have principals with longer job tenure than Catholic schools, see *ibid.* (Table 3.7) (average tenure***672** of principals at private nonreligious and Catholic schools is 8.2 and 4.7 years, respectively).

Additionally, Justice SOUTER's theory that the Cleveland voucher program's cap on the tuition encourages low-income students to attend religious schools ignores that these students receive nearly double the amount of tuition assistance under the community schools program than under the voucher program and that none of the ****2478** community schools is religious. See *ante,* at 2464.

In my view the more significant finding in these cases is that Cleveland parents who use vouchers to send their children to religious private schools do so as a result of true private choice. The Court rejects, correctly, the notion that the high percentage of voucher recipients who enroll in religious private schools necessarily demonstrates that parents do not actually have the option to send their children to nonreligious schools. *Ante,* at 2469–2471. Likewise, the mere fact that some parents enrolled their children in religious schools associated with a different faith than their own, see *post,* at 2495 (SOUTER, J., dissenting), says little about whether these parents had reasonable nonreligious options. Indeed, no voucher student has been known to be turned away from a nonreligious private school participating in the voucher program. *Supra,* at 2477. This is impressive given evidence in the record that the present litigation has discouraged the entry of some nonreligious private schools into the voucher program. Declaration of David P. Zanotti ¶ ¶ 5, 10, App. 225a, 227a. Finally, as demonstrated above, the Cleveland program does not establish financial incentives to undertake a religious education.

I find the Court's answer to the question whether parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools persuasive. In looking at the voucher program, all the choices available to potential beneficiaries of the government program should be considered. In these cases, parents who were eligible to ***673** apply for a voucher also had the option, at a minimum, to send their children to community schools. Yet the Court of Appeals chose not to look at community schools, let alone magnet schools, when evaluating the Cleveland voucher program. See 234 F.3d, at 958. That decision was incorrect. Focusing in these cases only on the program challenged by respondents ignores how the educational system in Cleveland actually functions. The record indicates that, in 1999, two nonreligious private schools that had previously served 15 percent of the students in the voucher program were prompted to convert to community schools because parents were concerned about the litigation surrounding the program, and because a new community schools program provided more per-pupil financial aid. Many of the students that enrolled in the two schools under the voucher program transferred to the community schools program and continued to attend these schools. See Affidavit of David L. Brennan ¶ ¶ 3, 10, App. 145a, 147a; Declaration of David P. Zanotti ¶ ¶ 4–10, *id.,* at 225a–227a. This incident provides strong evidence that both parents and nonreligious schools view the voucher program and the community schools program as reasonable alternatives.

Considering all the educational options available to parents whose children are eligible for vouchers, including community and magnet schools, the Court finds that parents in the Cleveland schools have an array of nonreligious options. *Ante,* at 2469. Not surprisingly, respondents present no evidence that any students who were candidates for a voucher were denied slots in a community school or a magnet school. Indeed, the record suggests the opposite with respect to community schools. See Affidavit of David L. Brennan ¶ 8, App. 147a.

Justice SOUTER nonetheless claims that, of the 10 community schools operating in Cleveland during the 1999–2000 school year, 4 were unavailable to students with vouchers and 4 others reported poor test scores. See *post,* at ***674** 2494, n. 10 (dissenting opinion). But that analysis unreasonably limits the choices available to Cleveland parents. It is undisputed that Cleveland's 24 magnet schools are reasonable alternatives to voucher schools. See *post,* at 2493–2494, n. 9 (SOUTER, J., dissenting); http:// www.cmsdnet.net/administration*****2479** / EducationalServices/magnet.htm (June 20, 2002). And of the four community schools Justice SOUTER claims are unavailable to voucher students, he is correct only about one (Life Skills Center of Cleveland). Affidavit of Steven M. Puckett ¶ 12, App. 162a. Justice SOUTER rejects the three other community schools (Horizon Science Academy, Cleveland Alternative Learning, and International Preparatory School) because they did not offer primary school classes, were targeted toward poor students or students with disciplinary or academic problems, or were not in operation for a year. See *post,* at 2494, n. 10. But a community school need not offer primary school classes to be an alternative to religious middle schools, and catering to impoverished or otherwise challenged students may make a school more attractive to certain inner-city parents. Moreover, the one community school that was closed in 1999–2000 was merely looking for a new location and was operational in other years. See Affidavit of Steven M. Puckett ¶ 12, App. 162a; Ohio Dept. of Ed., Office of School Options, Community Schools, Ohio's Community School Directory (June 22, 2002), http:// www.ode.state.oh.us/community_schools/ community_school_directory/default.asp. Two more community schools were scheduled to open after the 1999–2000 school year. See Affidavit of Steven M. Puckett ¶ 13, App. 163a.

Of the six community schools that Justice SOUTER admits as alternatives to the voucher program in 1999–2000, he notes that four (the Broadway, Cathedral, Chapelside, and Lincoln Park campuses of the Hope Academy) reported lower test scores than public schools during the school year *after* the District Court's grant of summary judgment to respondents,***675** according to report cards prepared by the Ohio Department of Education. See *post,* at 2494, n. 10 (dissenting opinion). (One, Old Brooklyn Montessori School, performed better than public schools. *Ibid.;* see also Ohio Dept. of Ed., 2001 Community School Report Card, Old Brooklyn Montessori School 5 (community school scored higher than public schools in four of five subjects in 1999–2000).) These report cards underestimate the value of the four Hope Academy schools. Before they entered the community school program, two of them participated in the voucher program. Although they received far less state funding in that capacity, they had among the highest rates of parental satisfaction of all voucher schools, religious or nonreligious. See P. Peterson, W. Howell, & J. Greene, An Evaluation of the Cleveland Voucher Program after Two Years 6, Table 4 (June 1999) (hereinafter Peterson). This is particularly impressive given

that a Harvard University study found that the Hope Academy schools attracted the "poorest and most educationally disadvantaged students." J. Greene, W. Howell, P. Peterson, Lessons from the Cleveland Scholarship Program 22, 24 (Oct. 15, 1997). Moreover, Justice SOUTER's evaluation of the Hope Academy schools assumes that the only relevant measure of school quality is academic performance. It is reasonable to suppose, however, that parents in the inner city also choose schools that provide discipline and a safe environment for their children. On these dimensions some of the schools that Justice SOUTER derides have performed quite ably. See Peterson, Table 7.

Ultimately, Justice SOUTER relies on very narrow data to draw rather broad conclusions. One year of poor test scores at four community schools targeted at the most challenged students from the inner city says little about the value of those schools, let alone the quality of the 6 other community schools and 24 magnet schools in Cleveland. Justice SOUTER's use of statistics confirms the Court's wisdom in refusing***676** to consider them when assessing the Cleveland program's constitutionality. See *ante,* at 2470. What appears to motivate Justice SOUTER's analysis is a ****2480** desire for a limiting principle to rule out certain nonreligious schools as alternatives to religious schools in the voucher program. See *post,* at 2492, 2493–2494, n. 9 (dissenting opinion). But the goal of the Court's Establishment Clause jurisprudence is to determine whether, after the Cleveland voucher program was enacted, parents were free to direct state educational aid in either a nonreligious or religious direction. See *ante,* at 2469. That inquiry requires an evaluation of all reasonable educational options Ohio provides the Cleveland school system, regardless of whether they are formally made available in the same section of the Ohio Code as the voucher program.

Based on the reasoning in the Court's opinion, which is consistent with the realities of the Cleveland educational system, I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause.

Justice THOMAS, concurring.

Frederick Douglass once said that "[e]ducation ... means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." [1] Today many of our inner-city public schools deny emancipation to urban minority students. Despite this Court's observation nearly 50 years ago in *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed.873 (1954), that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education," urban children have been forced into a system that continually fails them. These cases present an ***677** example of such failures. Besieged by escalating financial problems and declining academic achievement, the Cleveland City School District was in the midst of an academic emergency when Ohio enacted its scholarship program.

1. The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894, in 5 The Frederick Douglass Papers 623 (J. Blassingame & J.

McKivigan eds.1992) (hereinafter Douglass Papers).

The dissents and respondents wish to invoke the Establishment Clause of the First Amendment, as incorporated through the Fourteenth, to constrain a State's neutral efforts to provide greater educational opportunity for underprivileged minority students. Today's decision properly upholds the program as constitutional, and I join it in full.

I

This Court has often considered whether efforts to provide children with the best educational resources conflict with constitutional limitations. Attempts to provide aid to religious schools or to allow some degree of religious involvement in public schools have generated significant controversy and litigation as States try to navigate the line between the secular and the religious in education. See generally *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.,* 333 U.S. 203, 237–238, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (Jackson, J., concurring) (noting that the Constitution does not tell judges "where the secular ends and the sectarian begins in education"). We have recently decided several cases challenging federal aid programs that include religious schools. See, *e.g., Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000); *Agostini v. Felton,* 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). To determine whether a federal program survives scrutiny under the Establishment Clause, we have considered whether it has a secular purpose and whether it has the primary effect of advancing or inhibiting religion. See *Mitchell, supra,* at 807–808, 120 S.Ct. 2530. I agree with the Court that Ohio's program easily passes muster under our stringent test, but, as a matter *****2481*** of first principles, I question whether this test should be applied to the States.

****678*** The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." On its face, this provision places no limit on the States with regard to religion. The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government.[2] Whether and how this Clause should constrain state action under the Fourteenth Amendment is a more difficult question.

2. See, *e.g., School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 309–310, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Stewart, J., dissenting) ("[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments"); see also *Wallace v. Jaffree,* 472 U.S. 38, 113, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting).

The Fourteenth Amendment fundamentally restructured the relationship between individuals and the States and ensured that States would not deprive citizens of liberty without due process of law. It guarantees citizenship to all individuals born or naturalized in the United States and provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws." As Justice Harlan noted, the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship, and to the security of personal liberty." *Plessy v. Ferguson,* 163 U.S. 537, 555, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (dissenting opinion). When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty.

Consequently, in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral ***679** basis than the Federal Government." *Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 699, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (Harlan, J., concurring). Thus, while the Federal Government may "make no law respecting an establishment of religion," the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.[3]

> 3. Several Justices have suggested that rights incorporated through the Fourteenth Amendment apply in a different manner to the States than they do to the Federal Government. For instance, Justice Jackson stated, "[t]he inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms." *Beauharnais v. Illinois,* 343 U.S. 250, 294, 72 S.Ct. 725, 96 L.Ed. 919 (1952) (dissenting opinion). Justice Harlan noted: "The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal." *Roth v. United States,* 354 U.S. 476, 503–504, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (dissenting opinion). See also *Gitlow v. New York,* 268 U.S. 652, 672, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) (Holmes, J., dissenting).

*****2482*** Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights.[4] But I ***680** cannot accept its use to oppose neutral programs of school choice through the incorporation of the Establishment Clause. There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice.

> 4. In particular, these rights inhere in the Free Exercise Clause, which unlike the Establishment Clause protects individual liberties of religious worship. "That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth—is the safeguarding of an individual's right to free

exercise of his religion has been consistently recognized." *Schempp, supra,* at 312, 83 S.Ct. 1560 (Stewart, J., dissenting). See also Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1159 (1991) ("[T]he free exercise clause was paradigmatically about citizen rights, not state rights; it thus invites incorporation. Indeed, this clause was specially concerned with the plight of minority religions, and thus meshes especially well with the minority-rights thrust of the Fourteenth Amendment"); Lietzau, Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation, 39 DePaul L. Rev. 1191, 1206–1207 (1990).

II

The wisdom of allowing States greater latitude in dealing with matters of religion and education can be easily appreciated in this context. Respondents advocate using the Fourteenth Amendment to handcuff the State's ability to experiment with education. But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment. Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform that allows voluntary participation of private and religious schools in educating poor urban children otherwise condemned to failing public schools. The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children.[5] This is a choice that those with greater means have routinely exercised.

5. This Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children. "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). But see *Troxel v. Granville,* 530 U.S. 57, 80, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (THOMAS, J., concurring in judgment).

***681** Cleveland parents now have a variety of educational choices. There are traditional public schools, magnet schools, and privately run community schools, in addition to the scholarship program. Currently, 46 of the 56 private schools participating in the scholarship program are church affiliated (35 are Catholic), and 96 percent of students in the program attend religious schools. See App. 281a–286a; 234 F.3d 945, 949 (C.A.6 2000). Thus, were the Court to disallow the inclusion of religious schools, Cleveland children could use their scholarships at only 10 private schools.

In addition to expanding the reach of the scholarship program, the inclusion of religious schools makes sense given Ohio's purpose of increasing educational performance and opportunities. Religious schools, like other private schools, achieve far better educational results than their public counterparts. For example, the students at Cleveland's Catholic schools score significantly higher on Ohio proficiency tests than students at Cleveland public schools. Of

Cleveland eighth graders taking the 1999 Ohio proficiency test, 95 percent in Catholic schools passed the reading test, whereas only 57 percent in ***2483** public schools passed. And 75 percent of Catholic school students passed the math proficiency test, compared to only 22 percent of public school students. See Brief for Petitioners in No. 00–1777, p. 10. But the success of religious and private schools is in the end beside the point, because the State has a constitutional right to experiment with a variety of different programs to promote educational opportunity. That Ohio's program includes successful schools simply indicates that such reform can in fact provide improved education to underprivileged urban children.

Although one of the purposes of public schools was to promote democracy and a more egalitarian culture,[6] failing urban public schools disproportionately affect minority children most in need of educational opportunity. At the time ***682** of Reconstruction, blacks considered public education "a matter of personal liberation and a necessary function of a free society." J. Anderson, Education of Blacks in the South, 1860–1935, p. 18 (1988). Today, however, the promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts. Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities. [7] Opponents of the program raise formalistic concerns about the Establishment Clause but ignore the core purposes of the Fourteenth Amendment.

6. See, *e.g.,* N. Edwards, School in the American Social Order: The Dynamics of American Education 360–362 (1947).

7. Minority and low-income parents express the greatest support for parental choice and are most interested in placing their children in private schools. "[T]he appeal of private schools is especially strong among parents who are low in income, minority, and live in low-performing districts: precisely the parents who are the most disadvantaged under the current system." T. Moe, Schools, Vouchers, and the American Public 164 (2001). Nearly three-fourths of all public school parents with an annual income less than $20,000 support vouchers, compared to 57 percent of public school parents with an annual income of over $60,000. See *id.,* at 214 (Table 7–3). In addition, 75 percent of black public school parents support vouchers, as do 71 percent of Hispanic public school parents. *Ibid.*

While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. As Thomas Sowell noted 30 years ago: "Most black people have faced too many grim, concrete problems to be romantics. They want and need certain tangible results, which can be achieved only by developing certain specific abilities." Black Education: Myths and Tragedies 228 (1972). The same is true today. An individual's life prospects increase dramatically with each successfully completed phase of education. For instance, a black high ***683** school dropout earns just over $13,500, but with a

high school degree the average income is almost $21,000. Blacks with a bachelor's degree have an average annual income of about $37,500, and $75,500 with a professional degree. See U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 140 (2001) (Table 218). Staying in school and earning a degree generates real and tangible financial benefits, whereas failure to obtain even a high school degree essentially relegates students to a life of poverty and, all too often, of crime.[8] The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation****2484*** that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects.

8. In 1997, approximately 68 percent of prisoners in state correctional institutions did not have a high school degree. See U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics–2000, p. 519 (Table 6.38).

* * *

Ten States have enacted some form of publicly funded private school choice as one means of raising the quality of education provided to underprivileged urban children.[9] These programs address the root of the problem with failing urban public schools that disproportionately affect minority students. Society's other solution to these educational failures is often to provide racial preferences in higher education. Such preferences, however, run afoul of the Fourteenth Amendment's prohibition against distinctions based on race. See *Plessy,* 163 U.S., at 555, 16 S.Ct. 1138 (Harlan, J., dissenting). By contrast, school choice programs that involve religious schools ****684*** appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause. Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disserves those in the greatest need.

9. These programs include tax credits for such schooling. In addition, 37 States have some type of charter school law. See School Choice 2001: What's Happening in the States xxv (R. Moffitt, J. Garrett, & J. Smith eds. 2001) (Table 1).

As Frederick Douglass poignantly noted, "no greater benefit can be bestowed upon a long benighted people, than giving to them, as we are here earnestly this day endeavoring to do, the means of an education." [10]

10. Douglass Papers 623.

Justice STEVENS, dissenting.

Is a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths a "law respecting an establishment of religion" within the meaning of the First Amendment? In answering that question, I think we should ignore three factual matters that are discussed at length by my colleagues.

First, the severe educational crisis that confronted the Cleveland City School District when Ohio enacted its voucher program is not a matter that should affect our appraisal of its constitutionality. In the 1999–2000 school year, that program provided relief to less than five percent of the students enrolled in the district's schools. The solution to the disastrous conditions that prevented over 90 percent of the student body from meeting basic proficiency standards obviously required massive improvements unrelated to the voucher program.[1] Of course, the emergency may have ***685** given some families a powerful motivation to leave the public school system and accept religious indoctrination that they would otherwise have avoided, but that is not a valid reason for upholding the program.

> 1. Ohio is currently undergoing a major overhaul of its public school financing pursuant to an order of the Ohio Supreme Court in *DeRolph v. State,* 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001). The Court ought, at least, to allow that reform effort and the district's experimentation with alternative public schools to take effect before relying on Cleveland's educational crisis as a reason for state financed religious education.

Second, the wide range of choices that have been made available to students *within the public school system* has no bearing on the question whether the State may pay the tuition for students who wish to reject public education entirely and attend private schools that will provide them with a sectarian education. The fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at state expense****2485** does, however, support the claim that the law is one “respecting an establishment of religion.” The State may choose to divide up its public schools into a dozen different options and label them magnet schools, community schools, or whatever else it decides to call them, but the State is still required to provide a public education and it is the State's decision to fund private school education over and above its traditional obligation that is at issue in these cases.[2]

> 2. The Court suggests that an education at one of the district's community or magnet schools is provided “largely at state expense.” *Ante,* at 2471, n. 6. But a public education at either of these schools is provided *entirely* at State expense—as the State is required to do.

Third, the voluntary character of the private choice to prefer a parochial education over an education in the public school system seems to me quite irrelevant to the question whether the government's choice to pay for religious indoctrination is constitutionally permissible. Today, however, the Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds.

For the reasons stated by Justice SOUTER and Justice BREYER, I am convinced that the Court's decision is profoundly misguided. Admittedly, in reaching that conclusion ***686** I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears

to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.

I respectfully dissent.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court's majority holds that the Establishment Clause is no bar to Ohio's payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools' religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these. "[C]onstitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government." *Agostini v. Felton,* 521 U.S. 203, 254, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (SOUTER, J., dissenting). I therefore respectfully dissent.

The applicability of the Establishment Clause [1] to public funding of benefits to religious schools was settled in *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), which inaugurated***687** the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent:

> 1. "Congress shall make no law respecting an establishment of religion," U.S. Const., Amdt. 1.
>
> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they *****2486*** may adopt to teach or practice religion." *Id.,* at 16, 67 S.Ct. 504.

The Court has never in so many words repudiated this statement, let alone, in so many words, overruled *Everson.*

Today, however, the majority holds that the Establishment Clause is not offended by Ohio's Pilot Project Scholarship Program, under which students may be eligible to receive as much as $2,250 in the form of tuition vouchers transferable to religious schools. In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of

tuition. The money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension.[2] Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.

> 2. See, *e.g.,* App. 319a (Saint Jerome School Parent and Student Handbook 1999–2000, p. 1) ("FAITH must dominate the entire educational process so that the child can make decisions according to Catholic values and choose to lead a Christian life"); *id.,* at 347a (Westside Baptist Christian School Parent–Student Handbook, p. 7) ("Christ is the basis of all learning. All subjects will be taught from the Biblical perspective that all truth is God's truth").

***688** How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria.

I

The majority's statements of Establishment Clause doctrine cannot be appreciated without some historical perspective on the Court's announced limitations on government aid to religious education, and its repeated repudiation of limits previously set. My object here is not to give any nuanced exposition of the cases, which I tried to classify in some detail in an earlier opinion, see *Mitchell v. Helms,* 530 U.S. 793, 873–899, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (dissenting opinion), but to set out the broad doctrinal stages covered in the modern era, and to show that doctrinal bankruptcy has been reached today.

Viewed with the necessary generality, the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria ***689** of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

A

Everson v. Board of Ed. of Ewing inaugurated the modern development of Establishment***2487** Clause doctrine at the behest of a taxpayer challenging state provision of "tax-raised funds to pay the bus fares of parochial school pupils" on regular city buses as part of a general scheme to reimburse the public-transportation costs of children attending both public and private nonprofit schools. 330 U.S., at 17, 67 S.Ct. 504. Although the Court split, no Justice disagreed with the basic doctrinal principle already quoted, that "[n]o tax in any amount ... can be levied to support any religious activities or institutions, ... whatever form they may adopt to teach ... religion." *Id.,* at 16, 67 S.Ct. 504. Nor did any Member of the Court deny the tension between the New Jersey program and the aims of the Establishment Clause. The majority upheld the state law on the strength of rights of religious-school students under the Free Exercise Clause, *id.,* at 17–18, 67 S.Ct. 504, which was thought to entitle them to free public transportation when offered as a "general government servic[e]" to all schoolchildren, *id.,* at 17, 67 S.Ct. 504. Despite the indirect benefit to religious education, the transportation was simply treated like "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," *id.,* at 17–18, 67 S.Ct. 504, and, most significantly, "state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic," *id.,* at 17, 67 S.Ct. 504. The dissenters, however, found the benefit to religion too pronounced to survive the general principle of no establishment, no aid, and they described it as running counter to every objective served by the establishment ban: New Jersey's use of tax-raised funds forced a taxpayer to "contribut[e] to the propagation of opinions which he disbelieves in so far as ... religions differ," *id.,* at 45, 67 S.Ct. 504 (internal quotation marks omitted); it exposed religious ***690** liberty to the threat of dependence on state money, *id.,* at 53, 67 S.Ct. 504; and it had already sparked political conflicts with opponents of public funding, *id.,* at 54, 67 S.Ct. 504.[3]

> 3. See *Everson,* 330 U.S., at 54, n. 47, 67 S.Ct. 504 (noting that similar programs had been struck down in six States, upheld in eight, and *amicus curiae* briefs filed by "three religious sects, one labor union, the American Civil Liberties Union, and the states of Illinois, Indiana, Louisiana, Massachusetts, Michigan and New York").

The difficulty of drawing a line that preserved the basic principle of no aid was no less obvious some 20 years later in *Board of Ed. of Central School Dist. No. 1 v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), which upheld a New York law authorizing local school boards to lend textbooks in secular subjects to children attending religious schools, a result not self-evident from *Everson's* "general government services" rationale. The Court relied instead on the theory that the in-kind aid could only be used for secular educational purposes, 392 U.S., at 243, 88 S.Ct. 1923, and found it relevant that "no funds or books are furnished [directly] to parochial schools, and the financial benefit is to parents and children, not to schools," *id.,* at 243–244, 88 S.Ct. 1923.[4] Justice Black, who wrote *Everson,* led the dissenters. Textbooks, even when " 'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect," 392 U.S., at 252, 88 S.Ct. 1923, he wrote, and Justice Douglas raised other objections underlying the establishment ban, *id.,* at 254–266, 88 S.Ct. 1923. Religious schools would request those books most in keeping with their faiths, and public boards would have final approval***2488** power: "If the board of education supinely submits by approving and

supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church ***691** and state separate has been lost. If the board resists, then the battle line between church and state will have been drawn ... ." *Id.,* at 256, 88 S.Ct. 1923 (Douglas, J., dissenting). The scheme was sure to fuel strife among religions as well: "we can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church." *Id.,* at 265, 88 S.Ct. 1923.

> 4. The Court noted that "the record contains no evidence that any of the private schools ... previously provided textbooks for their students," and "[t]here is some evidence that at least some of the schools did not." *Allen,* 392 U.S., at 244, n. 6, 88 S.Ct. 1923. This was a significant distinction: if the parochial schools provided secular textbooks to their students, then the State's provision of the same in their stead might have freed up church resources for allocation to other uses, including, potentially, religious indoctrination.

Transcending even the sharp disagreement, however, was

> "the consistency in the way the Justices went about deciding the case .... Neither side rested on any facile application of the 'test' or any simplistic reliance on the generality or evenhandedness of the state law. Disagreement concentrated on the true intent inferable behind the law, the feasibility of distinguishing in fact between religious and secular teaching in church schools, and the reality or sham of lending books to pupils instead of supplying books to schools ... .[T]he stress was on the practical significance of the actual benefits received by the schools." *Mitchell,* 530 U.S., at 876, 120 S.Ct. 2530 (SOUTER, J., dissenting).

B

Allen recognized the reality that "religious schools pursue two goals, religious instruction and secular education," 392 U.S., at 245, 88 S.Ct. 1923; if state aid could be restricted to serve the second, it might be permissible under the Establishment Clause. But in the retrenchment that followed, the Court saw that the two educational functions were so intertwined in religious primary and secondary schools that aid to secular education could not readily be segregated, and the intrusive monitoring required to enforce the line itself raised Establishment Clause concerns about the entanglement of church and state. See *Lemon v. Kurtzman,* 403 U.S. 602, 620, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (striking down program supplementing salaries for teachers of secular subjects in private schools). To avoid ***692** the entanglement, the Court's focus in the post- *Allen* cases was on the principle of divertibility, on discerning when ostensibly secular government aid to religious schools was susceptible to religious uses. The greater the risk of diversion to religion (and the monitoring necessary to avoid it), the less legitimate the aid scheme was under the no-aid principle. On the one hand, the Court tried to be practical, and when the aid recipients were not so "pervasively sectarian" that their secular and religious functions were inextricably intertwined, the Court generally upheld aid earmarked for secular use. See, *e.g., Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976); *Hunt v. McNair,* 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973); *Tilton v.*

Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). But otherwise the principle of nondivertibility was enforced strictly, with its violation being presumed in most cases, even when state aid seemed secular on its face. Compare, *e.g., Levitt v. Committee for Public Ed. & Religious Liberty,* 413 U.S. 472, 480, 93 S.Ct. 2814, 37 L.Ed.2d 736 (1973) (striking down state program reimbursing private schools' administrative costs for teacher-prepared tests in compulsory secular subjects), with *Wolman v. Walter,* 433 U.S. 229, 255, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977) (upholding similar program using standardized tests); and *Meek v. Pittenger,* 421 U.S. 349, 369–372, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975) (no public funding for staff and materials for "auxiliary services" like guidance counseling and speech and hearing services), with *Wolman, supra,* at 244, 97 S.Ct. 2593 (permitting state aid for diagnostic speech, hearing, and psychological testing).

*****2489*** The fact that the Court's suspicion of divertibility reflected a concern with the substance of the no-aid principle is apparent in its rejection of stratagems invented to dodge it. In *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973), for example, the Court struck down a New York program of tuition grants for poor parents and tax deductions for more affluent ones who sent their children to private schools. The *Nyquist* Court dismissed warranties of a "statistical guarantee," that the scheme provided at most 15% of the total cost of an education at a religious school, ****693*** *id.,* at 787–788, 93 S.Ct. 2955, which could presumably be matched to a secular 15% of a child's education at the school. And it rejected the idea that the path of state aid to religious schools might be dispositive: "far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.,* at 781, 93 S.Ct. 2955. The point was that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.,* at 783, 93 S.Ct. 2955.[5] *Nyquist* thus held that aid to parents through tax deductions was no different from forbidden direct aid to religious schools for religious uses. The focus remained on what the public money bought when it reached the end point of its disbursement.

> 5. The Court similarly rejected a path argument in *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), overruled by *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), where the State sought to distinguish *Meek v. Pittenger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), overruled by *Mitchell, supra,* based on the fact that, in *Meek,* the State had lent educational materials to individuals rather than to schools. "Despite the technical change in legal bailee," the Court explained, "the program in substance is the same as before," and "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek.*" *Wolman, supra,* at 250, 97 S.Ct. 2593. Conversely, the Court upheld a law reimbursing private schools for state-mandated testing, dismissing a proffered distinction based on the indirect path of aid in an earlier case as "a formalistic dichotomy that bears ... little relationship either to common sense or to the realities of school finance." *Committee for Public Ed. and Religious Liberty v. Regan,* 444 U.S. 646, 658, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980).

C

Like all criteria requiring judicial assessment of risk, divertibility is an invitation to argument, but the object of the arguments provoked has always been a realistic assessment of facts aimed at respecting the principle of no aid. In *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), however, that object began to fade, for *Mueller* started down the road from realism to formalism.

***694** The aid in *Mueller* was in substance indistinguishable from that in *Nyquist,* see 463 U.S., at 396–397, n. 6, 103 S.Ct. 3062, and both were substantively difficult to distinguish from aid directly to religious schools, *id.,* at 399, 103 S.Ct. 3062. But the Court upheld the Minnesota tax deductions in *Mueller,* emphasizing their neutral availability for religious and secular educational expenses and the role of private choice in taking them. *Id.,* at 397–398, 103 S.Ct. 3062. The Court relied on the same two principles in *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), approving one student's use of a vocational training subsidy for the blind at a religious college, characterizing it as aid to individuals from which religious schools could derive no "large" benefit: "the full benefits of the program [are not] limited, in large part or in whole, to students at sectarian institutions." *Id.,* at 488, 106 S.Ct. 748.

School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 395–396, and n. 13, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), overruled in part by *Agostini v. Felton,* 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), clarified that the notions of evenhandedness neutrality and private choice in *****2490*** *Mueller* did not apply to cases involving direct aid to religious schools, which were still subject to the divertibility test. But in *Agostini,* where the substance of the aid was identical to that in *Ball,* public employees teaching remedial secular classes in private schools, the Court rejected the 30–year–old presumption of divertibility, and instead found it sufficient that the aid "supplement[ed]" but did not "supplant" existing educational services, 521 U.S., at 210, 230, 117 S.Ct. 1997. The Court, contrary to *Ball,* viewed the aid as aid "directly to the eligible students ... no matter where they choose to attend school." 521 U.S., at 229, 117 S.Ct. 1997.

In the 12 years between *Ball* and *Agostini,* the Court decided not only *Witters,* but two other cases emphasizing the form of neutrality and private choice over the substance of aid to religious uses, but always in circumstances where any aid to religion was isolated and insubstantial. *Zobrest v. Catalina Foothills School Dist.,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), like ***695** *Witters,* involved one student's choice to spend funds from a general public program at a religious school (to pay for a sign-language interpreter). As in *Witters,* the Court reasoned that "[d]isabled children, not sectarian schools, [were] the primary beneficiaries ...; to the extent sectarian schools benefit at all ..., they are only incidental beneficiaries." 509 U.S., at 12, 113 S.Ct. 2462. *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), like *Zobrest* and *Witters,* involved an individual and insubstantial use of neutrally available public funds for a religious purpose (to print an evangelical magazine).

To be sure, the aid in *Agostini* was systemic and arguably substantial, but, as I have said, the

majority there chose to view it as a bare "supplement." 521 U.S., at 229, 117 S.Ct. 1997. And this was how the controlling opinion described the systemic aid in our most recent case, *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), as aid going merely to a "portion" of the religious schools' budgets, *id.,* at 860, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment). The plurality in that case did not feel so uncomfortable about jettisoning substance entirely in favor of form, finding it sufficient that the aid was neutral and that there was virtual private choice, since any aid "first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere." *Id.,* at 816, 120 S.Ct. 2530. But that was only the plurality view.

Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools. Today's cases are notable for their stark illustration of the inadequacy of the majority's chosen formal analysis.

II

Although it has taken half a century since *Everson* to reach the majority's twin standards of neutrality and ***696** free choice, the facts show that, in the majority's hands, even these criteria cannot convincingly legitimize the Ohio scheme.

A

Consider first the criterion of neutrality. As recently as two Terms ago, a majority of the Court recognized that neutrality conceived of as evenhandedness toward aid recipients had never been treated as alone sufficient to satisfy the Establishment Clause, *Mitchell,* 530 U.S., at 838–839, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment); *id.,* at 884, 120 S.Ct. 2530 (SOUTER, J., dissenting). But at least in its limited significance, formal neutrality seemed to serve some purpose. Today, however, the majority employs the neutrality criterion in a way that renders it impossible to understand.

****2491** Neutrality in this sense refers, of course, to evenhandedness in setting eligibility as between potential religious and secular recipients of public money. *Id.,* at 809–810, 120 S.Ct. 2530 (plurality opinion); *id.,* at 878–884, 120 S.Ct. 2530 (SOUTER, J., dissenting) (three senses of "neutrality").[6] Thus, for example, the aid scheme in *Witters* provided an eligible recipient with a scholarship to be used at any institution within a practically unlimited universe of schools, 474 U.S., at 488, 106 S.Ct. 748; it did not tend to provide more or less aid depending on which one the scholarship recipient chose, and there was no indication that the maximum scholarship amount would be insufficient at secular ***697** schools. Neither did any condition of Zobrest's interpreter's subsidy favor religious education. See 509 U.S., at 10, 113 S.Ct. 2462.

6. Justice O'CONNOR apparently no longer distinguishes between this notion of evenhandedness neutrality and the free-exercise neutrality in *Everson.* Compare *ante,* at 2476 (concurring opinion), with *Mitchell,* 530 U.S., at 839, 120 S.Ct. 2530 (opinion concurring in judgment) ("Even if we at one time used the term 'neutrality' in a

descriptive sense to refer to those aid programs characterized by the requisite equipoise between support of religion and antagonism to religion, Justice SOUTER's discussion convincingly demonstrates that the evolution in the meaning of the term in our jurisprudence is cause to hesitate before equating the neutrality of recent decisions with the neutrality of old”).

In order to apply the neutrality test, then, it makes sense to focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction. Here, one would ask whether the voucher provisions, allowing for as much as $2,250 toward private school tuition (or a grant to a public school in an adjacent district), were written in a way that skewed the scheme toward benefiting religious schools.

This, however, is not what the majority asks. The majority looks not to the provisions for tuition vouchers, Ohio Rev. Code Ann. § 3313.976 (West Supp.2002), but to every provision for educational opportunity: “The program permits the participation of *all* schools within the district, [as well as public schools in adjacent districts], religious or nonreligious.” *Ante,* at 2468 (emphasis in original). The majority then finds confirmation that “participation of *all* schools” satisfies neutrality by noting that the better part of total state educational expenditure goes to public schools, *ibid.,* thus showing there is no favor of religion.

The illogic is patent. If regular, public schools (which can get no voucher payments) “participate” in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. “Neutrality” as the majority employs the term is, literally, verbal and nothing more. This, indeed, is the only way the majority can gloss over the very nonneutral feature of the total scheme covering “ *all* schools”: public tutors may receive from the State no more than $324 per child to support extra tutoring (that is, the State's 90% of a total amount of $360), App. 166a, whereas the tuition voucher schools (which ***698** turn out to be mostly religious) can receive up to $2,250, *id.,* at 56a.[7]

7. The majority's argument that public school students within the program “direct almost twice as much state funding to their chosen school as do program students who receive a scholarship and attend a private school,” *ante,* at 2468, n. 3, was decisively rejected in *Committee for Public Ed.* & *Religious Liberty v. Nyquist,* 413 U.S. 756, 782–783, n. 38, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973):

“We do not agree with the suggestion ... that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. ... The grants to parents of private school children are given in addition to the right that they have to send their children to public schools ‘totally at state expense.’ And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to

equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause."

*****2492*** Why the majority does not simply accept the fact that the challenge here is to the more generous voucher scheme and judge its neutrality in relation to religious use of voucher money seems very odd. It seems odd, that is, until one recognizes that comparable schools for applying the criterion of neutrality are also the comparable schools for applying the other majority criterion, whether the immediate recipients of voucher aid have a genuinely free choice of religious and secular schools to receive the voucher money. And in applying this second criterion, the consideration of " *all* schools" is ostensibly helpful to the majority position.

B

The majority addresses the issue of choice the same way it addresses neutrality, by asking whether recipients or potential recipients of voucher aid have a choice of public schools among secular alternatives to religious schools. Again, however, the majority asks the wrong question and misapplies the criterion. The majority has confused choice in spending scholarships with choice from the entire menu of ****699*** possible educational placements, most of them open to anyone willing to attend a public school. I say "confused" because the majority's new use of the choice criterion, which it frames negatively as "whether Ohio is coercing parents into sending their children to religious schools," *ante,* at 2469, ignores the reason for having a private choice enquiry in the first place. Cases since *Mueller* have found private choice relevant under a rule that aid to religious schools can be permissible so long as it first passes through the hands of students or parents.[8] The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

8. In some earlier cases, "private choice" was sensibly understood to go beyond the mere formalism of path, to ensure that aid was neither systemic nor predestined to go to religious uses. Witters, for example, had a virtually unlimited choice among professional training schools, only a few of which were religious; and Zobrest was simply one recipient who chose to use a government-funded interpreter at a religious school over a secular school, either of which was open to him. But recent decisions seem to have stripped away any substantive bite, as "private choice" apparently means only that government aid follows individuals to religious schools. See, *e.g., Agostini v. Felton,* 521 U.S. 203, 229, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (state aid for remedial instruction at a religious school goes "directly to the eligible students ... no matter where they choose to attend school").

***700** Defining choice as choice in spending the money or channeling the aid is, moreover, necessary if the choice criterion is to function as a limiting principle at all. If "choice" is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school. See *supra,* at 2491 ****2493** (noting the same result under the majority's formulation of the neutrality criterion). And because it is unlikely that any participating private religious school will enroll more pupils than the generally available public system, it will be easy to generate numbers suggesting that aid to religion is not the significant intent or effect of the voucher scheme.

That is, in fact, just the kind of rhetorical argument that the majority accepts in these cases. In addition to secular private schools (129 students), the majority considers public schools with tuition assistance (roughly 1,400 students), magnet schools (13,000 students), and community schools (1,900 students), and concludes that fewer than 20% of pupils receive state vouchers to attend religious schools. *Ante,* at 2470. (In fact, the numbers would seem even more favorable to the majority's argument if enrollment in traditional public schools without tutoring were considered, an alternative the majority thinks relevant to the private choice enquiry, *ante,* at 2469.) Justice O'CONNOR focuses on how much money is spent on each educational option and notes that at most $8.2 million is spent on vouchers for students attending religious schools, *ante,* at 2473 (concurring opinion), which is only 6% of the State's expenditure if one includes separate funding for Cleveland's community ($9.4 million) and magnet ($114.8 million) public schools. The variations show how results may shift when a judge can pick and choose the alternatives to use in the comparisons, and they also show what dependably comfortable results the choice criterion***701** will yield if the identification of relevant choices is wide open. If the choice of relevant alternatives is an open one, proponents of voucher aid will always win, because they will always be able to find a "choice" somewhere that will show the bulk of public spending to be secular. The choice enquiry will be diluted to the point that it can screen out nothing, and the result will always be determined by selecting the alternatives to be treated as choices.

Confining the relevant choices to spending choices, on the other hand, is not vulnerable to comparable criticism. Although leaving the selection of alternatives for choice wide open, as the majority would, virtually guarantees the availability of a "choice" that will satisfy the criterion, limiting the choices to spending choices will not guarantee a negative result in every case. There may, after all, be cases in which a voucher recipient will have a real choice, with enough secular private school desks in relation to the number of religious ones, and a voucher amount high enough to meet secular private school tuition levels. See *infra,* at 2495–2497. But, even to the extent that choice-to-spend does tend to limit the number of religious funding options that pass muster, the choice criterion has to be understood this way in order, as I have said, for it to function as a limiting principle.[9] Otherwise ***702** there is ****2494** surely no point in requiring the choice to be a true or real or genuine one.[10]

9. The need for a limit is one answer to Justice O'CONNOR, who argues at length that community schools should factor in the "private choice" calculus. *Ante,* at 2478 (concurring opinion). To be fair, community schools do exhibit some features of private schools: they are autonomously managed without any interference from the school district or State and two have prior histories as private schools. It may be, then, that community schools might arguably count as choices because they are not like other public schools run by the State or municipality, but in substance merely private schools with state funding outside the voucher program.

But once any public school is deemed a relevant object of choice, there is no stopping this progression. For example, both the majority and Justice O'CONNOR characterize public magnet schools as an independent category of genuine educational options, simply because they are "nontraditional" public schools. But they do not share the "private school" features of community schools, and the only thing that distinguishes them from "traditional" public schools is their thematic focus, which in some cases appears to be nothing more than creative marketing. See, *e.g.,* Cleveland Municipal School District, Magnet and Thematic Programs/Schools (including, as magnet schools, "[f]undamental [e]ducation [c]enters," which employ "[t]raditional classrooms and teaching methods with an emphasis on basic skills"; and "[a]ccelerated [l]earning" schools, which rely on "[i]nstructional strategies [that] provide opportunities for students to build on individual strengths, interests and talents").

10. And how should we decide which "choices" are "genuine" if the range of relevant choices is theoretically wide open? The showcase educational options that the majority and Justice O'CONNOR trumpet are Cleveland's 10 community schools, but they are hardly genuine choices. Two do not even enroll students in kindergarten through third grade, App. 162a, and thus parents contemplating participation in the voucher program cannot select those schools. See Ohio Rev. Code Ann. § 3313.975(C)(1) (West Supp.2002) ("[N]o new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three"). One school was not "in operation" as of 1999, and in any event targeted students below the federal poverty line, App. 162a, not all voucher-eligible students, see n. 21, *infra.* Another school was a special population school for students with "numerous suspensions, behavioral problems and who are a grade level below their peers," App. 162A, which, as Justice O'CONNOR points out, may be "more attractive to certain inner-city parents," *ante,* at 2479, but is probably not an attractive "choice" for most parents.

Of the six remaining schools, the most recent statistics on fourth-grade student performance (unavailable for one school) indicate: three scored well below the Cleveland average in each of five tested subjects on state proficiency examinations, one scored above in one subject, and only one community school, Old Brooklyn Montessori School, was even an arguable competitor, scoring slightly better than traditional public schools in three subjects, and somewhat below in two. See Ohio Dept. of Ed., 2002 Community School Report Card, Hope Academy, Lincoln Park, p. 5; *id.,* Hope Academy, Cathedral Campus, at 5; *id.,* Hope Academy, Chapelside Campus, at 5; *id.,* Hope Academy, Broadway Campus, at 5; *id.,* Old Brooklyn Montessori School, at 5; 2002

District Report Card, Cleveland Municipal School District, p. 1. These statistics are consistent with 1999 test results, which were only available for three of the schools. Brief for Ohio School Boards Association et al. as *Amici Curiae* 26–28 (for example, 34.3% of students in the Cleveland City School District were proficient in math, as compared with 3.3% in Hope Chapelside and 0% in Hope Cathedral).

I think that objective academic excellence should be the benchmark in comparing schools under the majority's test; Justice O'CONNOR prefers comparing educational options on the basis of subjective "parental satisfaction," *ante,* at 2479, and I am sure there are other plausible ways to evaluate "genuine choices." Until now, our cases have never talked about the quality of educational options by whatever standard, but now that every educational option is a relevant "choice," this is what the "genuine and independent private choice" enquiry, *ante,* at 2467 (opinion of the Court), would seem to require if it is to have any meaning at all. But if that is what genuine choice means, what does this enquiry have to do with the Establishment Clause?
703 It is not, of course, that I think even a genuine choice criterion is up to the task of the Establishment Clause when substantial state funds go to religious teaching; the discussion in Part III, *infra,* shows that it is not. The point is simply that if the majority wishes to claim that choice is a criterion, it must define choice in a way that can function as a criterion with a practical capacity to screen something out.

If, contrary to the majority, we ask the right question about genuine choice to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher program (only 53 of which accepted voucher students in 1999–2000), 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones. See App. 281a–286a. Unfortunately for the majority position, there is no explanation for this that suggests the religious direction results simply from free choices by parents. One answer to these statistics, for example, which would be consistent with the genuine choice claimed to be operating, might be that 96.6% of families choosing to avail themselves of vouchers choose to educate their children in schools of their own religion. This would not, in my view, render the scheme constitutional, but it would speak to the majority's choice criterion. ***704*** Evidence shows, however, *****2495*** that almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools. App. to Pet. for Cert. in No. 00–1777, p. 147a.[11] The families made it clear they had not chosen the schools because they wished their children to be proselytized in a religion not their own, or in any religion, but because of educational opportunity.[12]

11. For example, 40% of families who sent their children to private schools for the first time under the voucher program were Baptist, App. 118a, but only one school, enrolling 44 voucher students, is Baptist, *id.,* at 284a.

12. When parents were surveyed as to their motives for enrolling their children in the voucher program, 96.4% cited a better education than available in the public schools, and 95% said their children's safety. *Id.,* at 69a–70a. When asked specifically in one

study to identify the most important factor in selecting among participating private schools, 60% of parents mentioned academic quality, teacher quality, or the substance of what is taught (presumably secular); only 15% mentioned the religious affiliation of the school as even a consideration. *Id.,* at 119a.

Even so, the fact that some 2,270 students chose to apply their vouchers to schools of other religions, App. 281a–286a, might be consistent with true choice if the students "chose" their religious schools over a wide array of private nonreligious options, or if it could be shown generally that Ohio's program had no effect on educational choices and thus no impermissible effect of advancing religious education. But both possibilities are contrary to fact. First, even if all existing nonreligious private schools in Cleveland were willing to accept large numbers of voucher students, only a few more than the 129 currently enrolled in such schools would be able to attend, as the total enrollment at all nonreligious private schools in Cleveland for kindergarten through eighth grade is only 510 children, see Brief for California Alliance for Public Schools as *Amicus Curiae* 15, and there is no indication that these schools have many open seats.[13] Second, the ****705*** $2,500 cap that the program places on tuition for participating low-income pupils has the effect of curtailing the participation of nonreligious schools: "nonreligious schools with higher tuition (about $4,000) stated that they could afford to accommodate just a few voucher students." [14] By comparison, the average tuition at participating Catholic schools in Cleveland in 1999–2000 was $1,592, almost $1,000 below the cap. [15]

13. Justice O'CONNOR points out that "there is no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program." *Ante,* at 2477. But there is equally no evidence to support her assertion that "many parents with vouchers selected nonreligious private schools over religious alternatives," *ibid.,* and in fact the evidence is to the contrary, as only 129 students used vouchers at private nonreligious schools.

14. General Accounting Office Report No. 01–914, School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee 25 (Aug.2001) (GAO Report). Of the 10 nonreligious private schools that "participate" in the Cleveland voucher program, 3 currently enroll no voucher students. And of the remaining seven schools, one enrolls over half of the 129 students that attend these nonreligious schools, while only two others enroll more than 8 voucher students. App. 281a–286a. Such schools can charge full tuition to students whose families do not qualify as "low income," but unless the number of vouchers are drastically increased, it is unlikely that these students will constitute a large fraction of voucher recipients, as the program gives preference in the allocation of vouchers to low-income children. See Ohio Rev. Code Ann. § 3313.978(A) (West Supp.2002).

15. GAO Report 25. A 1993–1994 national study reported a similar average tuition for Catholic elementary schools ($1,572), but higher tuition for other religious schools ($2,213), and nonreligious schools ($3,773). U.S. Dept. of Ed., Office of Educational

Research and Improvement, National Center for Education Statistics, Private Schools in the United States: A Statistical Profile, 1993–94 (NCES 1997–459 June 1997) (Table 1.5). The figures are explained in part by the lower teaching expenses of the religious schools and general support by the parishes that run them. Catholic schools, for example, received 24.1% of their revenue from parish subsidies in the 2000–2001 school year. National Catholic Educational Association, Balance Sheet for Catholic Elementary Schools: 2001 Income and Expenses 25 (2001). Catholic schools also often rely on priests or members of religious communities to serve as principals, 32% of 550 reporting schools in one study, *id.,* at 21; at the elementary school level, the average salary of religious sisters serving as principals in 2000–2001 was $28,876, as compared to lay principals, who received on average $45,154, and public school principals who reported an average salary of $72,587. *Ibid.*

Justice O'CONNOR argues that nonreligious private schools can compete with Catholic and other religious schools below the $2,500 tuition cap. See *ante,* at 2477. The record does not support this assertion, as only three secular private schools in Cleveland enroll more than eight voucher students. See n. 14, *supra.* Nor is it true, as she suggests, that our national statistics are spurious because secular schools cater to a different market from Catholic or other religious schools: while there is a spectrum of nonreligious private schools, there is likely a commensurate range of low-end and high-end religious schools. My point is that at each level, the religious schools have a comparative cost advantage due to church subsidies, donations of the faithful, and the like. The majority says that nonreligious private schools in Cleveland derive similar benefits from “third-party contributions,” *ante,* at 2469, n. 4, but the one affidavit in the record that backs up this assertion with data concerns a private school for “emotionally disabled and developmentally delayed children” that received 11% of its budget from the United Way organization, App. 194a–195a, a large proportion to be sure, but not even half of the 24.1% of budget that Catholic schools on average receive in parish subsidies alone, see *supra* this note.

*****2496 *706*** Of course, the obvious fix would be to increase the value of vouchers so that existing nonreligious private and non-Catholic religious schools would be able to enroll more voucher students, and to provide incentives for educators to create new such schools given that few presently exist. Private choice, if as robust as that available to the seminarian in *Witters,* would then be “true private choice” under the majority's criterion. But it is simply unrealistic to presume that parents of elementary and middle school students in Cleveland will have a range of secular and religious choices even arguably comparable to the statewide program for vocational and higher education in *Witters.* And to get to that hypothetical point would require that such massive financial support be made available to religion as to disserve every objective of the Establishment Clause even more than the present scheme does. See Part III–B, *infra.*[16]

16. The majority notes that I argue both that the Ohio program is unconstitutional because the voucher amount is too low to create real private choice and that any greater expenditure would be unconstitutional as well. *Ante,* at 2469, n. 4. The majority is dead right about this, and there is no inconsistency here: any voucher program that

satisfied the majority's requirement of "true private choice" would be even more egregiously unconstitutional than the current scheme due to the substantial amount of aid to religious teaching that would be required.

707** There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students. And contrary to the majority's assertion, *ante,* at 2468, public schools in adjacent districts hardly have a financial incentive to participate in the Ohio voucher program, and none has.[17] For the overwhelming**2497*** number of children in the voucher scheme, the only alternative to the public schools is religious. And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sake of channeling money into religious institutions. The criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian.

17. As the Court points out, *ante,* at 2463–2464, n. 1, an out-of-district public school that participates will receive a $2,250 voucher for each Cleveland student on top of its normal state funding. The basic state funding, though, is a drop in the bucket as compared to the cost of educating that student, as much of the cost (at least in relatively affluent areas with presumptively better academic standards) is paid by local income and property taxes. See Brief for Ohio School Boards Association et al. as *Amici Curiae* 19–21. The only adjacent district in which the voucher amount is close enough to cover the local contribution is East Cleveland City (local contribution, $2,019, see Ohio Dept. of Ed., 2002 Community School Report Card, East Cleveland City School District, p. 2), but its public-school system hardly provides an attractive alternative for Cleveland parents, as it too has been classified by Ohio as an "academic emergency" district. See *ibid.*

III

I do not dissent merely because the majority has misapplied its own law, for even if I assumed *arguendo* that the ***708** majority's formal criteria were satisfied on the facts, today's conclusion would be profoundly at odds with the Constitution. Proof of this is clear on two levels. The first is circumstantial, in the now discarded symptom of violation, the substantial dimension of the aid. The second is direct, in the defiance of every objective supposed to be served by the bar against establishment.

A

The scale of the aid to religious schools approved today is unprecedented, both in the number of dollars and in the proportion of systemic school expenditure supported. Each measure has received attention in previous cases. On one hand, the sheer quantity of aid, when delivered to a class of religious primary and secondary schools, was suspect on the theory that the greater the aid, the greater its proportion to a religious school's existing expenditures, and the greater the likelihood that public money was supporting religious as well as secular instruction. As we

said in *Meek,* “it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role” as the object of aid that comes in “substantial amounts.” 421 U.S., at 365, 95 S.Ct. 1753. Cf. *Nyquist,* 413 U.S., at 787–788, 93 S.Ct. 2955 (rejecting argument that tuition assistance covered only 15% of education costs, presumably secular, at religious schools). Conversely, the more “attenuated [the] financial benefit ... that eventually flows to parochial schools,” the more the Court has been willing to find a form of state aid permissible. *Mueller,* 463 U.S., at 400, 103 S.Ct. 3062.[18]

18. The majority relies on *Mueller, Agostini,* and *Mitchell* to dispute the relevance of the large number of students that use vouchers to attend religious schools, *ante,* at 2470, but the reliance is inapt because each of those cases involved insubstantial benefits to the religious schools, regardless of the number of students that benefited. See, *e.g., Mueller,* 463 U.S., at 391, 103 S.Ct. 3062 ($112 in tax benefit to the highest bracket taxpayer, see Brief for Respondents Becker et al. in *Mueller v. Allen,* O.T.1982, No. 82–195, p. 5); *Agostini,* 521 U.S., at 210, 117 S.Ct. 1997 (aid “must ‘supplement, and in no case supplant’ ”); *Mitchell,* 530 U.S., at 866, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment) *(“de minimis”).* See also *supra,* at 2490.

***709** On the other hand, the Court has found the gross amount unhelpful for Establishment Clause analysis when the aid afforded a benefit solely to one individual, however substantial as to him, but only an incidental benefit to the religious school at which the individual chose to spend the State's money. See *Witters,* 474 U.S., at 488, 106 S.Ct. 748; cf. *Zobrest,* 509 U.S., at 12, 113 S.Ct. 2462. When neither the design nor the implementation of an aid scheme channels a series of individual students' subsidies toward religious recipients, the relevant beneficiaries for establishment purposes, the Establishment Clause is unlikely to be implicated. The majority's reliance on the observations of five Members of the Court in *Witters* as to the irrelevance of substantiality of aid in that case, see *ante,* at 2467, is therefore beside the point in the matter before us, which involves considerable sums of public funds systematically distributed through thousands of students attending religious ****2498** elementary and middle schools in the city of Cleveland.[19]

19. No less irrelevant, and lacking even arguable support in our cases, is Justice O'CONNOR's argument that the $8.2 million in tax-raised funds distributed under the Ohio program to religious schools is permissible under the Establishment Clause because it “pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions,” *ante,* at 2474. Our cases have consistently held that state benefits at some level can go to religious institutions when the recipients are not pervasively sectarian, see, *e.g., Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (aid to church-related colleges and universities); *Bradfield v. Roberts,* 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1899) (religious hospitals); when the benefit comes in the form of tax exemption or deduction, see, *e.g., Walz v. Tax Comm'n of City of New York,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (property-tax exemptions); *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (tax deductions for educational expenses); or when the aid can plausibly be said

to go to individual university students, see, *e.g., Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986) (state scholarship programs for higher education, and by extension federal programs such as the G.I. Bill). The fact that those cases often allow for large amounts of aid says nothing about direct aid to pervasively sectarian schools for religious teaching. This "greater justifies the lesser" argument not only ignores the aforementioned cases, it would completely swallow up our aid-to-school cases from *Everson* onward: if $8.2 million in vouchers is acceptable, for example, why is there any requirement against greater than *de minimis* diversion to religious uses? See *Mitchell, supra,* at 866, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment).

***710** The Cleveland voucher program has cost Ohio taxpayers $33 million since its implementation in 1996 ($28 million in voucher payments, $5 million in administrative costs), and its cost was expected to exceed $8 million in the 2001–2002 school year. People for the American Way Foundation, Five Years and Counting: A Closer Look at the Cleveland Voucher Program 1–2 (Sept. 25, 2001) (hereinafter Cleveland Voucher Program) (cited in Brief for National School Boards Association et al. as *Amici Curiae* 9). These tax-raised funds are on top of the textbooks, reading and math tutors, laboratory equipment, and the like that Ohio provides to private schools, worth roughly $600 per child. Cleveland Voucher Program 2.[20]

20. The amount of federal aid that may go to religious education after today's decision is startling: according to one estimate, the cost of a national voucher program would be $73 billion, 25% more than the current national public-education budget. People for the American Way Foundation, Community Voice or Captive of the Right? 10 (Dec.2001).

The gross amounts of public money contributed are symptomatic of the scope of what the taxpayers' money buys for a broad class of religious-school students. In paying for practically the full amount of tuition for thousands of qualifying students,[21] cf. *Nyquist, supra,* at 781–783, 93 S.Ct. 2955 (state aid amounting to 50% of tuition was unconstitutional), the scholarships purchase everything that tuition purchases, be it instruction in math or indoctrination in faith. The consequences***711** of "substantial" aid hypothesized in *Meek* are realized here: the majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.

21. Most, if not all, participating students come from families with incomes below 200% of the poverty line (at least 60% are below the poverty line, App. in Nos. 00–3055, etc. (CA6), p. 1679), and are therefore eligible for vouchers covering 90% of tuition, Ohio Rev. Code Ann. § 3313.978(A) (West Supp.2002); they may make up the 10% shortfall by "in-kind contributions or services," which the recipient school "shall permit," § 3313.976(A)(8). Any higher income students in the program receive vouchers paying 75% of tuition costs. § 3313.978(A).

B

It is virtually superfluous to point out that every objective underlying the prohibition of religious

establishment is betrayed by this scheme, but something has to be said about the enormity of the violation.***2499** I anticipated these objectives earlier, *supra,* at 2487, in discussing *Everson,* which cataloged them, the first being respect for freedom of conscience. Jefferson described it as the idea that no one "shall be compelled to ... support any religious worship, place, or ministry whatsoever," A Bill for Establishing Religious Freedom, in 5 The Founders' Constitution 84 (P. Kurland & R. Lerner eds.1987), even a "teacher of his own religious persuasion," *ibid.,* and Madison thought it violated by any " 'authority which can force a citizen to contribute three pence ... of his property for the support of any ... establishment.' " Memorial and Remonstrance ¶ 3, reprinted in *Everson,* 330 U.S., at 65–66, 67 S.Ct. 504. "Any tax to establish religion is antithetical to the command that the minds of men always be wholly free," *Mitchell,* 530 U.S., at 871, 120 S.Ct. 2530 (SOUTER, J., dissenting) (internal quotation marks and citations omitted).[22] Madison's objection to three pence has simply been lost in the majority's formalism.

22. As a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause. See Feldman, Intellectual Origins of the Establishment Clause, 77 N.Y.U. L. Rev. 346, 398 (May 2002) ("In the time between the proposal of the Constitution and of the Bill of Rights, the predominant, not to say exclusive, argument against established churches was that they had the potential to violate liberty of conscience").

As for the second objective, to save religion from its own corruption, Madison wrote of the " 'experience ... that ecclesiastical***712** establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.' " Memorial and Remonstrance ¶ 7, reprinted in *Everson,* 330 U.S., at 67, 67 S.Ct. 504. In Madison's time, the manifestations were "pride and indolence in the Clergy; ignorance and servility in the laity[,] in both, superstition, bigotry and persecution," *ibid.;* in the 21st century, the risk is one of "corrosive secularism" to religious schools, *Ball,* 473 U.S., at 385, 105 S.Ct. 3216, and the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith. Even "[t]he favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." *Lee v. Weisman,* 505 U.S. 577, 608, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (Blackmun, J., concurring).

The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not "discriminate on the basis of ... religion," Ohio Rev. Code Ann. § 3313.976(A)(4) (West Supp.2002), which means the school may not give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as non-believers, §§ 3313.977(A)(1)(c)-(d). This indeed was the exact object of a 1999 amendment repealing the portion of a predecessor statute that had allowed an admission preference for "[c]hildren ... whose parents are affiliated with any organization that provides financial support to the school, at the discretion of the school." § 3313.977(A)(1)(d) (West 1999). Nor is the State's religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as

teacher or principal over a layperson of a different religion claiming ***713** equal qualification for the job.[23] Cf. National Catholic****2500** Educational Association, Balance Sheet for Catholic Elementary Schools: 2001 Income and Expenses 25 (2001) ("31% of [reporting Catholic elementary and middle] schools had at least one full-time teacher who was a religious sister"). Indeed, a separate condition that "[t]he school ... not ... teach hatred of any person or group on the basis of ... religion," § 3313.976(A)(6) (West Supp.2002), could be understood (or subsequently broadened) to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others,[24] if they want government money for their schools.

23. And the courts will, of course, be drawn into disputes about whether a religious school's employment practices violated the Ohio statute. In part precisely to avoid this sort of involvement, some Courts of Appeals have held that religious groups enjoy a First Amendment exemption for clergy from state and federal laws prohibiting discrimination on the basis of race or ethnic origin. See, *e.g., Rayburn v. General Conference of Seventh–Day Adventists,* 772 F.2d 1164, 1170 (C.A.4 1985) ("The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state both on a substantive and procedural level"); *EEOC v. Catholic Univ. of America,* 83 F.3d 455, 470 (C.A.D.C.1996); *Young v. Northern Ill. Conference of United Methodist Church,* 21 F.3d 184, 187 (C.A.7 1994). This approach would seem to be blocked in Ohio by the same antidiscrimination provision, which also covers "race ... or ethnic background." Ohio Rev. Code Ann. § 3313.976(A)(4) (West Supp.2002).

24. See, *e.g.,* Christian New Testament (2 Corinthians 6:14) (King James Version) ("Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?"); The Book of Mormon (2 Nephi 9:24) ("And if they will not repent and believe in his name, and be baptized in his name, and endure to the end, they must be damned; for the Lord God, the Holy One of Israel, has spoken it"); Pentateuch (Deut. 29:19) (The New Jewish Publication Society Translation) (for one who converts to another faith, "[t]he LORD will never forgive him; rather will the LORD's anger and passion rage against that man, till every sanction recorded in this book comes down upon him, and the LORD blots out his name from under heaven"); The Koran 334 (The Cow Ch. 2:1) (N. Dawood transl. 4th rev. ed. 1974) ("As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon their hearts and ears; their sight is dimmed and a grievous punishment awaits them").

***714** For perspective on this foot-in-the-door of religious regulation, it is well to remember that the money has barely begun to flow. Prior examples of aid, whether grants through individuals or in-kind assistance, were never significant enough to alter the basic fiscal structure of religious schools; state aid was welcome, but not indispensable. See, *e.g., Mitchell,* 530 U.S., at 802, 120 S.Ct. 2530 (federal funds could only supplement funds from nonfederal sources); *Agostini,* 521 U.S., at 210, 117 S.Ct. 1997 (federally funded services could " 'supplement, and in no case supplant, the level of services' " already provided). But given the figures already

involved here, there is no question that religious schools in Ohio are on the way to becoming bigger businesses with budgets enhanced to fit their new stream of tax-raised income. See, *e.g.,* People for the American Way Foundation, A Painful Price 5, 9, 11 (Feb. 14, 2002) (of 91 schools participating in the Milwaukee program, 75 received voucher payments in excess of tuition, 61 of those were religious and averaged $185,000 worth of overpayment per school, justified in part to “raise low salaries”). The administrators of those same schools are also no doubt following the politics of a move in the Ohio State Senate to raise the current maximum value of a school voucher from $2,250 to the base amount of current state spending on each public school student ($4,814 for the 2001 fiscal year). See Bloedel, Bill Analysis of S.B. No. 89, 124th Ohio Gen. Assembly, regular session 2001–2002 (Ohio Legislative Service Commission). Ohio, in fact, is merely replicating the experience in Wisconsin, where a similar increase in the value of educational vouchers in Milwaukee has induced the creation of some 23 new private schools, Public Policy Forum, Research Brief, vol. 90, no. 1, p. 3 (Jan. 23, 2002), some of which, we may safely surmise, are religious. New schools have presumably ***715** pegged their financial prospects to the government from the start, and the odds are that increases in government aid will bring the threshold voucher ****2501** amount closer to the tuition at even more expensive religious schools.

When government aid goes up, so does reliance on it; the only thing likely to go down is independence. If Justice Douglas in *Allen* was concerned with state agencies, influenced by powerful religious groups, choosing the textbooks that parochial schools would use, 392 U.S., at 265, 88 S.Ct. 1923 (dissenting opinion), how much more is there reason to wonder when dependence will become great enough to give the State of Ohio an effective veto over basic decisions on the content of curriculums? A day will come when religious schools will learn what political leverage can do, just as Ohio's politicians are now getting a lesson in the leverage exercised by religion.

Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. See *Mitchell, supra,* at 872, 120 S.Ct. 2530 (SOUTER, J., dissenting); *Everson,* 330 U.S., at 8–11, 67 S.Ct. 504. As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord. “Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another.” *Id.,* at 53, 67 S.Ct. 504. (Rutledge, J., dissenting).

Justice BREYER has addressed this issue in his own dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer ***716** expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death

penalty.[25] Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element.[26] Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes,[27] or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention.[28] Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.

25. See R. Martino, Abolition of the Death Penalty (Nov. 2, 1999) ("The position of the Holy See, therefore, is that authorities, even for the most serious crimes, should limit themselves to non-lethal means of punishment") (citing John Paul II, *Evangelium Vitae,* n. 56).

26. H. Donin, To Be a Jew 15 (1972).

27. See R. Martin, Islamic Studies 224 (2d ed.1996) (interpreting the Koran to mean that "[m]en are responsible to earn a living and provide for their families; women bear children and run the household").

28. See The Baptist Faith and Message, Art. XVIII, available at www.sbc.net-bfm-bfm2000.asp xviii (available in Clerk of Court's case file) ("A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ"). *****2502***

* * *

If the divisiveness permitted by today's majority is to be avoided in the short term, it will be avoided only by action ****717*** of the political branches at the state and national levels. Legislatures not driven to desperation by the problems of public education may be able to see the threat in vouchers negotiable in sectarian schools. Perhaps even cities with problems like Cleveland's will perceive the danger, now that they know a federal court will not save them from it.

My own course as a judge on the Court cannot, however, simply be to hope that the political branches will save us from the consequences of the majority's decision. *Everson's* statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away. True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. I do not have the option to leave it silent, and I hope that a future Court will reconsider today's dramatic departure from basic Establishment Clause

principle.

Justice BREYER, with whom Justice STEVENS and Justice SOUTER join, dissenting.

I join Justice SOUTER's opinion, and I agree substantially with Justice STEVENS. I write separately, however, to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. I do so because I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program. And by explaining the nature of the concern, I hope to demonstrate why, in my view, "parental choice" cannot significantly alleviate the constitutional problem. See Part IV, *infra.*

I

The First Amendment begins with a prohibition, that "Congress shall make no law respecting an establishment of ***718** religion," and a guarantee, that the government shall not prohibit "the free exercise thereof." These Clauses embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to "worship God in their own way," and allows all families to "teach their children and to form their characters" as they wish. C. Radcliffe, The Law & Its Compass 71 (1960). The Clauses reflect the Framers' vision of an American Nation free of the religious strife that had long plagued the nations of Europe. See, *e.g.,* Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969) (religious strife was "one of the principal evils that the first amendment sought to forestall"); B. Kosmin & S. Lachman, One Nation Under God: Religion in Contemporary American Society 24 (1993) (First Amendment designed in "part to prevent the religious wars of Europe from entering the United States"). Whatever the Framers might have thought about particular 18th–century school funding practices, they undeniably intended an interpretation of the Religion Clauses that would implement this basic First Amendment objective.

In part for this reason, the Court's 20th–century Establishment Clause cases—both those limiting the practice of religion in public schools and those limiting the public funding of private religious education—focused directly upon social conflict, potentially created when government becomes involved in religious education. In *Engel v. Vitale,* 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), the Court held that the Establishment Clause forbids prayer ****2503** in public elementary and secondary schools. It did so in part because it recognized the "anguish, hardship and bitter strife that could come when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval ... ." *Id.,* at 429, 82 S.Ct. 1261. And it added: "The history of governmentally established religion, both in England and in this country, showed that whenever***719** government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Id.,* at 431, 82 S.Ct. 1261.

See also *Lee v. Weisman,* 505 U.S. 577, 588, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (striking down school-sanctioned prayer at high school graduation ceremony because "potential for

divisiveness" has "particular relevance" in school environment); *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 307, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring) (Bible-reading program violated Establishment Clause in part because it gave rise "to those very divisive influences and inhibitions of freedom" that come with government efforts to impose religious influence on "young impressionable [school] children").

In *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Court held that the Establishment Clause forbids state funding, through salary supplements, of religious school teachers. It did so in part because of the "threat" that this funding would create religious "divisiveness" that would harm "the normal political process." *Id.,* at 622, 91 S.Ct. 2105. The Court explained:

"[P]olitical debate and division ... are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which [the First Amendment's religious clauses were] ... intended to protect." *Ibid.*

And in *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 794, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973), the Court struck down a state statute that, much like voucher programs, provided aid for parents whose children attended religious schools, explaining that the "assistance of the sort here involved carries grave potential for ... continuing political strife over aid to religion."

When it decided these 20th–century Establishment Clause cases, the Court did not deny that an earlier American society***720** might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. See, *e.g.,* D. Tyack, Onward Christian Soldiers: Religion in the American Common School, in History and Education 217–226 (P. Nash ed.1970). Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict. See Kosmin & Lachman, *supra,* at 45 (Catholics constituted less than 2% of American church-affiliated population at time of founding).

The 20th–century Court was fully aware, however, that immigration and growth had changed American society dramatically since its early years. By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million. Jeffries & Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 299–300 (Nov.2001). There were similar percentage increases in the Jewish population. Kosmin & Lachman, *supra,* at 45–46. Not surprisingly, with this increase in numbers, members of non-Protestant religions, ****2504** particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid–19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, *supra,* at 300. "Dreading Catholic domination," native Protestants "terrorized

Catholics." P. Hamburger, Separation of Church and State 219 (2002). In some States "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds ... rioted over whether Catholic children could be ***721** released from the classroom during Bible reading." Jeffries & Ryan, 100 Mich. L. Rev., at 300.

The 20th–century Court was also aware that political efforts to right the wrong of discrimination against religious minorities in primary education had failed; in fact they had exacerbated religious conflict. Catholics sought equal government support for the education of their children in the form of aid for private Catholic schools. But the "Protestant position" on this matter, scholars report, "was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)." *Id.,* at 301. And this sentiment played a significant role in creating a movement that sought to amend several state constitutions (often successfully), and to amend the United States Constitution (unsuccessfully) to make certain that government would not help pay for "sectarian" (*i.e.,* Catholic) schooling for children. *Id.,* at 301–305. See also Hamburger, *supra,* at 287.

These historical circumstances suggest that the Court, applying the Establishment Clause through the Fourteenth Amendment to 20th–century American society, faced an interpretive dilemma that was in part practical. The Court appreciated the religious diversity of contemporary American society. See *Schempp, supra,* at 240, 83 S.Ct. 1560 (Brennan, J., concurring). It realized that the status quo favored some religions at the expense of others. And it understood the Establishment Clause to prohibit (among other things) any such favoritism. Yet *how* did the Clause achieve that objective? Did it simply require the government to give each religion an equal chance to introduce religion into the primary schools—a kind of "equal opportunity" approach to the interpretation of the Establishment Clause? Or, did that Clause avoid government favoritism of some religions by insisting upon "separation"—that the government achieve ***722** equal treatment by removing itself from the business of providing religious education for children? This interpretive choice arose in respect both to religious activities in public schools and government aid to private education.

In both areas the Court concluded that the Establishment Clause required "separation," in part because an "equal opportunity" approach was not workable. With respect to religious activities in the public schools, how could the Clause require public primary and secondary school teachers, when reading prayers or the Bible, *only* to treat all religions alike? In many places there were too many religions, too diverse a set of religious practices, too many whose spiritual beliefs denied the virtue of formal religious training. This diversity made it difficult, if not impossible, to devise meaningful forms of "equal treatment" by providing an "equal opportunity" for all to introduce their own religious practices into the public schools.

With respect to government aid to private education, did not history show that efforts to obtain equivalent funding for the private education of children whose parents did not hold popular religious beliefs only exacerbated religious strife? As Justice Rutledge recognized:

> "Public money devoted to payment of religious costs, educational or other, *****2505*** brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one [religious sect] by numbers [of adherents] alone will benefit most, there another. This is precisely the history of societies which have had an established religion and dissident groups." *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 53–54, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (dissenting opinion).

The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, *not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in the public ****723*** schools), but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue.

II

The principle underlying these cases—avoiding religiously based social conflict—remains of great concern. As religiously diverse as America had become when the Court decided its major 20th–century Establishment Clause cases, we are exponentially more diverse today. America boasts more than 55 different religious groups and subgroups with a significant number of members. Graduate Center of the City University of New York, B. Kosmin, E. Mayer, & A. Keysar, American Religious Identification Survey 12–13 (2001). Major religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. *Ibid.* And several of these major religions contain different subsidiary sects with different religious beliefs. See Lester, Oh, Gods!, The Atlantic Monthly 37 (Feb.2002). Newer Christian immigrant groups are "expressing their Christianity in languages, customs, and independent churches that are barely recognizable, and often controversial, for European-ancestry Catholics and Protestants." H. Ebaugh & J. Chafetz, Religion and the New Immigrants: Continuities and Adaptations in Immigrant Congregations 4 (abridged student ed.2002).

Under these modern-day circumstances, how is the "equal opportunity" principle to work—without risking the "struggle of sect against sect" against which Justice Rutledge warned? School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example,****724*** whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?

Consider the voucher program here at issue. That program insists that the religious school accept students of all religions. Does that criterion treat fairly groups whose religion forbids them to do so? The program also insists that no participating school "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity,

national origin, or religion." Ohio Rev. Code Ann. § 3313.976(A)(6) (West Supp.2002). And it requires the State to "revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation" of the program's rules. § 3313.976(B). As one *amicus* argues, "it is difficult to imagine a more divisive activity" than the appointment of state officials as referees to determine whether a particular religious doctrine "teaches hatred or advocates lawlessness." Brief for National Committee *****2506*** for Public Education and Religious Liberty as *Amicus Curiae* 23.

How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in a religious ceremony, or resort to force to call attention to what it views as an immoral social practice? What kind of public hearing will there be in response to claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? How will the public react to government funding for schools that take controversial religious positions on topics that are of current popular interest—say, the conflict in the Middle East or the war on terrorism? Yet any major funding program ****725*** for primary religious education will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive. Efforts to respond to these problems not only will seriously entangle church and state, see *Lemon,* 403 U.S., at 622, 91 S.Ct. 2105, but also will promote division among religious groups, as one group or another fears (often legitimately) that it will receive unfair treatment at the hands of the government.

I recognize that other nations, for example Great Britain and France, have in the past reconciled religious school funding and religious freedom without creating serious strife. Yet British and French societies are religiously more homogeneous—and it bears noting that recent waves of immigration have begun to create problems of social division there as well. See, *e.g.,* The Muslims of France, 75 Foreign Affairs 78 (1996) (describing increased religious strife in France, as exemplified by expulsion of teenage girls from school for wearing traditional Muslim scarves); Ahmed, Extreme Prejudice; Muslims in Britain, The Times of London, May 2, 1992, p. 10 (describing religious strife in connection with increased Muslim immigration in Great Britain).

In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits. See, *e.g.,* Webster, On the Education of Youth in America (1790), in Essays on Education in the Early Republic 43, 53, 59 (F. Rudolph ed. 1965) ("[E]ducation of youth" is "of more consequence than making laws and preaching the gospel, because it lays the foundation on which both law and gospel rest for success"); Pope Paul VI, Declaration on Christian Education (1965) ("[T]he Catholic school can be such an aid to the fulfillment of the mission of the People of God and to the fostering of dialogue between ****726*** the Church and mankind, to the benefit of both, it retains even in our present circumstances the utmost importance").

III

I concede that the Establishment Clause currently permits States to channel various forms of assistance to religious schools, for example, transportation costs for students, computers, and secular texts. See *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000). States now certify the nonsectarian educational content of religious school education. See, *e.g., New Life Baptist Church Academy v. East Longmeadow,* 885 F.2d 940 (C.A.1 1989). Yet the consequence has not been great turmoil. But see, *e.g.,* May, Charter School's Religious Tone; Operation of South Bay Academy Raises Church–State Questions, San Francisco Chronicle, Dec. 17, 2001, p. A1 (describing increased government supervision of charter schools after complaints that students were "studying Islam in class and praying with their teachers," and Muslim educators complaining*****2507*** of " 'post-Sept. 11 anti-Muslim sentiment' ").

School voucher programs differ, however, in both *kind* and *degree* from aid programs upheld in the past. They differ in kind because they direct financing to a core function of the church: the teaching of religious truths to young children. For that reason the constitutional demand for "separation" is of particular constitutional concern. See, *e.g., Weisman,* 505 U.S., at 592, 112 S.Ct. 2649 ("heightened concerns" in context of primary education); *Edwards v. Aguillard,* 482 U.S. 578, 583–584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) ("Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools").

Private schools that participate in Ohio's program, for example, recognize the importance of primary religious education, for they pronounce that their goals are to "communicate the gospel," "provide opportunities to ... experience a faith community," "provide ... for growth in prayer," and "provide****727*** instruction in religious truths and values." App. 408a, 487a. History suggests, not that such private school teaching of religion is undesirable, but that *government funding* of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university. See *supra,* at 2503–2504. Contrary to Justice O'CONNOR's opinion, *ante,* at 2474 (concurring opinion), history also shows that government involvement in religious primary education is far more divisive than state property tax exemptions for religious institutions or tax deductions for charitable contributions, both of which come far closer to exemplifying the neutrality that distinguishes, for example, fire protection on the one hand from direct monetary assistance on the other. Federal aid to religiously based hospitals, *ante,* at 2475 (O'CONNOR, J., concurring), is even further removed from education, which lies at the heartland of religious belief.

Vouchers also differ in *degree.* The aid programs recently upheld by the Court involved limited amounts of aid to religion. But the majority's analysis here appears to permit a considerable shift of taxpayer dollars from public secular schools to private religious schools. That fact, combined with the use to which these dollars will be put, exacerbates the conflict problem. State aid that takes the form of peripheral secular items, with prohibitions against diversion of funds to religious teaching, holds significantly less potential for social division. In this respect as

well, the secular aid upheld in *Mitchell* differs dramatically from the present case. Although it was conceivable that minor amounts of money could have, contrary to the statute, found their way to the religious activities of the recipients, see 530 U.S., at 864, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment), that case is at worst the camel's nose, while the litigation before us is the camel itself.

***728** IV

I do not believe that the "parental choice" aspect of the voucher program sufficiently offsets the concerns I have mentioned. Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of ****2508*** the dominant religions. And it does little to ameliorate the entanglement problems or the related problems of social division that Part II, *supra,* describes. Consequently, the fact that the parent may choose which school can cash the government's voucher check does not alleviate the Establishment Clause concerns associated with voucher programs.

V

The Court, in effect, turns the clock back. It adopts, under the name of "neutrality," an interpretation of the Establishment Clause that this Court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity to secure government funding overcomes the Establishment Clause concern for social concord. An earlier Court found that "equal opportunity" principle insufficient; it read the Clause as insisting upon greater separation of church and state, at least in respect to primary education. See *Nyquist,* 413 U.S., at 783, 93 S.Ct. 2955. In a society composed of many different religious creeds, I fear that this present departure from the Court's earlier understanding risks creating a form of religiously***729*** based conflict potentially harmful to the Nation's social fabric. Because I believe the Establishment Clause was written in part to avoid this kind of conflict, and for reasons set forth by Justice SOUTER and Justice STEVENS, I respectfully dissent.

CAVINESS V. HORIZON COMMUNITY LEARNING CENTER, INC., 590 F.3D 806 (FEDERAL APPEALS COURT, 9TH CIRCUIT 2010).

This appeal requires us to decide whether a private non-profit corporation that runs a charter school[1] in Arizona was a state actor under 42 U.S.C. § 1983 when it took certain employment-related actions with respect to a former teacher, Michael Caviness. The district court held that Horizon Community Learning Center ("Horizon") and its executive director, Lawrence Pieratt, were not functioning as state actors in these circumstances.[2] Because the allegations in Caviness's complaint are insufficient to raise a reasonable inference that Horizon was a state actor and thus acted under color of state law in taking the alleged actions after Caviness was terminated, we affirm the judgment of the district court.

1. Section 15–101(3) of the Arizona Revised Statutes provides:

> "Charter school" means a public school established by contract with a district governing board, the state board of education or the state board for charter schools pursuant to article 8 of this chapter to provide learning that will improve pupil achievement.

2. We refer to Pieratt by name when appropriate, and otherwise refer to defendants collectively as "Horizon."

I

Horizon is a private, non-profit corporation that operates a charter school in Arizona. Because Caviness's argument is primarily based on the Arizona statutes and regulations that authorize and regulate charter schools, we provide a brief description of the relevant provisions.

A

In Arizona, charter schools are "public school[s] established by contract with a district governing board, the state board of education, or the state board for charter schools ... to provide learning that will ***809** improve pupil achievement." Ariz. Rev. Stat. § 15–101(3) (footnote omitted). Charter schools "serve as alternatives to traditional public schools" by "provid[ing] additional academic choices for parents and pupils," and they are intended "to provide a learning environment that will improve pupil achievement." *Id.* § 15–181(A). By contrast, Arizona defines a "private school" as a "nonpublic institution where instruction is imparted." *Id.* § 15–101(19). Charter schools are publicly funded, although they are authorized to accept private grants and gifts. *Id.* § 15–185(D).

A private or public entity seeking to create a charter school must submit an application and be "sponsored" by either "a school district governing board, the state board of education or the state board for charter schools." *Id.* § 15–183(C).[3] In turn, "[t]he sponsor of a charter school may contract with a public body, private person or private organization for the purpose of establishing a charter school...." *Id.* § 15–183(B). The sponsoring entity of a charter school has "oversight and administrative responsibility for the charter schools that it sponsors." *Id.* § 15–

183(R).

3. The statute describes the application process as follows:

> The application shall include a detailed business plan for the charter school and may include a mission statement for the charter school, a description of the charter school's organizational structure and the governing body, a financial plan for the first three years of operation of the charter school, a description of the charter school's hiring policy, the name of the charter school's applicant or applicants and requested sponsor, a description of the charter school's facility and the location of the school, a description of the grades being served and an outline of criteria designed to measure the effectiveness of the school.

Ariz. Rev. Stat. § 15–183(A).

Each charter school must develop a plan for running the school on a largely autonomous basis. A school's charter must specify "a governing body for the charter school that is responsible for the policy decisions of the charter school." *Id.* § 15–183(E)(8). The charter must "include a description of the charter school's personnel policies, personnel qualifications and method of school governance and the specific role and duties of the sponsor of the charter school." *Id.* § 15–183(F).

Charter schools are subject to certain state regulations. The state's Department of Education promulgates a list notifying charter schools of their obligations to comply with specified federal, state, and local statutes and rules relating to health, safety, civil rights, and insurance. *Id.* § 15–183(E)(1). Charter schools are required to display a United States flag in each classroom and, for grades 7 through 12, purchase copies of the Constitution and Bill of Rights. *Id.* § 15–506. According to Arizona's Attorney General, charter schools are deemed to be "political subdivisions" of the state for purposes of complying with Arizona's Open Meetings Act. *See* Ariz. Op. Atty. Gen. No. 195–10, 1995 WL 870820 at *4 (1995). *But see Salt River Pima–Maricopa Indian Cmty. Sch. v. Arizona,* 200 Ariz. 108, 23 P.3d 103, 108 (2001) (holding that the Attorney General's conclusion that charter schools were political subdivisions of the state for purposes of open meeting laws did not influence the court's determination that charter schools were not political subdivisions of the state for purposes of a federal statute that limited the amount of federal funds such schools could receive).

Several Arizona statutes are applicable to charter school employees. Charter school employees must undergo finger-printing and background checks, and charter schools may not employ teachers who have been convicted of certain crimes. ***810** Ariz. Rev. Stat. § 15–183(C)(4). Teachers at charter schools are also afforded certain benefits. Among other things, "[a] charter school that is sponsored by a school district governing board, the state board of education or the state board for charter schools is eligible to participate in the Arizona state retirement system...." *Id.* § 15–187(C). State retirement benefits are available to "any person in the employ of ... a political subdivision" of Arizona, *id.* § 38–701(2), and charter schools are "a political

subdivision of th[e] state for purposes of [employee retirement eligibility definitions in] title 38, chapter 5, article 2," *id.* § 15–187(C).

Except as otherwise specified in Arizona statutes regulating charter schools, or in the school's own charter, a charter school "is exempt from all statutes and rules relating to schools, governing boards and school districts." *Id.* § 15–183(E)(5). Charter schools are therefore exempt from state teacher-certification requirements, as well as the statutes governing dismissal of certified teachers. *See id.* § 15–531 *et seq.*

B

Caviness was employed as a high school physical education teacher, health teacher, and track coach at Horizon for six years.[4] In February 2006, a female student filed a grievance against Caviness alleging that "the student-teacher boundary had been crossed." Horizon immediately put Caviness on paid administrative leave and thereafter initiated an investigation. In March 2006, the Horizon Board held a hearing regarding the student's allegations, at which Horizon, but not Caviness, questioned the student.

> 4. The underlying facts are taken from Caviness's complaint, and are presumed true for purposes of reviewing a Rule 12(b)(6) motion to dismiss. *See, e.g., Marder v. Lopez,* 450 F.3d 445, 447 n. 1 (9th Cir.2006).

Evidence elicited at the hearing indicated that the female student and Caviness had been communicating via telephone, and that "the student had a crush on him." When the student learned that Caviness had an adult girlfriend, the student became upset and retaliated against Caviness by filing the grievance. The Horizon Board determined that Caviness had exercised questionable judgment regarding the extent of his personal communications with the student, and therefore decided not to renew Caviness's teaching and coaching contract. The Board decided to keep Caviness on paid administrative leave until the end of his employment term, which was in June 2006.

In April 2006, Pieratt wrote a letter to Caviness and sent copies to the Horizon Board members and the Arizona Department of Education. Caviness alleges that the letter "contained numerous false and defamatory statements and private information which Pieratt misused to purposely place ... Caviness in a bad light." In May 2006, Caviness asked Pieratt for permission to attend the Arizona state high school track championship to watch several Horizon students compete, but Pieratt refused to consent.

In July 2006, after the end of his employment term with Horizon, Caviness applied for a position as a teacher and coach with Mesa School District. Mesa decided not to hire him after it asked Pieratt to rate Caviness's ability and knowledge as a teacher, and Pieratt "declined to rate him since the [Horizon] Board had taken the action of non-renewing his contract." Caviness alleges that Pieratt's statement to Mesa was "purposely false and incomplete and was intended to harm" Caviness, since Pieratt "knew that Caviness had an excellent ***811** 6–year record as a teacher and coach and it was reasonable and appropriate for [Pieratt] to respond accordingly

rather than decline to provide information."

In August 2006, Caviness's attorney sent a letter to Horizon informing it that a Horizon employee had called Caviness a pedophile. The letter demanded "written representations from Horizon that it had instructed all of its agents and employees to cease and desist from making any further false and defamatory statements to anyone." In his reply to this letter, Pieratt did not address these demands, and Caviness claims that another Horizon teacher subsequently defamed him by also calling him a pedophile.

On December 21, 2006, Caviness sent a request to Pieratt for a name-clearing hearing "arising from defendant's conduct and/or failure to act subsequent to the March 24, 2006 hearing, and his right [to freedom of] association." Horizon did not respond to this request.

C

In March 2007, Caviness filed a complaint under 42 U.S.C. § 1983 in district court against Horizon. Caviness alleged that Horizon, acting under color of state law, deprived Caviness of his liberty interest in finding and obtaining work without due process by making "several false statements about" him "in connection with his employment, which ... cause[d] serious damage to Caviness's standing and associations in [the] community or, alternatively, imposed on Caviness a stigma ... that has ... interfered with his freedom to take advantage of other employment opportunities," without providing Caviness with notice or a name-clearing hearing. Caviness also alleged that Horizon violated his First Amendment right to freedom of association "by ordering him not to freely associate at certain public events."[5]

> 5. Caviness additionally alleged certain state-law causes of action that are not at issue in this appeal.

In an order issued August 31, 2007, the district court sua sponte raised the question whether Horizon was a state actor for purposes of § 1983, and directed the parties to submit memoranda in support of federal subject matter jurisdiction. The district court subsequently granted Horizon's motion requesting that this briefing be treated as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

On December 17, 2007, the district court granted Horizon's motion to dismiss. In its order, the district court rejected Caviness's arguments that Horizon was a state actor because of its statutory characterization as a "public school," and because it performed a public function in providing public education. Because there was "no evidence, with respect to [Caviness's] specific employment claims, that Horizon acted in concert or conspired with state actors, was subject to government coercion or encouragement, or was otherwise entwined or controlled by an agency of the State," the district court held that Horizon was not functioning as a state actor in executing its employment decisions regarding Caviness.

Caviness brought this timely appeal from the district court's order granting Horizon's motion to dismiss.

II

We review de novo the district court's conclusion that a party is not a state actor. *Lee v. Katz,* 276 F.3d 550, 553 (9th Cir.2002). We also review de novo the district court's dismissal of Caviness's ***812** complaint under Rule 12(b)(6) for failure to state a claim. *Winn v. Ariz. Christian Sch. Tuition Org.,* 562 F.3d 1002, 1007 (9th Cir.2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (internal quotation marks omitted). Although "we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1949–50. "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.,* 83 F.3d 1136, 1140 (9th Cir.1996).

III

Section 1983 "provides remedies for deprivations of rights under the Constitution and laws of the United States when the deprivation takes place under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." *Gorenc v. Salt River Project Agric. Improvement & Power Dist.,* 869 F.2d 503, 505 (9th Cir.1989) (internal quotation marks omitted). In order to recover under § 1983 for conduct by the defendant, a plaintiff must show "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *see also Rendell–Baker v. Kohn,* 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). The state-action element in § 1983 "excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (internal quotation marks omitted).

As we have explained, "[s]tate action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Villegas v. Gilroy Garlic Festival Ass'n,* 541 F.3d 950, 955 (9th Cir.2008) (en banc) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001)). "[C]ourts have developed a variety of approaches" for determining whether such a close nexus is present. *Lee,* 276 F.3d at 554 (noting that the Supreme Court in *Brentwood* "list[ed] seven approaches to the issue"); *see id.* at 554 n. 3; *see also Kirtley v. Rainey,* 326 F.3d 1088, 1092 (9th Cir.2003).

This case presents the special situation of a private nonprofit corporation running a charter school that is defined as a "public school" by state law. We therefore begin with the recognition that Arizona has statutorily defined a charter school as a "public school." Ariz. Rev. Stat. § 15–101(3). However, because the conduct of a private corporation is at issue, our inquiry does not end there. Rather, in answering the question whether there is a close nexus between the State

and the challenged action, our inquiry "begins by identifying the specific conduct of which the plaintiff complains." *Sullivan,* 526 U.S. at 51, 119 S.Ct. 977 (internal quotation marks omitted); *see also Blum,* 457 U.S. at 1003, 102 S.Ct. 2777 ("Faithful adherence to the 'state action' requirement ... requires careful attention to the gravamen of the plaintiff's complaint."). "It is important to identify the function at issue ***813** because an entity may be a State actor for some purposes but not for others." *Lee,* 276 F.3d at 555 n. 5 (internal quotation marks and alteration omitted).

Thus, in *George v. Pacific–CSC Work Furlough,* we considered the complaint by a custodial staff employee of a private entity, Pacific, which had contracted with California to operate a correctional facility. 91 F.3d 1227, 1230 (9th Cir.1996). After the custodial employee was terminated, he sued the private company under § 1983, alleging that his First Amendment rights were violated because he was terminated for speaking out about safety and security problems. In rejecting the employee's theory that Pacific was a state actor because it was "performing and fulfilling a traditional state and government function, i.e., operating a correctional detention facility," we explained that "[t]he relevant inquiry is whether [Pacific's] *role as an employer* was state action" in the employee's case, and noted that "[a]n entity may be a state actor for some purposes but not for others." *Id.* (emphasis in original). We concluded that while "Pacific ha[d] been granted certain powers and privileges under the law to allow it to function adequately as a prison," the plaintiff failed to show state action because the "complaint offer[ed] no indication Pacific ha[d] become the government for employment purposes." *Id.* (internal citation, quotation marks, and alterations omitted); *see also Cornish v. Corr. Servs. Corp.,* 402 F.3d 545, 550 (5th Cir.2005) (in suit by terminated employee of private prison contractor, question in determining state action "is whether [defendant] acted under color of state law in terminating [plaintiff's] employment, *not* whether its providing juvenile correctional services was state action").

In this case, Caviness's complaint objects to Horizon's failure to instruct its employees to cease making statements about Caviness's performance as a teacher, and its refusal to provide him with a name-clearing hearing. The complaint also objects to Horizon's order forbidding Caviness from having contact with students during the paid administrative leave period. All these actions were taken by Horizon in connection with its role as Caviness's employer, and therefore the relevant inquiry in this case is whether Horizon's role as an employer was state action. *George,* 91 F.3d at 1230.

In determining whether Caviness's factual allegations "plausibly give rise to an entitlement to relief," *Iqbal,* 129 S.Ct. at 1950, we are limited to the pleadings in the complaint. With respect to Caviness's claim that Horizon's actions in its role as his employer constituted state action, Caviness's complaint alleges only that Horizon is a non-profit corporation, "an Arizona charter school[,] and [an] Arizona public school operating in Maricopa County," and that Pieratt was acting as president, CEO, or executive director of Horizon. Caviness does not argue that the facts alleged in his complaint render Horizon a state actor. Rather, he argues that under Arizona's statutory scheme, all charter schools are, as a matter of law, state actors. Therefore, Caviness's appeal must fail unless being an Arizona charter school is, by that fact alone,

sufficient to make Horizon the government for employment purposes.

A

Caviness first argues that under the statutory and regulatory structure in Arizona, a charter school is a state actor for all purposes, including employment purposes, as a matter of law. Caviness first relies on the fact that Arizona statutes designate charter schools as "public schools," Ariz. Rev. Stat. § 15–101(3), to argue that they provide "public educational ***814** services" as a matter of law. Further, he notes that the Arizona Attorney General has concluded that charter school board meetings are subject to Arizona's Open Meetings Act. *See* Ariz. Op. Atty. Gen. No. 195–10, 1995 WL 870820, at *4.

We disagree. Under § 1983, a state's statutory characterization of a private entity as a public actor for some purposes is not necessarily dispositive with respect to all of that entity's conduct. *See Jackson v. Met. Edison Co.,* 419 U.S. 345, 350 & n. 7, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (statutory designation of utility as "public utility" insufficient to make utility a state actor). Rather, a private entity may be designated a state actor for some purposes but still function as a private actor in other respects. *See Gorenc,* 869 F.2d at 507 (holding that an entity designated as a "political subdivision" in the state constitution was not a state actor where the entity, "in the hiring and firing of its employees ... acts as a private company, that is, in a proprietary manner not in a governmental manner"). Accordingly, Caviness's reliance on Arizona's statutory characterization of charter schools as "public schools" does not itself avail him in the employment context. For the same reason, the opinion of the Attorney General that charter school boards are "political subdivisions" for purposes of Arizona's Open Meetings Act does not help Caviness here. *See id.*; *see also Salt River,* 23 P.3d at 108 (holding that Arizona charter schools were not political subdivisions for certain federal funding purposes). Caviness raises the similar argument that a charter school is a state actor under § 1983 because, in *Greater Heights Academy v. Zelman,* 522 F.3d 678 (6th Cir.2008), the Sixth Circuit held, "[a]fter considering Ohio's statutory and case law," that Ohio charter schools are a political subdivision of Ohio for purposes of determining whether the schools could sue the state under the Fourteenth Amendment. *Id.* at 680. This conclusion tells us nothing about Arizona's charter school system, however, and so it does not support Caviness's position. Moreover, even if we had determined that an Arizona charter school was a political subdivision of Arizona for purposes of suits under the Fourteenth Amendment, such a determination would not resolve the question whether the state "was sufficiently involved in causing the harm to plaintiff" such that we should treat Horizon as acting under color of state law. *Gorenc,* 869 F.2d at 506.

B

Second, Caviness argues that Horizon is a state actor because it provides a public education, a function that is "traditionally and exclusively the prerogative of the state." Courts have "found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson,* 419 U.S. at 352, 95 S.Ct. 449. In these cases, "private individuals or groups are endowed by the State with powers or functions governmental in nature" such that "they become agencies or instrumentalities of the State." *Lee,* 276 F.3d at 554–55 (quoting *Evans v. Newton,* 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966)). The challenged

“function at issue must be both traditionally and exclusively governmental.” *Id.* at 555; *see also Johnson v. Knowles,* 113 F.3d 1114, 1118 (9th Cir.1997) (discussing as state action the exercise of those powers that have been “recognized as traditionally exclusively sovereign”).

Caviness argues that since charter schools are “public schools” under Arizona law, they therefore engage in the provision of “public educational services,” which he distinguishes from the provision of the “educational services” that the Supreme ***815** Court held is not the exclusive and traditional province of the state. *Rendell–Baker,* 457 U.S. at 842, 102 S.Ct. 2764. Caviness reasons that “education in general” can be provided by anyone, while “*public* educational services” are traditionally and exclusively the province of the state.

This argument is foreclosed by *Rendell–Baker.* In that case, the Supreme Court addressed the question whether a private school that was almost wholly state-funded could be considered a state actor for purposes of § 1983. *See id.* A Massachusetts statute provided that the state could “enter into an agreement with any public or private school, agency, or institution to provide the necessary special education” to identified students. *Id.* at 832 n. 1, 102 S.Ct. 2764. The school, a non-profit organization which specialized “in dealing with students who have experienced difficulty completing public high schools,” was “founded as a private institution” and operated by a board of directors who were neither public officials nor chosen by public officials. *Id.* at 832, 102 S.Ct. 2764. Nearly all of the students in the school had been referred to the school by the state, and the school's diplomas were publicly certified. *Id.* The tuition of state-referred students was publicly funded, and public funds accounted for 90 to 99 percent of the school's operating budget. *Id.*

A former teacher sued the school under § 1983 alleging deprivations of her First, Fifth, and Fourteenth Amendment rights when her employment was terminated after a dispute with the school's board of directors. *Id.* at 835, 102 S.Ct. 2764. In evaluating “whether the school's action in discharging [plaintiff] can fairly be seen as state action,” *id.* at 838, 102 S.Ct. 2764, the Court considered whether the school was performing a public function that has “been ‘traditionally the *exclusive* prerogative of the State,’ ” *id.* at 842, 102 S.Ct. 2764 (emphasis in original) (quoting *Jackson,* 419 U.S. at 353, 95 S.Ct. 449). Although the school provided a public function by educating “students who could not be served by traditional public schools,” the Court held that the “legislative policy choice” to provide those services at public expense “in no way” made their provision “the exclusive province of the State.” *Id.*

Like the private organization running the school in *Rendell–Baker,* Horizon is a private entity that contracted with the state to provide students with educational services that are funded by the state. The Arizona statute, like the Massachusetts statute in *Rendell–Baker,* provides that the sponsor “may contract with a public body, private person or private organization for establishing a charter school,” Ariz. Rev. Stat. § 15–183(B), to “provide additional academic choices for parents and pupils ... [and] serve as alternatives to traditional public schools,” *id.* § 15–181(A). The Arizona legislature chose to provide alternative learning environments at public expense, but, as in *Rendell–Baker,* that “legislative policy choice in no way makes these services the exclusive province of the State.”457 U.S. at 842. Merely because Horizon is “a private entity

perform[ing] a function which serves the public does not make its acts state action." *Id.*; *see also Johnson v. Pinkerton Acad.,* 861 F.2d 335, 338 (1st Cir.1988) ("Granted that the state requires that its children, to a certain age, be educated, even to the extent of assuming full tuition cost of all who do not voluntarily pay their own way, it does not follow that the mechanics of furnishing the education is exclusively a state function.").

Caviness's argument that *Rendell–Baker* does not control this case since the school there was private, whereas here Horizon is a public school as a matter of Arizona law, merely restates his erroneous argument ***816** that the state's statutory characterization is necessarily controlling.[6] Accordingly, we conclude that Horizon's provision of educational services is not a function that is traditionally and exclusively the prerogative of the state, and therefore is not a basis for holding that Horizon acted under color of state law in taking the alleged actions relating to Caviness's employment.

> 6. Caviness does not expressly argue that Horizon is a state actor by virtue of "public entwinement in the management and control of ostensibly separate trusts or corporations." *Brentwood Acad.,* 531 U.S. at 296, 121 S.Ct. 924. Such an argument in this case would fail, as the complaint is devoid of allegations that any state actors were involved in Horizon's governing board, or that Horizon's sponsor played any role in the employment decisions of the school.

C

Caviness alternatively argues that Horizon is a state actor because Arizona regulates the personnel matters of charter schools.

This argument also fails. A state may be responsible for a private entity's actions if "it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (citing cases). The Supreme Court has repeatedly held that "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." *Sullivan,* 526 U.S. at 52, 119 S.Ct. 977 (alteration omitted) (quoting *Jackson,* 419 U.S. at 350, 95 S.Ct. 449). Even extensive government regulation of a private business is insufficient to make that business a state actor if the challenged conduct was "not compelled or even influenced by any state regulation." *Rendell–Baker,* 457 U.S. at 841–42, 102 S.Ct. 2764; *see also Morse v. N. Coast Opportunities, Inc.,* 118 F.3d 1338, 1342 (9th Cir.1997) (extensive federal regulation specifying who had responsibility for school's employment decisions insufficient to create state action because the regulations included "no substantive standard" or "procedural guidelines" that could have guided, compelled, or influenced employment decisions).

Citing section 15–187 of the Arizona Revised Statutes, Caviness contends that charter schools are state actors because charter school teachers have the same legal rights in, and to, their teaching jobs as teachers in the public school districts. *See* Ariz. Rev. Stat. § 15–531 *et seq.*[7] ***817** This argument is erroneous and appears to be based on a misreading of section 15–

187(A), which provides those rights only to a school district teacher who was previously a charter school teacher "on th[at] teacher's return to the school district."[8]

> 7. For the first time on appeal, Caviness alleges that he was a tenured certified teacher entitled to the due process rights set forth in Arizona's statutes. *See* Ariz. Rev. Stat. § 15–531 *et seq.*; *id.* § 15–539, 540, 541. Although his complaint does not include such an allegation, Caviness argues that we should infer that he held this status from the allegations in the complaint stating that he had an employment contract with a specified term, he was given a hearing by Horizon, and he was placed on paid administrative leave after the hearing—requirements that are also mandated under Arizona law for tenured certificated teachers. *See id.* § 15–539–541. Although Caviness's argument is not entirely clear, he appears to argue that once we draw the factual inference that he was a certified tenured teacher, we must also draw the legal conclusion that Horizon was a state actor with statutory and constitutional due process obligations. The fact that Horizon implemented certain employment procedures in Caviness's case does not, without more, give rise to the inference that Caviness had a state-recognized status that gave him legal and constitutional entitlements to such procedures, or to further the inference that Horizon was legally obligated to provide them. Accordingly, we decline to make such inferences here. *Iqbal,* 129 S.Ct. at 1949 (holding that "mere conclusory statements" are not enough to survive a motion to dismiss).

> 8. Section 15–187(A) states in full:
>
>> A teacher who is employed by or teaching at a charter school and who was previously employed as a teacher at a school district shall not lose any right of certification, retirement or salary status or any other benefit provided by law, by the rules of the governing board of the school district or by the rules of the board of directors of the charter school due to teaching at a charter school on the teacher's return to the school district.

Specifically, section 15–187(B)[9] gives hiring priority to teachers who have moved from a public school district to a charter school and who seek to return to the same public school district. Therefore, sections 15–187(A) and (B) ensure that the teacher receives preference when reapplying to his or her prior public school district without a reduction in seniority, certification, or benefits provided to employees by the public school district. This in no way suggests that the government controls or influences post-termination decisions made by Horizon. In fact, Horizon is expressly "exempt from all statutes and rules relating to schools, governing boards and school districts," *id.* § 15–183(E)(5), which include the right to a hearing after dismissal provided by section 15–541. The absence of any reference to charter schools in the statutory sections governing certified teachers' employment rights further supports our conclusion. *See id.* § 15–501 *et seq.*

> 9. Section 15–187(B) provides in pertinent part that "[a] teacher who is employed by or

> teaching at a charter school and who submits an employment application to the school district where the teacher was employed immediately before employment by or at a charter school shall be given employment preference by the school district."

Caviness also argues that Horizon is a state actor because, under Arizona law, charter schools (but not traditional private schools) are permitted to participate in the state's retirement system. *See id.* § 15–187(C). We are not persuaded. Permitting charter schools to participate in the state's retirement plan provides additional compensation to entities that operate charter schools by relieving them from pension or retirement obligations they might otherwise face. The Supreme Court, as well as case law in this and our sister circuits, permits the state to "subsidize[ ] the operating and capital costs" of a private entity without converting its acts into those of the state. *Rendell–Baker,* 457 U.S. at 840, 102 S.Ct. 2764; *see also, e.g., Morse,* 118 F.3d at 1342; *Pinkerton Acad.,* 861 F.2d at 339 (state's act of permitting private school to participate in public retirement program "would be no more than the equivalent of additional compensation to defendant for its teaching services by relieving defendant of pension obligations").

Nor does the fact that Horizon's sponsor has the authority to approve and review the school's charter, which includes Horizon's self-created personnel policies and method of governance, change our decision. This type of regulation does not constitute state action because "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Sullivan,* 526 U.S. at 52, 119 S.Ct. 977; *see also Jackson,* 419 U.S. at 357, 95 S.Ct. 449; *Morse,* 118 F.3d at 1342 (citing cases). Even when the state has the power "initially to review the qualifications of a[n employee] selected by the school," such regulation is not sufficient to make the school's employment- ***818** related actions those of the state. *Rendell–Baker,* 457 U.S. at 838 n. 6, 841–42, 102 S.Ct. 2764; *see also George,* 91 F.3d at 1231 (holding that termination was not state action even though the state "retain[ed] the right to dismiss" the employee, because the state had "neither legally regulated nor contractually specified the manner in which [the private actor] disciplines or terminates its own employees").

Caviness does not argue, nor does the complaint allege, that the state was involved in the contested employment actions, or that it showed any "interest in the school's personnel matters." *Rendell–Baker,* 457 U.S. at 841, 102 S.Ct. 2764. None of the regulations cited by Caviness contains substantive standards or procedural guidelines that "could have compelled or influenced" Horizon's actions. *Morse,* 118 F.3d at 1342. Ultimately, Horizon's actions and personnel decisions were "made by concededly private parties, and turn[ed] on judgments made by private parties without standards established by the State." *Sullivan,* 526 U.S. at 53, 119 S.Ct. 977 (internal quotation marks and alterations omitted).

IV

Because the allegations in Caviness's complaint are insufficient to raise a reasonable inference that Horizon was a state actor and thus acted under color of state law in taking the alleged actions after Caviness was terminated, we affirm the judgment of the district court. Caviness's motion for attorneys' fees under 42 U.S.C. § 1988 is denied. AFFIRMED.

League of Women Voters of Washington v. State, 355 P.3d 1131 (Supreme Court of the state of Washington, 2015) (en banc).

MADSEN, C.J.

This case is a direct review of a King County Superior Court decision that found certain portions of Initiative 1240 (I–1240) (Charter School Act or Act), codified at chapter 28A.710 RCW, unconstitutional but left the remainder of the Act standing. We hold that the provisions of I–1240 that designate and treat charter schools as common schools violate article IX, section 2 of our state constitution and are void. This includes the Act's funding provisions, which attempt to tap into and shift a portion of moneys allocated for common schools to the new charter schools authorized by the Act. Because the provisions designating and funding charter schools as common schools are integral to the Act, such void provisions are not severable, ***1134** and that determination is dispositive of the present case.

FACTS

In November 2012, Washington voters approved I–1240, codified in the Act, providing for the establishment of up to 40 charter schools within five years. Clerk's Papers (CP) at 39–78; RCW 28A.710.150(1). The Act was intended to provide parents with "more options" regarding the schooling of their children. RCW 28A.710.005(1)(f); *see also* RCW 28A.710.020(1) (new charter schools are public "common school[s] open to all children free of charge"). But the new schools came with a trade-off: the loss of local control and local accountability. Charter schools must provide a basic education, similar to traditional public schools, including instruction in the essential academic learning requirements, which are developed by the superintendent of public instruction. *See* RCW 28A.710.040(2)(b); former RCW 28A.655.070(1)-(2) (2013). However, under the Act's provisions, charter schools "free teachers and principals from burdensome regulations that limit other public schools" thereby giving charter schools "the flexibility to innovate" regarding staffing and curriculum. RCW 28A.710.005(1)(g). Charter schools are exempt from many state rules. With the exception of "the specific state statutes and rules" identified in RCW 28A.710.040(2) and any "state statutes and rules made applicable to the charter school in the school's charter contract," charter schools are "not subject to and are exempt from all other state statutes and rules applicable to school districts and school district boards of directors ... in areas such as scheduling, personnel, funding, and educational programs." RCW 28A.710.040(3).

Under the Act, charter schools are devoid of local control from their inception to their daily operation.[1] Charter schools can be approved in two ways. First, the Washington Charter School Commission, which is an "independent state agency" established by the Act and made up of nine appointed members, has the power to establish charter schools anywhere in the State. *See* RCW 28A.710.070(1, 2), .080(1).[2] Second, school districts may apply to the Washington State Board of Education for permission to authorize charter schools. RCW 28A.710.080(2). The commission and approved school districts (referred to as "charter school authorizers") solicit charter applications, approve or deny applications, and negotiate and execute charter

contracts. RCW 28A.710.100(1). Charter school authorizers also monitor performance and legal compliance of charter schools, RCW 28A.710.180(1), but such oversight cannot "unduly inhibit the autonomy granted to charter schools," RCW 28A.710.180(2), and such oversight must also be consistent with the principles and standards developed by another private organization, the National Association of Charter School Authorizers. RCW 28A.710.100(3).[3]

[1] Charter schools are formed upon the application of a nonsectarian, nonprofit corporation, *see* RCW 28A.710.010(1), .040(4), and are governed by an appointed charter school board. RCW 28A.170.010(6), .020(3).

[2] All commission members must have a "commitment to charter schooling as a strategy for strengthening public education." RCW 28A.710.070(3).

[3] The commission has authorized seven charter schools. Spokane Public Schools, a school district authorizer, has authorized one charter school.

As for daily operation, charter schools are not governed by elected local school boards. Instead, charter schools are operated by a "charter school board," RCW 28A.710.020(3), which is "appointed or selected under the terms of a charter application to manage and operate the charter school." RCW 28A.710.010(6). The board is responsible for functions typically handled by an elected school board, including hiring, managing, and discharging employees; receiving and disbursing funds; entering contracts; and determining enrollment numbers. RCW 28A.710.030(1), .050(5).

As for funding, the Act requires the superintendent to apportion funds to charter schools on the same basis as public school districts. *See* RCW 28A.710.220, .230(1). Such disbursements include basic education moneys appropriated by the legislature in ***1135** the biennial operating budget for the use of common schools and moneys from the common school construction fund. *See* RCW 28A.710.220(2), .230(1); RCW 28A.150.380(1), .250(1).

Alarmed over the lack of local accountability and fiscal impacts of the Act, appellants[4] sued the State of Washington in King County Superior Court, seeking a declaratory judgment that the Act is unconstitutional.[5] Several supporters of charter schools intervened.[6] All three parties moved for summary judgment, and the trial court granted summary judgment to the State and intervenors on all issues but one. The trial court held that charter schools are not "common schools" under article IX of Washington's Constitution and, therefore, the common school construction fund could not be appropriated to charter schools. CP at 1043, 1045. The trial court found, however, that the provisions permitting such appropriations were severable. The trial court concluded that the Act was otherwise constitutional. All parties sought direct review, which we granted.

[4] The plaintiffs/appellants consist of several organizations and community members: the League of Women Voters of Washington; El Centro De Le Raza; Washington Association of School Administrators; Washington Education Association; Wayne Au, Ph.D.; Pat Braman; Donna Boyer; and Sarah Lucas.

[5] Appellants argued that the Act violates article II, section 37; article III, section 22; article VII, section 2(a); and article IX, sections 1, 2, and 3 of the Washington Constitution.

[6] Intervenors/respondents consist of the Washington State Charter Schools Association, League of Education Voters, Ducere Group, Cesar Chavez Charter School, I–1240 sponsor Tania De Sa Campos, and Matt Elisara.

ANALYSIS

We begin by noting what this case is not about. Our inquiry is not concerned with the merits or demerits of charter schools. Whether charter schools would enhance our state's public school system or appropriately address perceived shortcomings of that system are issues for the legislature and the voters.[7] The issue for this court is what are the requirements of the constitution. *Cf. Gerberding v. Munro,* 134 Wash.2d 188, 211, 949 P.2d 1366 (1998) ("we are not swayed in our analysis of [the term limits initiative] by the policy merits or demerits of term limits for officeholders"). Accordingly, "[o]ur review here is limited to the issue of whether the voters acted in compliance with our state's constitution in expressing their collective will." *Id.* "[W]hile initiative measures are reflective of the reserved power of the people to legislate, the people in their legislative capacity remain subject to the mandates of the Constitution." *Id.* at 196, 949 P.2d 1366 (citation omitted). Moreover, we have made clear that the initiative process is limited in scope to subject matter that is legislative in nature, that an initiative attempting to achieve something not within its power is invalid, and that the initiative power may not be used to amend the constitution. *Id.* at 210 n. 11, 949 P.2d 1366.

[7] Amici largely address the perceived benefits of charter schools and their successes in other states. *See, e.g.,* Br. of Amicus Pac. Legal Found. at 13–20; Br. of Amici Nat'l All. for Pub. Charter Sch., Black All. for Educ. Options, and the Nat'l Ctr. for Special Educ. in Charter Schools at 3–5; Br. of Amici First Place Scholars Charter Sch. et al. at 12–20.

Charter Schools Are Not Common Schools

This case turns on the language of article IX, section 2 of our state constitution and this court's case law addressing that provision. *See Tunstall v. Bergeson,* 141 Wash.2d 201, 220–21, 5 P.3d 691 (2000) ("the court's focus when addressing constitutional facial challenges is on whether the statute's language violates the constitution"). Article IX, section 2 of the Washington Constitution provides:

> The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.[8]

[8] Article IX, section 1 provides:

> It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Article IX, section 3 provides in relevant part:

> There is hereby established the common school construction fund to be used exclusively for the purpose of financing the construction of facilities for the common schools.

***1136** In order to tap the funding sources identified in article IX, I–1240 declared charter schools to be "common schools." *See* LAWS OF 2013, ch. 2, §§ 101(1)(m), (n)(vii), 202(1), (2), 208(1), 301, 302; *see also* RCW 28A.710.005(1)(m), (n)(vii), .020(1), (2), .070(1); RCW 28A.150.010; RCW 28A.315.005. The Act also directed that charter schools are to be funded "as other public schools," and defined "[p]ublic schools" to mean "the common schools as referred to in article IX of the state constitution, including charter schools," and other schools below the college level and maintained at public expense. LAWS OF 2013, ch. 2, §§ 222(1), 301; *see also id.* § 101(1)(n)(vii); RCW 28A.710.220(1), .005(1)(n)(vii); RCW 28A.150.010. Charter schools must report student enrollment and comply with applicable reporting requirements to receive state or federal funding. LAWS OF 2013, ch. 2, § 222(1); RCW 28A.710.220(1). The Act directs the superintendent of public instruction to allocate funding for charter schools "based on the same funding criteria used for noncharter public schools," and charter schools are "eligible to apply for student grants on the same basis as a school district." LAWS OF 2013, ch. 2, § 222(2); RCW 28A.710.220(2). The Act provides that charter schools "shall be included in the levy planning, budgets, and funding distribution in the same manner as other public schools in the district," that school districts "must allocate levy moneys to a conversion charter school," and that charter schools "must be included in levy planning, budgets, and funding distribution in the same manner as other public schools." LAWS OF 2013, ch. 2, § 222(5), (6), (8); RCW 28A.710.220(5), (6), (8). The Act additionally declares that charter schools are "eligible for state matching funds for common school construction." LAWS OF 2013, ch. 2, § 223(1); RCW 28A.710.230(1).

Moreover, I–1240's voter's pamphlet made clear to voters that the fiscal impact of the initiative was merely to shift existing school funding from existing (common) schools to charter schools. "Initiative 1240 is anticipated to shift revenues, expenditures and costs between local public

school districts or from local public school districts to charter schools, primarily from movement in student enrollment." CP at 549. "Charter schools would be tuition-free public schools within the state system of common schools." *Id.* at 550. "State funding for charter schools would be provided in the same manner as other public schools [and] ... based on the same funding criteria used for noncharter schools." *Id.* "Charter schools provide another enrollment option, but they do not change current law that state funding follows the student." *Id.* "Charter schools are eligible for state matching funds for common school construction." *Id.*

Relevant here, I–1240 also provides that charter schools are "governed by a charter school board," which is "appointed or selected ... to manage and operate the charter school." LAWS OF 2013, ch. 2, § 201(5)-(6); RCW 28A.710.010(5, 6). The charter school board has the power to hire and discharge charter school employees and may contract with nonprofit organizations to manage the charter school. LAWS OF 2013, ch. 2, § 203(1)(a), (c); RCW 28A.710.030(1)(a), (c); *see also* LAWS OF 2013, ch. 2, § 101(2); RCW 28A.710.005(2) ("the people enact this initiative measure to authorize ... charter schools in the state of Washington[ ] to be operated by qualified nonprofit organizations"). I–1240 also makes charter schools "free from many regulations" that govern other schools. LAWS OF 2013, ch. 2, § 101(1)(n)(viii); RCW 28A.710.005(1)(n)(viii). Charter schools are "exempt from all school district policies," as well as "all ... state statutes and rules applicable to school districts" except those listed in I–1240 section 204(2) and those made applicable in the school's charter contract. LAWS OF 2013, ch. 2, § 204(3); RCW 28A.710.040(3).

This case addresses the designation, funding, and control of charter schools ***1137** as set forth in I–1240 and that initiative's compliance with article IX, section 2. Accordingly, the case is largely determined by our prior decision in *School District No. 20 v. Bryan,* 51 Wash. 498, 99 P. 28 (1909). Intervenors ask us to "overturn *Bryan,*" Answering Br. & Opening Cross–Appeal Br. of Intervenors at 48, but we decline to do so. *Bryan* has been the law in Washington for more than a hundred years and is repeatedly relied on as authority by Washington's appellate courts.[9] Intervenors offer no compelling reason to abandon *Bryan.* Similarly, the State asks us to "recognize an evolving common school system" and not read *Bryan* as "a static statement of constitutional imperatives." Br. of Resp't/Cross–Appellant State of Wash. at 26, 23. But in *Bryan* this court established the criteria for evaluating a "common school" within the meaning of article IX, and warned, "The words 'common school' must measure up to every requirement of the constitution ... and whenever by any subterfuge it is sought to qualify or enlarge their meaning beyond the intent and spirit of the constitution, the attempt must fail." 51 Wash. at 503, 99 P. 28. *Bryan* established the rule that

9 *See, e.g., State v. Preston,* 79 Wash. 286, 288–89, 140 P. 350 (1914) (applying *Bryan* 's definition of "common schools"); *State ex rel. State Bd. for Vocational Educ. v. Yelle,* 199 Wash. 312, 314, 91 P.2d 573 (1939) (citing *Bryan* as authority concerning appropriate use of common school funds); *State ex rel. City of Seattle v. Seattle Elec. Co.,* 71 Wash. 213, 215, 128 P. 220 (1912) (acknowledging *Bryan* as relevant to the issue of "measuring the limit of legislative power by reference to the

constitution”); *Tunstall,* 141 Wash.2d at 221, 5 P.3d 691 (citing *Bryan* regarding uniformity); *Fed. Way Sch. Dist. No. 210 v. State,* 167 Wash.2d 514, 524, 219 P.3d 941 (2009) (quoting *Bryan* regarding uniformity definition); *Sch. Dists.' All. for Adequate Funding of Special Educ. v. State,* 149 Wash.App. 241, 263, 202 P.3d 990 (2009) (citing *Bryan* regarding uniformity definition), *aff'd,* 170 Wash.2d 599, 244 P.3d 1 (2010).

a common school, within the meaning of our constitution, is one that is common to all children of proper age and capacity, free, and subject to and under the control of the qualified voters of the school district. The complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with powers to discharge them if they are incompetent. *Id.* at 504, 99 P. 28. Here, because charter schools under I–1240 are run by an appointed board or nonprofit organization and thus are not subject to local voter control, they cannot qualify as “common schools” within the meaning of article IX.

The Charter School Act's Funding Provisions Fail

As *Bryan* noted, when adopting our constitution the people of this state “endeavored to protect and preserve the funds set apart by law for the support of the common school from invasion, so that they might be applied exclusively to ... such schools.” *Id.* at 502, 99 P. 28. As discussed above, charter schools do not qualify as common schools. As explained below, by diverting common school funds to charter schools, the Act contravenes article IX, section 2 of the Washington Constitution. *Id.* at 501, 507, 99 P. 28.[10]

[10] “ ‘To say that the Legislature can determine what institutions shall receive the proceeds of the school fund, and that whatever they determine to be entitled thereto becomes *ipso facto* a common school, is begging the whole question, and annulling the constitutional restriction.’ ” *Id.* at 504–05, 99 P. 28 (quoting *People ex rel. Roman Catholic Orphan Asylum Soc'y v. Bd. of Educ.,* 13 Barb. 400 (N.Y.Sup.Gen.Term 1851).)

Our constitution requires the legislature to dedicate state funds to support “common schools.” WASH. CONST. art. IX, §§ 2, 3. As noted, section 2 provides that “the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.” *Id.* Section 3 establishes a separate construction fund for the sole use of the common schools. Using *any* of those funds for purposes other than to support common schools is unconstitutional. *Mitchell v. Consol. Sch. Dist. No. 201,* 17 Wash.2d 61, 66, 135 P.2d 79 (1943) (plurality opinion). This court has repeatedly ***1138** struck down laws diverting common school funds to any other purpose. *See, e.g., Leonard v. City of Spokane,* 127 Wash.2d 194, 199, 897 P.2d 358 (1995) (public improvements); *Mitchell,* 17 Wash.2d at 65–66, 135 P.2d 79 (transportation to private schools); *State ex rel. State Bd. for Vocational Educ. v. Yelle,* 199 Wash. 312, 316–17, 91 P.2d 573 (1939) (vocational rehabilitation); *Sheldon v. Purdy,* 17 Wash. 135, 141, 49 P. 228 (1897) (interest on

school district bonds); *Bryan,* 51 Wash. at 505, 99 P. 28 (schools attached to teacher training colleges); *State v. Preston,* 79 Wash. 286, 288–89, 140 P. 350 (1914) (same).

Under the Act, money that is dedicated to common schools is unconstitutionally diverted to charter schools. As noted, the Act provides that charter schools are to be funded on the same basis as common schools. The superintendent must distribute money from the constitutionally restricted basic education allocation to charter schools on the same basis as common schools. *See* RCW 28A.710.220(2).[11] In other words, under the terms of the Act's provisions the source of funds for the operation of charter schools is the basic education moneys that are otherwise dedicated to the operation of common schools. *See* RCW 28A.510.250; RCW 28A.710.220(2); RCW 84.52.065,[12] .067.

> [11] A portion of the basic education allocation is derived from the state levy on real property designated for support of common schools. *See* RCW 84.52.065.

> [12] After the October 28, 2014 oral argument in this case, the State filed a statement of additional authority on July 22, 2015 citing Laws of 2015, chapter 4, section 516(5) as supporting the notion that "charter schools can operate without access to constitutionally restricted revenue." Statement of Additional Auth. at 1–2. Section 516(5) is a subsection of the operating budget regarding funding for the 2015–2017 biennium, and provides, "State general fund appropriations distributed through Part V of this act for the operation and administration of charter schools as provided in chapter 28A.710 RCW shall not include state common school levy revenues collected under RCW 84.52.065." LAWS OF 2015, ch. 4, § 516(5). This legislation, which is expressly effective on June 30, 2015 and is prospective in its application, does not alter our analysis or conclusion concerning the effect of the Act as previously passed by the voters in 2012 and codified in 2013. The validity of section 516(5) as a substantive law provision buried within an operating budget is not before us. For present purposes it is enough to note that section 516(5) does not assist the State.

However, the constitution sets aside certain property and other moneys to establish a permanent fund for the exclusive use of common schools, referred to in article IX as the "common school fund." WASH. CONST. art. IX, §§ 2, 3. Article IX, section 2 also extended constitutional protection to any "state tax for common schools." In *Yelle,* 199 Wash. at 316, 91 P.2d 573, this court addressed the restrictions on the use of basic education funds allocated to common schools. *Yelle* struck down a law that would have diverted tax revenues allocated to the common schools to support a vocational rehabilitation program operated by a state board. *Id.* This court explained that it was "beside the question" that the vast majority of state funding in place at that time, whether derived from tax revenues or "cash on hand," could have been allocated to other purposes in the first instance. *Id.* The constitutional protection afforded to common school appropriations is not dependent on the source of the revenue (i.e., the type of tax or other funding source) or the account in which the funds are held (i.e., the general fund or

other state fund). Rather, this court held that all money "allocated to the support of the common schools ... constitute[s] a 'state tax for the common schools' in contemplation of Art. IX, § 2, of the constitution." *Id. Yelle* continued, "[O]nce appropriated to the support of the common schools," funds cannot "subsequently be diverted to other purposes." *Id.* at 317, 91 P.2d 573. This court cautioned that to hold otherwise "would be calamitous." *Id.*

Similarly, in *Mitchell* this court explained that the use of *any* common school funds for other than a common school purpose violates the constitution. There, this court held unconstitutional a statute that extended school bus transportation privileges to private school students along already existing and operating public school bus routes. This court rejected the argument that the statute did not impose any additional expense on the school district in that the private school students would merely join the public school students on the school bus's established and regular route. *Mitchell,* 17 Wash.2d at 66, 135 P.2d 79. Although the statute in question did not identify or make any appropriation for carrying out its purpose, because its operation would have the effect of utilizing common school funds for other than common school purposes, it contravened article IX, section 2' s exclusivity requirement. *Id.* Restated, the statute's overall fiscal neutrality did not affect its constitutional infirmity. Also, even though the statute did not address funding, the fact that its intended operation would "necessitate[ ] the use of common school funds for other than common school purposes" rendered it unconstitutional. *Id.*

Under the Act, charter schools receive funds from the legislature's basic education allocation for the common schools. *See* RCW 28A.710.220(2). By statute, all of the basic education funds in the biennial operations budget are designated for the exclusive use of the common schools. RCW 28A.150.380(1) ("The state legislature shall, at each regular session in an odd-numbered year, appropriate for the current use of the common schools such amounts as needed for state support to school districts during the ensuing biennium for the program of basic education under RCW 28A.150.200."). These funds "made available by the legislature for the current use of the common schools" are then distributed annually by the Superintendent to "each school district of the state operating a basic education instructional program." RCW 28A.150.250(1). That the specific common school property levy is only a portion of the state funds used to support common schools does not alter the protection afforded to the entire basic education allocation as a " 'state tax for common schools' " within the meaning of article IX, section 2. *Yelle,* 199 Wash. at 316–17, 91 P.2d 573 (quoting CONST. art. IX, § 2). The Act unconstitutionally reallocates these restricted funds to charter schools, which do not qualify as common schools.

Compounding this problem, the State does not segregate constitutionally restricted moneys from other state funds. Nor can it demonstrate that these restricted moneys are protected from being spent on charter schools. *Cf. id.* at 317, 91 P.2d 573; *Leonard,* 127 Wash.2d at 199, 897 P.2d 358 (act violated article IX, section 2 because it diverted revenues that under the existing statutory scheme would otherwise be used to support the common schools). Given this absence of segregation and accountability, we find unconvincing the State's view that charter schools may be constitutionally funded through the general fund. *See* Br. of Resp't/Cross–Appellant State of Wash. at 30–31. Historically, the state common school funds were

maintained in a separate public school account and distributed to the common schools by the Superintendent. *See, e.g., Yelle,* 199 Wash. at 314–15, 91 P.2d 573. While some other constitutionally restricted state funds continue to be maintained in separate accounts (e.g., common school construction fund (WASH. CONST. art. IX, § 3), gas taxes for transportation purposes (WASH. CONST. art. II, § 40)), since at least 1967, the constitutionally restricted common school property levy revenues have been deposited in the State's "general fund," which is used for the basic education allocation. *See* RCW 84.52.067; LAWS OF 1967, Ex. Sess., ch. 133, § 2. There is no way to track the restricted common school funds or to ensure that these dollars are used exclusively to support the common schools.

***1140** In addition to the diversion of basic education funds, the Act diverts funds from the common school construction fund established under article IX, section 3. *See* RCW 28A.710.230(1). The school construction fund, unlike other restricted common school funds, continues to be held in a segregated account. *See* RCW 28A.515.320. The trial court correctly held that the Charter School Act's provisions authorizing diversion of these restricted funds are unconstitutional.

Our constitution directs the legislature to establish and fund common schools and restricts the legislature's power to divert funds committed to common schools for other purposes even if related to education. CONST. art. IX, §§ 1–3. The Charter School Act's diversion of basic education funds allocated to the support of the common schools and common school construction funds is unconstitutional and void.

We also disagree with the State's view that the Act's remaining provisions are saved because funding "follows the student" and in any event charter schools could be funded out of the state general fund. Br. of Resp't/Cross–Appellant State of Wash. at 40. The fact that public school money distributions are generally based on per capita student attendance does not mean that common school funds are available for students who do not attend common schools. Where a child is not attending a common school, there can be no entitlement to "an apportionment of the current state school fund, to a credit predicated on attendance of children at such ... school." *State v. Preston,* 79 Wash. 286, 289, 140 P. 350 (1914).

Similarly, in *Bryan,* the legislative act in question provided for a model training school department to be established in the state normal schools, under the supervision of the board of trustees of such normal schools. Relevant here, the legislation directed the superintendent of public instruction to apportion moneys " 'out of the funds available for the support of the common schools' " in an amount reflecting " 'the number of pupils in attendance' " at the model training school and distribute such portion to the noted boards. *Bryan,* 51 Wash. at 500–01, 99 P. 28 (quoting LAWS OF 1907, ch. 97, § 4). In other words, under the legislation in question the money would follow the student. This court affirmed the trial court's ruling that such legislation " 'which seeks to apportion or appropriate any part of the common school fund or revenue therefrom or state tax for the support of the common schools is unconstitutional and void.' " *Id.* at 501, 99 P. 28.

Further, as discussed above, the Act designates and relies on common school funds as its funding source. Without those funds, the Act cannot function as intended. Notably, I–1240 supporters' statements in the voters' pamphlet assured voters that charter schools would be funded out of the current school system by merely shifting existing school funding. In response to criticism that I–1240 "diverts taxpayer money into unaccountable ... charter schools [and] ... will drain millions of dollars from existing classrooms," CP at 553, supporters stated in the pamphlet that "[c]harter schools *are* public schools, open to *all* students, accountable to a local school board or state commission, and do not take a penny from our public school system or students. They're funded based on student enrollment just like other public schools." *Id.* at 553.

The Act's Invalid Provisions Are Not Severable

The next question is whether the above noted unconstitutional provisions render the Act unconstitutional in its entirety. "A legislative act is not unconstitutional in its entirety unless invalid provisions are unseverable." *Amalgamated Transit Union Local 587 v. State,* 142 Wash.2d 183, 227, 11 P.3d 762, 27 P.3d 608 (2000). The test for severability is whether the unconstitutional provisions are so connected to the remaining provisions that it cannot be reasonably believed that the legislative body would have passed the remainder of the act's provisions without the invalid portions, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes. *Id.* at 227–28, 11 P.3d 762, 27 P.3d 608; *Gerberding v. Munro,* 134 Wash.2d 188, 197, 949 P.2d 1366 (1998); ***1141** *State v. Crediford,* 130 Wash.2d 747, 760, 927 P.2d 1129 (1996). While the presence of a severability clause may provide assurance that the legislative body would have enacted remaining sections without the invalid portions, a severability clause is not necessarily dispositive on the question of whether the legislative body would have enacted the remainder of the act. *Amalgamated,* 142 Wash.2d at 228, 11 P.3d 762, 27 P.3d 608. Here, the Act contains a severability clause, but the invalid provisions are so intertwined with the remainder of the Act and so fundamental to the Act's efficacy that under either of the above tests the invalid portions are not severable.

The Act identifies charter schools as common schools and is expressly reliant on common school funding to support such charter schools. That a funding source is required for the existence of charter schools is self-evident. As discussed above, the Act specifically intends to use common school funding allocations as that source. Without a valid funding source the charter schools envisioned in I–1240 are not viable. Moreover, I–1240's voters' pamphlet stressed that the funding for charter schools will come from existing funding sources in the form of a "shift [in] revenues" from "local public school districts to charter schools." CP at 549. In sum, without funding, charter schools are not viable. Nor can it be believed that voters would have approved the Charter School Act without its funding mechanism. *See Leonard,* 127 Wash.2d at 202, 897 P.2d 358 (act's funding mechanism is its "heart and soul" and act would be "virtually worthless" without it; thus, the funding mechanism is not severable from the remainder of the act).

In sum, the Charter School Act violates article IX, section 2 because charter schools are not common schools despite the Act's attempt to so designate them. The Act's designated funding mechanisms fail, and these provisions are not severable from the remainder of the Charter

School Act.[13]

[13] Because these determinations are dispositive of this case, we do not address the parties' other arguments. *See Bryan,* 51 Wash. at 506–07, 99 P. 28; *Gerberding,* 134 Wash.2d at 211 n. 12, 949 P.2d 1366.

CONCLUSION

The portions of I–1240 designating charter schools as common schools violate article IX, section 2 of the Washington Constitution and are invalid. For the same reason, the portions of I–1240 providing access to restricted common school funding are also invalid. These provisions are not severable and render the entire Act unconstitutional. We affirm in part and reverse in part and remand for an appropriate order.

WE CONCUR: JOHNSON, OWENS, STEPHENS, WIGGINS, YU, JJ.

FAIRHURST, J. (concurring in part and dissenting in part).

We must decide whether newly created charter schools are "common schools" as defined by article IX, section 2 of the Washington Constitution and, if not, whether the charter schools act (Act), codified at chapter 28A.710 RCW, requires the State to support charter schools with funds that are constitutionally restricted to the benefit of common schools. I agree that charter schools are not common schools. But because nothing in the Act expressly requires the use of restricted funds, the Act is facially valid. Since charter schools may be constitutionally funded with unrestricted monies from the general fund, I concur in part and dissent in part.

In November 2012, Washington voters approved Initiative 1240 (I–1240), codified in the Act, allowing up to 40 charter schools to open within five years. The Act was intended to provide parents with "more options to find the best learning environment for their children." RCW 28A.710.005(1)(f). Under the Act, charter schools would be operated by nonprofit, nonsectarian organizations. RCW 28A.710.010(1), .040(4). Further, charter schools must be free and open to all students. RCW 28A.710.020(1). If student interest exceeds capacity, spaces are allotted by lottery. RCW 28A.710.050(4).

While charter schools are given more "flexibility to innovate and make decisions about staffing, curriculum, and learning opportunities to improve student achievement and outcomes," they are still subject to various ***1142** restrictions. RCW 28A.710.005(1)(g). For example, all teachers must be state certificated. RCW 28A.710.040(2)(c). Like traditional public schools, charter schools are required to provide a basic education through instruction in the essential academic learning requirements (EALRs). RCW 28A.710.040(2)(b). EALRs are developed by the superintendent of public instruction (Superintendent) and prescribe the substantive content taught to all of Washington's public school students, often spanning several hundred pages per

subject. Charter schools are also subject to performance improvement goals advanced by the state Board of Education. RCW 28A.710.040(2)(g).

When it comes to evaluating performance, charter schools are assessed under the same statewide student assessment system developed and overseen by the Superintendent. RCW 28A.710.040(2)(b). Charter schools are additionally required to provide annual performance reports to the parents and the community served by the school. RCW 28A.710.040(2)(f) (citing RCW 28A.655.110). If a charter school falls to the bottom 25 percent of the statewide school accountability index, that charter school's contract will not be renewed. RCW 28A.710.200(2).

Funding for a charter school is tied to student enrollment, and the Superintendent allocates funding to charter schools using the same formulas that are applied to traditional public schools. RCW 28A.710.220(2). The State's general fund is the main source of funding for public education, including charter schools. *See* LAWS OF 2013, 2d Spec. Sess., ch. 4, §§ 501–516 (operational expenses for education).

A. Common schools can and must function without using constitutionally restricted funds

Washington's constitution identifies three funds whose use is restricted solely for the benefit of common schools. The Act does not require the use of monies from any of these funds. The current funding scheme for charter schools and public education is consistent with our constitution and precedent. The appellants,[1] making a facial challenge, fail to meet their burden.

[1] The plaintiffs/appellants consist of several nonprofit organizations and community members: the League of Women Voters of Washington; El Centro De Le Raza; Washington Association of School Administrators; Washington Education Association; Wayne Au, Ph.D.; Pat Braman; Donna Boyer; and Sarah Lucas (hereinafter collectively appellants).

1. *The Act does not divert resources from any of the three restricted funds*

Sections 2 and 3 of article IX identify three protected funds: the permanent common school fund, the state tax for common schools, and the common school construction fund. The legislature cannot use revenue from any of these restricted funds for purposes other than to support common schools. *Mitchell v. Consol. Sch. Dist. No. 201,* 17 Wash.2d 61, 66, 135 P.2d 79 (1943) (plurality opinion).

First, the permanent common school fund was created by article IX, section 3 in 1889. There are two components of the permanent common school fund that we must consider—the principal of the fund and the interest that accrues on the fund.

In 1967, the legislature froze the principal of the permanent common school fund. LAWS OF 1967, ch. 29, § 1, at 98. To this day, our constitution requires that the principal of the fund must

remain intact. CONST. art. IX, § 3; RCW 28A.515.300(2). The Act does not direct the legislature to expend any principal, nor do appellants allege that the principal of the fund has been improperly appropriated.

Neither has the interest been diverted to the support of charter schools. When the fund was created in 1889, our constitution provided that "interest accruing on [the permanent common school fund,] ... shall be exclusively applied to the current use of the common schools." CONST. art. IX, § 3 (1889). However, when the legislature froze the principal of the fund in 1967, it directed all of the interest accruing on the fund toward the newly created common school construction fund, which was dedicated solely to common school construction. CONST. art. IX, § 3. Thus, the interest from the permanent common school fund is not and cannot be used ***1143** for *any* school operating costs. Appellants therefore cannot show that any money from the permanent common school fund is being diverted to support charter schools.

Second, the state tax for common schools, codified in RCW 84.52.065, levies "for the support of common schools of the state a tax of three dollars and sixty cents per thousand dollars." Currently, revenue from the state tax for common schools is placed into the general fund, RCW 84.52.067, from which our public education system receives support, LAWS OF 2013, 2d Spec. Sess., ch. 4, §§ 501–516. As discussed in more detail below, the state tax for common schools constitutes only a fraction of the total appropriation to our public schools. For example, in fiscal year 2015, the appropriation for public education amounted to roughly $7.095 billion from the general fund. LAWS OF 2013, 2d Spec. Sess., ch. 4, §§ 502, 505, 507, 510–511, 514–515. Of this, only $2.003 billion consists of the state tax for common schools. WASH. STATE ECON. & REVENUE FORECAST COUNCIL, WASHINGTON STATE ECONOMIC AND REVENUE FORECAST 69 (2014), http://www.erfc.wa.gov/publications/documents /sep14pub.pdf. Thus, only 28 percent of the revenue appropriated for public education from the general fund is restricted. Because charter schools account for merely 2 percent of Washington's public schools, they can certainly be funded through the remaining 72 percent of the appropriation from the general fund. Importantly, nowhere does the Act expressly require the State to fund charter schools with revenue from the state tax for common schools.

Finally, article IX, section 3 created the third restricted fund when it "established the common school construction fund to be used exclusively for the purpose of financing the construction of facilities for the common schools." The text of the Act does not actually require the State to provide such funding from the common school construction fund. The Act simply provides that "[c]harter schools are eligible for state matching funds for common school construction." RCW 28A.710.230(1). A review of the 2013 session laws reveals that the legislature funds school construction from both the state building construction account and the common school construction account. *See* LAWS OF 2013, ch. 19, §§ 5001–5030, at 2734–43. In fact, the majority of public school construction is funded by the state building construction account. *Id.* Thus, while the legislature may not appropriate from the common school construction fund for construction or repair of charter schools, nothing would prevent it from using the state building construction account or even unrestricted revenues in the general fund. Appellants fail to establish that the Act will divert any revenue from the common school construction fund.

Contrary to the majority's view, the Act does not expressly require the use of any of the three restricted funds. The majority points to RCW 28A.710.220(2). Majority at 1138. That statute provides that "[c]ategorical funding must be allocated to a charter school based on the same funding criteria used for noncharter public schools."[2] On its face, this statute does not require the State to support charter schools with restricted funds. Taken in context, this provision relates to the *amount* of money that a charter school may receive and requires that charter schools be subject to the same per-pupil formula as other public schools. It plainly says nothing about the *source* of funding. In fact, nowhere does the Act identify a source of funding, it merely states that charter schools must "receive funding based on student enrollment just like existing public schools." RCW 28A.710.005(1)(n)(vii). Because the Act neither identifies a source of funding nor commands the use of restricted funds to ***1144** support charter schools, it withstands appellants' facial challenge and is constitutional.[3]

[2] The full text of RCW 28A.710.220(2) states:

> According to the schedule established under RCW 28A.510.250, the superintendent of public instruction shall allocate funding for a charter school including general apportionment, special education, categorical, and other nonbasic education moneys. Allocations must be based on the statewide average staff mix ratio of all noncharter public schools from the prior school year and the school's actual full-time equivalent enrollment. Categorical funding must be allocated to a charter school based on the same funding criteria used for noncharter public schools and the funds must be expended as provided in the charter contract. A charter school is eligible to apply for state grants on the same basis as a school district.

[3] The majority also cites to three other statutes for the proposition that the Act's terms identify restricted funds as the source of funding. Majority at 1138 (citing RCW 28A.510.250; RCW 84.52.065, .067). First, none of these statutes are located within the Act and are thus not relevant to appellants' claim that the Act is facially invalid. Second, these statutes plainly do not require the use of restricted funds. In fact, none of them discuss the source of funding for charter schools. *See* RCW 28A.510.250 (establishing a schedule for when the Superintendent must allocate funds to schools); RCW 84.52.065 (requiring the State to levy a tax for common schools), .067 (requiring the state tax for common schools to be deposited into the general fund).

2. *The current funding scheme for charter schools is constitutional and consistent with precedent*

The State now funds public education primarily through the general fund. WASH. STATE OFFICE OF FIN. MGMT., A GUIDE TO THE WASH. STATE BUDGET PROCESS 6 (2014), http://www.ofm.wa.gov/reports/ budgetprocess.pdf (45.1 percent of the general fund is spent on K–12 education). According to the Washington State Office of Financial Management, there

are seven separate appropriations that comprise the overall allocations to public schools. Clerk's Papers (CP) at 1032. These include appropriations for (1) general apportionment, (2) pupil transportation, (3) special education, (4) institutional education programs, (5) programs for highly capable students, (6) transitional bilingual programs, and (7) the learning assistance program. *Id.* These seven appropriations are made primarily from the state general fund. *See, e.g.,* LAWS OF 2013, 2d Spec. Sess., ch. 4, §§ 501–516 (operational expenses for education).[4] Charter schools draw support from these appropriations.

> 4 LAWS OF 2013, 2d Spec. Sess., ch. 4, § 502 ($5.581 billion for general apportionment), § 505 ($427 million for pupil transportation), § 507 ($738 million for special education programs), § 510 ($15 million for institutional education programs), § 511 ($10 million for programs for highly capable students), § 514 ($106 million for transitional bilingual programs), § 515 ($218 million for the learning assistance program).

This funding scheme is both constitutional and consistent with our precedent. The general fund is not identified as a restricted fund by article IX, nor are any of the seven separate appropriations that comprise the overall funding for public education. It is, as the name suggests, a general fund. Even our decision in *School District No. 20 v. Bryan,* relied on heavily by the majority, acknowledged that "all experiments in education must be indulged, if at all, at the expense of the general fund." 51 Wash. 498, 505, 99 P. 28 (1909).

The majority "find[s] unconvincing the State's view that charter schools may be constitutionally funded through the general fund" because restricted funds are not segregated from unrestricted funds. Majority at 1139. Not only does this directly contradict established case law, *see Bryan,* 51 Wash. at 505, 99 P. 28, but taken to its full logical extent, it would mean that *any* expenditure from the general fund would be unconstitutional unless it was for the support of common schools.[5] This cannot be the case.

> 5 In addition to K–12 schools, the general fund is used to support critical functions such as human services, higher education, governmental operating costs, and natural resources. *See* OFFICE OF FIN. MGMT., *supra,* at 6.

The majority also attempts to classify the entire $7.095 billion appropriation for public education as a restricted fund by relying on inapposite statutes and case law. The majority cites to RCW 28A.150.380 to support its claim that the entire appropriation for public education is restricted. Majority at 1139. But RCW 28A.150.380(1) provides only that the legislature must "appropriate for the current use of the common schools such amounts as needed for state support to school districts." This statute is not an appropriations bill but, rather, a general mandate. The statute does not appropriate funds, nor does it even reference any of the seven appropriations that comprise our funding for public education. Most importantly, the statute does not prohibit the legislature from supporting additional, noncommon school educational programs with resources from the unrestricted portion of the general fund. In fact, the second

half of ***1145** this statute, RCW 28A.150.380,(2), expressly permits appropriations for other educational programs, with no common school limitation. (The legislature may fund "special programs to enhance or enrich the program of basic education."). Indeed, programs, such as Running Start, that are not under the control of local voters and are thus not common schools, receive support through the $7.095 billion appropriation for public education. *See* LAWS OF 2013, 2d Spec. Sess., ch. 4, § 502(18); WASH. STATE BD. FOR CMTY. & TECH. COLLS., RUNNING START FINANCE STUDY REPORT: DECEMBER 2010 7, http://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName= Running% 20Start% 20Finance% 20Study% 20Report% 20-% 20Dec% 202010_ef747037–8891–4bd7–8787–e55a1c185533.pdf (high schools reimburse community colleges for 93 percent of each student's tuition).

The majority next cites to *State ex rel. State Board for Vocational Education v. Yelle,* 199 Wash. 312, 91 P.2d 573 (1939). Majority at 1139. There, the legislature appropriated approximately $64,000 " '*from the current school fund*' " for the State Board for Vocational Education in order to secure matching funds from the federal government. *Yelle,* 199 Wash. at 313, 91 P.2d 573 (quoting LAWS OF 1939, ch. 223, § 2, at 940). The court emphasized and heavily relied on the fact that the appropriation came from the current school fund, which by definition was " 'to be applied exclusively to the common schools.' " *Id.* at 316, 91 P.2d 573 (quoting LAWS OF 1939, ch. 174, § 1, at 530). Thus, it made sense that once money was allocated to the current school fund, it could not thereafter be diverted to a noncommon school.

But *Yelle* does not control because our funding mechanism for public education has materially changed since *Yelle* was decided in 1939. *See Fed. Way Sch. Dist. No. 210 v. State,* 167 Wash.2d 514, 525, 219 P.3d 941 (2009) (distinguishing prior case law on grounds that funding system had been replaced by a "completely new and different funding mechanism"). The legislature no longer uses the current school fund, and, in fact, the current school fund is extinct. This likely explains why no court, until the majority, has ever cited to *Yelle* since it was first published nearly 80 years ago. The legislature now supports public education primarily through the general fund. *See* LAWS OF 2013, 2d Spec. Sess., ch. 4, §§ 501–516 (operational expenses for education). Unlike the current school fund, the general fund is inherently unrestricted and may be used to support charter schools. *Yelle* did not forbid the legislature from using unrestricted resources in the general fund for other education purposes. Indeed, after *Yelle,* the legislature made a nearly identical appropriation to the Board for Vocational Education but this time from the general fund instead of the current school fund. *Compare* LAWS OF 1939, ch. 223, § 2, at 940 ("FROM THE CURRENT SCHOOL FUND"), *with* LAWS OF 1941, ch. 234, § 2, at 748 ("FROM THE GENERAL FUND").

The majority also cites to our plurality decision in *Mitchell,* where the legislature attempted to transport private school students with buses supported by restricted funds. 17 Wash.2d at 63–64, 135 P.2d 79. There, the State admitted that "the directors of the school district are using public funds *'from the state permanent school fund and the current school fund'* (italics ours) for the transportation, in a school bus, of children eligible to attend the common public schools to and from the Christian school." *Id.* at 64, 135 P.2d 79. Relying in part on this admission, the lead

opinion noted that in order to carry out the legislation, "the directors of school districts must, of necessity, resort to the common school fund." *Id.* at 66, 135 P.2d 79. By contrast, the State here will not necessarily have to resort to the common school fund or any restricted fund in order to support charter schools. Notably, the concurrence in *Mitchell* recognized that schools that were not common schools could qualify for student transportation under the legislation so long as restricted funds were not used. *Id.* at 70–71, 135 P.2d 79 (Grady, J., concurring). The text of the Act does not command the use of restricted funds, and, as discussed above, the State may fund charter schools with general funds.[6]

> [6] The majority also cites to *Leonard v. City of Spokane,* 127 Wash.2d 194, 897 P.2d 358 (1995). Majority at 1139. But that case involved the direct usurpation of the state tax for common schools. *Leonard,* 127 Wash.2d at 199, 897 P.2d 358 (invalidating the legislation because it diverted revenue from property tax that would otherwise constitute the state tax for common schools). No such diversion exists here. Again, charter schools would receive support from the general fund.

***1146** The majority believes that once money is appropriated to our public schools from the general fund, it becomes restricted solely for the benefit of common schools. *See* majority at 1139. Although the seven separate appropriations listed above can reasonably be considered public school funds, they are not common school funds. We recognized this critical distinction in *Moses Lake School District No. 161 v. Big Bend Community College,* concluding that while the diverted resources in that case might "have been public school funds, none were 'common school funds.' " 81 Wash.2d 551, 560, 503 P.2d 86 (1972); *see also Seattle Sch. Dist. No. 1 v. State,* 90 Wash.2d 476, 521, 585 P.2d 71 (1978) ("[T]he constitutional draftsmen must have contemplated that funds, other than common school funds, were available for and used to educate our resident children." (emphasis omitted)). The majority conflates the legislature's appropriation for public education with common school funds, an approach we have long rejected. *See Pac. Mfg. Co. v. Sch. Dist. No. 7,* 6 Wash. 121, 33 P. 68 (1893). Because charter schools are part of our system of public education, they are a proper recipient of public school funds.

3. *Appellants fail to meet their burden under a facial challenge*

Because the Act was enacted through the initiative process, we begin with the presumption that it is constitutional. *Amalgamated Transit Union Local 587 v. State,* 142 Wash.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2000). Appellants have raised a facial challenge against the Act and must prove that the Act is unconstitutional beyond a reasonable doubt. *Id.* This requires a showing that the statute cannot be constitutionally applied under any circumstances. *Id.* " '[A] facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied.' " *Lummi Indian Nation v. State,* 170 Wash.2d 247, 258, 241 P.3d 1220 (2010) (quoting *Wash. State Republican Party v. Pub. Disclosure Comm'n,* 141 Wash.2d 245, 282 n. 14, 4 P.3d 808 (2000)).

The majority faults the State for not being able to "demonstrate that these restricted moneys

are protected from being spent on charter schools." Majority at 1139. This impermissibly shifts the burden of proof to the State.[7] It is well settled that, in a facial challenge, the burden rests on the plaintiff, here appellants. *Amalgamated Transit,* 142 Wash.2d at 205, 11 P.3d 762, 27 P.3d 608. Appellants fail to meet their burden for two reasons.

[7] The majority also runs contrary to the established presumption of constitutionality. " 'In matters of economic legislation, we follow the rule giving every reasonable presumption in favor of the constitutionality of the law or ordinance.' " *Leonard,* 127 Wash.2d at 198, 897 P.2d 358 (quoting *Sofie v. Fibreboard Corp.,* 112 Wash.2d 636, 642–43, 771 P.2d 711 (1989)). Here, because charter schools comprise only two percent of Washington's public schools, it is reasonable to assume that they can be funded using a portion of the $5.092 billion that is not restricted.

First, as discussed at length above, appellants cannot prove that charter schools will receive resources from any of the three restricted funds. In *Moses Lake School District No. 161,* we placed the burden on the plaintiffs to show that constitutionally restricted funds were being diverted. 81 Wash.2d at 559–60, 503 P.2d 86. We concluded that the plaintiffs there could show no more than the diversion of public school funds, which are distinguishable from common school funds as referenced by article IX. *Id.* at 560, 503 P.2d 86. Similarly, appellants here can show no more than the use of general funds that have been appropriated to our public education system, of which charter schools are a part. Notably, appellants concede that unrestricted revenue from the general fund can be used to support noncommon schools, stating that "[n]othing prevents the Legislature or school districts from using unrestricted funds to support ... supplemental programs and services." Reply Br. of Appellants at 18.

***1147** Second, even assuming that appellants and the majority were correct and the entire appropriation for public education was restricted solely for the use of common schools, the nature of an appropriation is that it is finite and renewed every two years. *See Wash. State Legislature v. State,* 139 Wash.2d 129, 145, 985 P.2d 353 (1999) ("[A] budget bill, by its nature, appropriates funds for a finite time period—two years."). The legislature is free to adjust its appropriations with any new biennial budget. Thus, it is well within the realm of possibility that the legislature may appropriate charter school funding separate and apart from the basic education appropriation in future budget bills. Indeed, in *Yelle,* the remedy was to fund vocational education using monies from the general fund the following biennium, not to abolish vocational schools. *Compare* LAWS OF 1939, ch. 223, § 2, at 940, *with* LAWS OF 1941, ch. 234, § 2, at 748. Because nothing prohibits the legislature from expressly appropriating funds to support charter schools separate and apart from the appropriation for public education in the next biennium, appellants' facial challenge must fail.[8]

[8] One might think in future bienniums the legislature might appropriate resources from restricted funds to support charter schools. This the legislature cannot do because our state constitution prohibits appropriations from restricted funds.

As a final note, the flaws that appellants and the majority find with the current funding scheme are born from the way in which the State manages restricted funds, not through any fault of the Act or the voters who passed the Act. While the State's accounting may be troubling, I do not find the Act itself to be unconstitutional on its face.

B. Provisions of the Act declaring charter schools to be common schools are severable

Provisions within an act are not severable if "it cannot reasonably be believed that the legislative body would have passed one without the other" or if "elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes." *Amalgamated Transit,* 142 Wash.2d at 227–28, 11 P.3d 762, 27 P.3d 608. Appellants argue that voters would not have passed I–1240 if they knew that charter schools were not common schools and, as such, could not be funded with restricted common school funds. I disagree for three reasons.

First, I–1240 would have passed even though charter schools may not receive restricted funds. I–1240 does not state that charter schools will receive restricted funds, and voters were never told anything to this effect. Rather, I–1240 states in general terms that charter schools shall "receive funding based on student enrollment just like existing public schools." RCW 28A.710.005(1)(n)(vii); *see also* RCW 28A.710.220(2) (requiring the Superintendent to fund charter schools without reference to restricted funds). I–1240 and the voters' pamphlet do not reference restricted funds likely because the current funding scheme for public education does not distinguish between restricted and unrestricted funds, and, thus, there was no framework to discuss this issue.

While the voters' pamphlet reveals that voters were very concerned about funding, this concern centered on the diversion of funds from local school districts rather than the source of funding. *See* CP at 553 (arguments for and against I–1240). Importantly, voters were never misled about the effect of I–1240 on local school districts. In fact, voters were repeatedly informed that I–1240 would "shift revenues, expenditures and costs between local public school districts *or from local public school districts to charter schools,* primarily from movement in student enrollment ... result[ing] in an indeterminate, *but non-zero,* fiscal impact to local public school districts." CP at 549 (emphasis added). Appellants allege that voters were misled to believe I–1240 was a "zero-sum game." Br. of Appellants at 28. This is inaccurate because the voters' pamphlet repeatedly described the fiscal impact of I–1240 as "indeterminate, but non-zero." CP at 549–51 (discussing the nonzero fiscal impact on nine occasions). Voters were properly informed. Because there is nothing to indicate that voters were concerned about the ***1148** *source* of the funding, I–1240 would have passed even though charter schools are not eligible to receive restricted funds.

Second, I–1240 contains a severability clause. *See* CP at 78. "A severability clause may provide the assurance that the legislative body would have enacted remaining sections even if others are found invalid." *Amalgamated Transit,* 142 Wash.2d at 228, 11 P.3d 762, 27 P.3d 608. The majority correctly points out that a severability clause is not dispositive on the question of whether the legislative body would have enacted the remainder of the act. Majority at 1141. But we have recently stated that "[w]here the initiative passed by the people contains a

severability clause, the court may view this as 'conclusive as to the circumstances asserted unless it can be said that the declaration is obviously false on its face.' " *League of Educ. Voters v. State,* 176 Wash.2d 808, 827, 295 P.3d 743 (2013) (internal quotation marks omitted) (quoting *McGowan v. State,* 148 Wash.2d 278, 296, 60 P.3d 67 (2002)). Appellants have not argued that the severability clause is obviously false. I would uphold the severability clause and apply it here, concluding that the people would likely have passed the Act even if charter schools were not common schools.

Finally, elimination of the common school provisions would not render the Act useless to accomplish its purpose. The purpose of I–1240 was to establish 40 charter schools over the next five years. RCW 28A.710.005(1)(n). This purpose may be accomplished without designating public charter schools as common schools.

The majority believes that the voters would never have passed the Act without a funding source. Majority at 1141. But the voters did just that because the Act itself does not contain any reference to a source of funding. This is not an uncommon occurrence, as Washington voters have enacted unfunded initiatives in the past. *See Fed. Way Sch. Dist. No. 210,* 167 Wash.2d at 520, 219 P.3d 941 (acknowledging voters passed legislation mandating cost of living increases for teachers but that the legislation provided no funding source).

I agree with the majority that charter schools are not common schools. But nothing in the Act requires the diversion of resources out of the three funds identified by article IX as restricted for the benefit of common schools. Rather, the State can constitutionally support charter schools through the general fund. I would not invalidate the Act but, rather, would hold that appellants cannot meet their burden on this facial challenge. I respectfully concur in part and dissent in part.

IV. The Extent of the State's Control in Schools

Introduction

Governments fund public schools, yet how much control they have over what happens there is something that varies substantially from one country, or legal system, to another. Accordingly, this section examines the permissibility of school-sponsored messages about religion; the extent to which the state can control teachers' speech in schools; and the degree to which the state can restrict what students say in schools.

First, religious messages. Judicial decisions included in the prior section introduced the Establishment Clause, the relatively unique US constitutional provision that bans the state from promoting religion. This section continues that discussion by focusing on when a school can decide what its message is and when that decision is beyond the school's control. The section begins with the US Supreme Court's 1980 decision in *Stone v. Graham*, which will be of particular interest to those interested in the European Court of Human Rights' *Latusi* decision because of the similarity of the question presented—the permissibility of posting a religious symbol on school walls.

This section then continues with a case about teaching religious truth as part of the formal curriculum in science class, *Kitzmiller v. Dover*. This 2005 federal district court decision may seem perplexing to non-American readers; it helps to understand that national opinion polls going back decades reveal that Americans are split about evenly between those who believe the theory of evolution and those who subscribe instead to Biblical creationism. Creationists have long sought to have their religious view taught in public school science classes alongside the theory of evolution; advocating for the inclusion of "intelligent design" was the most recent way in which they sought to do this. "Intelligent design" controversies have been surprisingly limited since the *Kitzmiller* decision, perhaps because of the large attorney fee award to which the school district was subject after it lost the case (in US courts, fee shifting is not the norm).

Examining curricular issues in a non-religious context, the 2010 federal appeals decision in *Griswold v. Driscoll* asks to what degree the state can choose what messages it conveys in its curriculum. Interestingly, this decision was written by retired US Supreme Court Justice David Souter who was sitting by designation (basically, hearing cases as a guest judge) with two other federal appeals judges when this case came before the appellate court. The decision discusses the various lines of reasoning under which the case could be decided, including the emerging government speech doctrine (for more information about this issue, see Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 Wake Forest Law Review 211 (2013)).

Second, teachers' speech. In some ways, the closest parallel to Europe's headscarf controversies involves disputes over the degree to which the state can control teachers' in-school speech. In short, does the school "own" the speech because it is hiring the teacher, or does the teacher have some influence over the speech as an individual with constitutional rights? The issue has split federal appeals courts, and some are deciding these cases under the government speech doctrine mentioned above. The 2010 federal appeals decision included in

this section, *Evans-Marshall v. Board of Education*, presents two parallel lines of analysis and thus illustrates the complexity of this area of law.

Third, students' speech. The US Supreme Court's 1969 *Tinker v. Des Moines* decision carved out a protected area for students' speech in schools—prior to the *Tinker* decision, schools were environments in which school officials' authority was almost always unquestioned. In fact, the legal standard the Court adopted in *Tinker* was the standard the school district had suggested, thinking it would receive substantial deference from the court. Yet, when the Court applied the standard, the students won. Since *Tinker*, three other US Supreme Court cases have dealt directly with students' rights in schools: *Bethel v. Fraser*, 468 U.S. 675 (1985); *Hazelwood v. Kuhlmeier* 484 U.S. 260 (1988); and *Morse v. Frederick*, 551 U.S. 393 (2007). Today, courts struggle with how to apply these precedential decisions to instances when students engage in online speech while they are off campus. A federal appellate court's 2013 decision in *Wynar v. Douglas County School District* illustrates this problem and summarizes much of the law to date.

Lastly, it is important to realize that just because a student is speaking does not mean that the speech is "student speech." The US Supreme Court's 2000 decision in *Santa Fe Independent School District v. Doe* demonstrates a circumstance in which a student speaker was speaking as an agent of the school and thus the Establishment Clause (which only restricts actions by the government, not actions by private entities or individuals) barred the pre-football game student-led prayer over the loudspeaker.

Stone v. Graham, 449 U.S. 39 (US Supreme Court 1980)

PER CURIAM.

A Kentucky statute requires the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State.[1] Petitioners,***40** claiming that this statute violates the Establishment and Free Exercise Clauses of the First Amendment,[2] sought an injunction against its enforcement. The state trial court upheld the statute, finding that its "avowed purpose" was "secular and not religious," and that the statute would "neither advance nor inhibit any religion or religious group" nor involve the State excessively in religious matters. App. to Pet. for Cert. 38–39. The Supreme Court of the Commonwealth of Kentucky affirmed by an equally divided court. 599 S.W.2d 157 (1980). We reverse.

> 1. The statute provides in its entirety:
>
> "(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.
>
> "(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'
>
> "(3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act." 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980).
>
> 2. The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." This prohibition is applicable to the States through the Fourteenth Amendment. *Abington School District v. Schempp*, 374 U.S. 203, 215–216, 83 S.Ct. 1560, 1567–1568, 10 L.Ed.2d 844 (1963).

This Court has announced a three–part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally the statute must not foster 'an excessive government entanglement with religion.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612–613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971)

(citations omitted).

If a statute violates any of these three principles, it must be ***41** struck down under the Establishment Clause. We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.

The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980).

The trial court found the "avowed" purpose of the statute to be secular, even as it labeled the statutory declaration "self–serving." App. to Pet. for Cert. 37. Under this Court's rulings, however, such an "avowed" secular purpose is not sufficient to avoid ****194** conflict with the First Amendment. In *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), this Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools, despite the school district's assertion of such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *Id.*, at 223, 83 S.Ct., at 1572.

The pre–eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths,[3] and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, ***42** adultery, stealing, false witness, and covetousness. See Exodus 20: 12–17; Deuteronomy 5: 16–21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1–11; Deuteronomy 5: 6–15.

3. As this Court commented in *Abington School District v. Schempp, supra,* at 224, 83 S.Ct., at 1572: "Surely the place of the Bible as an instrument of religion cannot be gainsaid...."

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Abington School District v. Schempp, supra*, at 225, 83 S.Ct., at 1573. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.

However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State ... Government" that the Establishment Clause prohibits. 374 U.S., at 222, 83 S.Ct., at 1571; see *Engel v. Vitale*, 370 U.S. 421, 431, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962).[4] Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." *Abington School District v. Schempp, supra*, at 225, 83 S.Ct., at 1573. We conclude that ***43** § 158.178 (1980) violates the first part of the *Lemon v. Kurtzman*, test, and thus the Establishment Clause of the Constitution.[5]

> 4. Moreover, while the actual copies of the Ten Commandments were purchased through private contributions, the state nevertheless expended public money in administering the statute. For example, the statute requires that the state treasurer serve as a collecting agent for the contributions. Ky. Rev. Stat. § 158.178(3) (1980).
>
> 5. The Supreme Court cases cited by the dissenting opinion as contrary, *Committee for Public Education v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); *Sloan v. Lemon*, 413 U.S. 825, 93 S.Ct. 2982, 37 L.Ed.2d 939 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), are easily distinguishable: all are cases involving state assistance to private schools. Such assistance has the obvious legitimate secular purpose of promoting educational opportunity. The posting of the Ten Commandments on classroom walls has no such secular purpose.

The petition for a writ of certiorari is granted, and the judgment below is reversed.

It is so ordered.

*****195*** THE CHIEF JUSTICE and Justice BLACKMUN dissent. They would grant certiorari and give this case plenary consideration.

Justice STEWART dissents from this summary reversal of the courts of Kentucky, which, so far as appears, applied wholly correct constitutional criteria in reaching their decisions.

Justice REHNQUIST, dissenting.

With no support beyond its own *ipse dixit*, the Court concludes that the Kentucky statute involved in this case "has *no* secular legislative purpose," *ante*, at 193 (emphasis supplied), and that "[t]he pre–eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," *ante*, at 194. This even though, as the trial court found, "[t]he

General Assembly thought the statute had a secular legislative purpose and specifically said so." App. to Pet. for Cert. 37. The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases ***44** and accords such pronouncements the deference they are due. See, *e.g., Committee for Public Education v. Nyquist*, 413 U.S. 756, 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973) ("we need touch only briefly on the requirement of a 'secular legislative purpose.' As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests"); *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971) ("the statutes themselves clearly state they are intended to enhance the quality of the secular education"); *Sloan v. Lemon*, 413 U.S. 825, 829–830, 93 S.Ct. 2982, 2985, 37 L.Ed.2d 939 (1973); *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968). See also *Florey v. Sioux Falls School District*, 619 F.2d 1311, 1314 (CA8) (upholding rules permitting public school Christmas observances with religious elements as promoting the articulated secular purpose of "advanc[ing] the student's knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization"), cert. denied. 449 U.S. 987, 101 S.Ct. 409, 66 L.Ed.2d 251. The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional. As this Court stated in *McGowan v. Maryland*, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed.2d 393 (1961), in upholding the validity of Sunday closing laws, "the present purpose and effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the state from achieving its secular goals."

Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), repeatedly cited by the Court, is not to the contrary. No statutory findings of secular purpose supported the challenged enactments in that case. In one of the two cases considered in *Abington School District* the trial court had determined that the challenged exercises were intended by the State to be religious exercises. *Id.*, at 223, 83 S.Ct., at 1572. A contrary finding is presented here. In the other case no specific finding had been ***45** made, and "the religious character of the exercise was admitted by the State," *id.*, at 224,[1] 83 S.Ct., at 1572.

> 1. The Court noted that even if the State's purpose were not strictly religious, "it is sought to be accomplished through readings, without comment, from the Bible." 374 U.S., at 224, 83 S.Ct., at 1572. Here of course there was no compelled reading, and there was comment accompanying the text of the Commandments mandated by statute and focusing on their secular significance.

The Court rejects the secular purpose articulated by the State because the Decalogue is "undeniably a sacred text," ****196** *ante*, at 194. It is equally undeniable, however, as the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. The trial court concluded that evidence submitted substantiated this determination. App. to Pet. for Cert. 38.

See also *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 33 (CA10 1973) (upholding construction on public land of monument inscribed with Ten Commandments because they have "substantial secular attributes"). Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import. See *id.*, at 34 ("It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era").[2] See also *Opinion of the Justices*, 108 N.H. 97, 228 A.2d 161 (1967) (upholding placement of plaques with the motto "In God We Trust" in public schools).

> 2. The Court's emphasis on the religious nature of the first part of the Ten Commandments is beside the point. The document as a whole has had significant secular impact, and the Constitution does not require that Kentucky students see only an expurgated or redacted version containing only the elements with directly traceable secular effects.

The Establishment Clause does not require that the public sector be insulated from all things which may have a religious ***46** significance or origin. This Court has recognized that "religion has been closely identified with our history and government," *Abington School District, supra*, at 212, 83 S.Ct., at 1565 and that "[t]he history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434, 82 S.Ct. 1261, 1268, 8 L.Ed.2d 601 (1962). Kentucky has decided to make students aware of this fact by demonstrating the secular impact of the Ten Commandments. The words of Justice Jackson, concurring in *McCollum v. Board of Education*, 333 U.S. 203, 235–236, 68 S.Ct. 461, 477, 92 L.Ed. 649 (1948), merit quotation at length:

> "I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view.... I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity–both Catholic and Protestant–and other faiths accepted by a large part of the world's peoples. One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."

***47** I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky.

Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707 (Federal trial court, Middle District of state of Pennsylvania 2005).

INTRODUCTION:

On October 18, 2004, the Defendant Dover Area School Board of Directors passed by a 6–3 vote the following resolution:

> Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught.

On November 19, 2004, the Defendant Dover Area School District announced by press release that, commencing in January 2005, teachers would be required to read the following statement to students in the ninth grade biology class at Dover High School:

> The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.
>
> Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.
>
> Intelligent Design is an explanation of the origin of life that differs from Darwin's***709** view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.
>
> With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

A. *Background and Procedural History*

On December 14, 2004, Plaintiffs filed the instant suit challenging the constitutional validity of the October 18, 2004 resolution and November 19, 2004 press release (collectively, "the ID Policy"). It is contended that the ID Policy constitutes an establishment of religion prohibited by the First Amendment to the United States Constitution, which is made applicable to the states by the Fourteenth Amendment, as well as the Constitution of the Commonwealth of Pennsylvania. Plaintiffs seek declaratory and injunctive relief, nominal damages, costs, and attorneys' fees.

This Court's jurisdiction arises under 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1983. In addition, the power to issue declaratory judgments is expressed in 28 U.S.C. §§ 2201 and 2202. This

Court has supplemental jurisdiction over Plaintiffs' cause of action arising under the Constitution of the Commonwealth of Pennsylvania pursuant to 28 U.S.C. § 1367. Venue is proper in this District under 28 U.S.C. § 1391(b) because one or more Defendants reside in this District, all Defendants reside in the Commonwealth of Pennsylvania, and the events or omissions giving rise to the claims at issue occurred in this District.

For the reasons that follow, we hold that the ID Policy is unconstitutional pursuant to the Establishment Clause of the First Amendment of the United States Constitution and Art. I, § 3 of the Pennsylvania Constitution.

B. *The Parties to the Action*

We will now introduce the individual Plaintiffs and provide information regarding their acquaintance with the biology curriculum controversy.[1] Tammy Kitzmiller,***710** resident of Dover, Pennsylvania is a parent of a child in the ninth grade and a child in the eleventh grade at Dover High School.[2] She did not attend any Board meetings until November 2004 and first learned of the biology curriculum controversy from reading the local newspapers. Bryan and Christy Rehm, residents of Dover, Pennsylvania are parents of a child in the eighth grade, a child in the second grade, a child in kindergarten in the Dover Area School District, and a child of pre-school age. They intend for their children to attend Dover High School. Bryan Rehm learned of the biology curriculum controversy by virtue of being a member of the science faculty at Dover Area High School. Before and after his resignation, he regularly attended Board meetings. His wife, fellow Plaintiff Christy Rehm learned of the biology curriculum controversy by virtue of discussions she had with her husband and also regularly attended Board meetings in 2004. Deborah F. Fenimore and Joel A. Leib, residents of Dover, Pennsylvania are the parents of a child in the twelfth grade at Dover High School and a child in the seventh grade in the Dover Area School District. They intend for their seventh grade child to attend Dover High School. Leib first learned of a change in the biology curriculum by reading local newspapers. Steven Stough, resident of Dover, Pennsylvania is a parent of a child in the eighth grade in the Dover Area School District and intends for his child to attend Dover High School. Stough did not attend any Board meetings until December 2004 and prior to that, he had learned of the biology curriculum change by reading the local newspapers. Beth A. Eveland, resident of York, Pennsylvania is a parent of a child in the first grade in the Dover Area School District and a child of pre-school age who intends for her children to attend Dover High School. Eveland attended her first Board meeting on June 14, 2004. Prior to that, she had learned of the issues relating to the purchase of the biology books from reading the *York Daily Record* newspaper. Cynthia Sneath, resident of Dover, Pennsylvania is a parent of a child in the first grade in the Dover Area School District and a child of pre-school age who intends for her children to attend Dover High School. Sneath attended her first Board meeting on October 18, 2004 and prior to that, she had learned of the biology curriculum controversy from reading the local newspapers. Julie Smith, resident of York, Pennsylvania is a parent of a child in the tenth grade at Dover High School. Smith did not attend a Board meeting in 2004; she learned of and followed the biology curriculum controversy by reading the local newspapers. Aralene (hereinafter "Barrie") Callahan and Frederick B. Callahan, residents of Dover, Pennsylvania are parents of a child in the tenth grade at Dover High School. Barrie Callahan learned of the biology curriculum

controversy by virtue of her status of a former Board member and from attending Board meetings. Fred Callahan learned of the biology curriculum controversy based upon discussions with his wife Barrie and from attending Board meetings.

1. Defendants again argue that certain Plaintiffs lack standing and their claims should therefore be dismissed. First, Defendants contend that Plaintiffs Eveland and Sneath lack standing because their claims are not ripe, based upon the age of their children. Defendants originally asserted this argument in submissions regarding their previously filed Motion to Dismiss. In our March 10, 2005 Order disposing of such Motion, we discussed that issue in detail and held that Plaintiffs Eveland and Sneath should not be dismissed based upon ripeness grounds. (Rec. Doc. 41 at 21–23). We have been presented with no reason to alter our prior ruling in this regard.

Defendants also argue that the Callahan Plaintiffs and Plaintiff Smith lack standing based upon mootness grounds as their children have already passed the ninth grade. In our March 10, 2005 Order, we addressed this issue and found it premature to dismiss Plaintiff Smith and the Callahan Plaintiffs. We explained that we would entertain a renewed motion at a point at which the record is more fully developed. *Id.* at 23–25. In Defendants' Motion for Summary Judgment they raised the issue of standing by way of footnote and subsequently raised it in their post-trial submissions. We find the cases cited by Defendants to be factually distinguishable and conclude that Defendants frame the Establishment Clause claim far too narrowly. Although students subjected to the ID Policy in the classroom are affected most directly, courts have never defined Establishment Clause violations in public schools so narrowly as to limit standing to only those students immediately subjected to the offensive content. *See Santa Fe Independent Sch. Dist. v. Doe,* 530 U.S. 290, 313–14, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (very adoption or passage of a policy that violates the Establishment Clause represents a constitutional injury). We therefore find that all Plaintiffs have standing to bring their claims in this action.

2. We note that the ages of Plaintiffs' children are expressed as of the time this lawsuit was filed in December 2004.

The Defendants include the Dover Area School District (hereinafter "DASD") and Dover Area School District Board of Directors (hereinafter "the Board") (collectively***711** "Defendants"). Defendant DASD is a municipal corporation governed by a board of directors, which is the Board. The DASD is comprised of Dover Township, Washington Township, and Dover Borough, all of which are located in York County, Pennsylvania. There are approximately 3,700 students in the DASD, with approximately 1,000 attending Dover High School. (Joint Stip. of Fact ¶ 3).

The trial commenced September 26, 2005 and continued through November 4, 2005. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law which are based upon the Court's review of the evidence presented at trial, the testimony of the witnesses at trial, the parties' proposed findings of fact and conclusions of law with supporting

briefs, other documents and evidence in the record, and applicable law.[3] Further orders and judgments will be in conformity with this opinion.

> 3. The Court has received numerous letters, amicus briefs, and other forms of correspondence pertaining to this case. The only documents submitted by third parties the Court has considered, however, are those that have become an official part of the record. Consistent with the foregoing, the Court has taken under consideration the following: (1) Brief of Amici Curiae Biologists and Other Scientists in Support of Defendants (doc. 245); (2) Revised Brief of Amicus Curiae, the Discovery Institute (doc. 301); (3) Brief of Amicus Curiae the Foundation for Thought and Ethics (doc. 309); and (4) Brief for Amicus Curiae Scipolicy Journal of Science and Health Policy (doc. 312).

The Court accordingly grants the outstanding Motions for Leave to File Amicus Briefs, namely the Motion for Leave to File a Revised Amicus Brief by The Discovery Institute (doc. 301), the Motion for Leave to File Amicus Brief by The Foundation for Thought and Ethics (doc. 309), and the Petition for Leave to File Amicus Curiae Brief by Scipolicy Journal of Science and Health Policy (doc. 312).

C. *Federal Jurisprudential Legal Landscape*

As we will review the federal jurisprudential legal landscape in detail below, we will accordingly render only an abbreviated summary of that terrain by way of an introduction at this juncture. The religious movement known as Fundamentalism began in nineteenth century America as a response to social changes, new religious thought and Darwinism. *McLean v. Ark. Bd. of Educ.,* 529 F.Supp. 1255, 1258 (E.D.Ark.1982). Religiously motivated groups pushed state legislatures to adopt laws prohibiting public schools from teaching evolution, culminating in the *Scopes* "monkey trial" of 1925. *McLean,* 529 F.Supp. at 1259; *see Scopes v. State,* 154 Tenn. 105, 289 S.W. 363 (1927) (criminal prosecution of public-school teacher for teaching about evolution).

In 1968, a radical change occurred in the legal landscape when in *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), the Supreme Court struck down Arkansas's statutory prohibition against teaching evolution. Religious proponents of evolution thereafter championed "balanced treatment" statutes requiring public-school teachers who taught evolution to devote equal time to teaching the biblical view of creation; however, courts realized this tactic to be another attempt to establish the Biblical version of the creation of man. *Daniel v. Waters,* 515 F.2d 485 (6th Cir.1975).

Fundamentalist opponents of evolution responded with a new tactic suggested by *Daniel's* reasoning which was ultimately found to be unconstitutional under the First Amendment, namely, to utilize scientific-sounding language to describe religious beliefs and then to require that schools teach the resulting "creation science"***712** or "scientific creationism" as an alternative to evolution.

In *Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), five years after *McLean,* the Supreme Court held that a requirement that public schools teach "creation

science" along with evolution violated the Establishment Clause. The import of *Edwards* is that the Supreme Court turned the proscription against teaching creation science in the public school system into a national prohibition.

D. *Consideration of the Applicability of the Endorsement and Lemon Tests to Assess the Constitutionality of the ID Policy*

Having briefly touched upon the salient legal framework, it is evident that as the cases and controversies have evolved over time, so too has the methodology that courts employ in evaluating Establishment Clause claims. We initially observe that the Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The prohibition against the establishment of religion applies to the states through the Fourteenth Amendment. *Modrovich v. Allegheny County,* 385 F.3d 397, 400 (3d Cir.2004); *see also Wallace v. Jaffree,* 472 U.S. 38, 49–50, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). The parties are in agreement that an applicable test in the case *sub judice* to ascertain whether the challenged ID Policy is unconstitutional under the First Amendment is that of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2125, 29 L.Ed.2d 745 (1971), (hereinafter "the *Lemon* test"). *See Edwards,* 482 U.S. 578, 107 S.Ct. 2573 (applying *Lemon* test to strike down Louisiana's "Creationism Act"); *see also Epperson,* 393 U.S. 97, 89 S.Ct. 266 (considering the purpose and the primary effect of an Arkansas statute forbidding the teaching of evolution in public schools). Defendants, however, object to using the endorsement test, first arguing that it applies only to religious-display cases and most recently asserting that it applies to limited Establishment Clause cases, including a policy or practice in question that involves: a facially religious display, an overtly religious group or organization using government facilities, the provision of public funding or government resources to overly religious groups engaged in religious activity, or the permission of an overtly religious practice.

After a searching review of Supreme Court and Third Circuit Court of Appeals precedent, it is apparent to this Court that both the endorsement test and the *Lemon* test should be employed in this case to analyze the constitutionality of the ID Policy under the Establishment Clause, for the reasons that follow.

Since a majority of the Supreme Court first implemented the endorsement test in *County of Allegheny v. ACLU,* 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), the Supreme Court and the Third Circuit have consistently applied the test to all types of Establishment Clause cases, notably cases involving religion in public-school settings. In *Santa Fe Independent Sch. Dist. v. Doe,* 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), the Supreme Court applied the endorsement test to school-sponsored prayer at high school football games. In *Santa Fe,* the Supreme Court clearly defined the endorsement test by noting that "[i]n cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state ***713** endorsement of prayer in public schools.' " *Id.* at 308, 120 S.Ct. 2266. The Supreme Court then provided a more concrete explanation of how the test functions in the public-school context, explaining that:

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Id. at 309–10, 120 S.Ct. 2266 (quoting *Lynch v. Donnelly,* 465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)). In *Zelman v. Simmons–Harris,* 536 U.S. 639, 652–53, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002), the Supreme Court applied the endorsement test to a school-voucher program. In *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 118–19, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), the Supreme Court applied the test to a school district's policy regarding a religious student club meeting on school property. In *Mitchell v. Helms,* 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), and *Agostini v. Felton,* 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), the Supreme Court applied the test to programs providing governmental aid to parochial schools. In *Rosenberger v. Rector & Visitors of the University of Virginia,* 515 U.S. 819, 841–42, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Supreme Court applied the endorsement test to a public university's policy regarding funding a religious student newspaper.

Defendants maintain that this Court should not apply the endorsement test to the challenged ID Policy because the Supreme Court did not apply the test to the creationism statutes at issue in *Epperson* and *Edwards.* As Plaintiffs aptly state however, *Epperson* was decided in 1968, five years before *Lemon,* and accordingly nearly two decades before Justice O'Connor first began to articulate the endorsement test as a way to conceptualize *Lemon.* In addition, not only did *Edwards* likewise pre-date the test's adoption in *Allegheny,* but contrary to Defendants' assertion, the Supreme Court did invoke at least the endorsement concept in that case. *See Edwards,* 482 U.S. at 585, 107 S.Ct. 2573 ("If the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria [of *Lemon*] is necessary.' ") (quoting *Wallace,* 472 U.S. at 56, 105 S.Ct. 2479). Moreover, it is notable that *Edwards* was a "purpose" case, so it would have been unnecessary for the Supreme Court to delve into a full-scale endorsement analysis even had the test existed at the time, as the test is most closely associated with *Lemon's* "effect" prong, rather than its "purpose" prong.

A review of the above cited Supreme Court cases reveals that none of them involve a challenge to a religious display, yet in each such case, the Supreme Court reviewed the challenged governmental conduct to ascertain whether it constituted religious endorsement. Additionally, in each cited case, the Supreme Court reviewed a public school district's, or public university's, policy touching on religion. It is readily apparent to this Court that based upon Supreme Court precedent, the endorsement test must be utilized by us in our resolution of this case.

Applicable Third Circuit Court of Appeals precedent regarding application of the endorsement test to cases involving public school policies confirms our conclusion regarding its applicability to the instant dispute. In *Child Evangelism Fellowship v. Stafford Township Sch. Dist.,* 386 F.3d 514 (3d Cir.2004), the Third Circuit employed the endorsement test in considering ***714** whether

a public school district would violate the Establishment Clause if it permitted religious groups to access students through a take-home-flyer system or a back-to-school night event. Also, in *ACLU v. Black Horse Pike Reg'l Bd. of Educ.,* 84 F.3d 1471 (3d Cir.1996), the Third Circuit applied the endorsement test in considering a challenge to a school board policy concerning whether prayer would be included in high school graduation ceremonies. In *Black Horse Pike,* the Third Circuit clearly stated that its duty was to "determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." *Id.* at 1486.

Our next task is to determine how to apply both the endorsement test and the *Lemon* test to the ID Policy. We are in agreement with Plaintiffs that the better practice is to treat the endorsement inquiry as a distinct test to be applied separately from, and prior to, the *Lemon* test. In recent Third Circuit cases, specifically, *Freethought Society v. Chester County,* 334 F.3d 247, 261 (3d Cir.2003), *Modrovich,* 385 F.3d at 401–04, 406–13, and *Child Evangelism,* 386 F.3d at 530–35, the court adopted the practice of applying both tests. The Third Circuit conducted the endorsement inquiry first and subsequently measured the challenged conduct against *Lemon's* "purpose" and "effect" standards.[4]

> 4. We do note that because of the evolving caselaw regarding which tests to apply, the "belt and suspenders" approach of utilizing both tests makes good sense. That said, it regrettably tasks us to make this narrative far longer than we would have preferred.

We will therefore initially analyze the constitutionality of the ID Policy under the endorsement test and will then proceed to the *Lemon* test as it applies to this case.

E. *Application of the Endorsement Test to the ID Policy*

The endorsement test recognizes that when government transgresses the limits of neutrality and acts in ways that show religious favoritism or sponsorship, it violates the Establishment Clause. As Justice O'Connor first elaborated on this issue, the endorsement test was a gloss on *Lemon* that encompassed both the purpose and effect prongs:

> The central issue in this case is whether [the government] has endorsed [religion] by its [actions].
>
> To answer that question, we must examine both what [the government] intended to communicate ... and what message [its conduct] actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the [government's] action.

Lynch, 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring).

As the endorsement test developed through application, it is now primarily a lens through which to view "effect," with purpose evidence being relevant to the inquiry derivatively. In *Allegheny,* the Supreme Court instructed that the word "endorsement is not self-defining" and

further elaborated that it derives its meaning from other words that the Court has found useful over the years in interpreting the Establishment Clause. 492 U.S. at 593, 109 S.Ct. 3086. The endorsement test emanates from the "prohibition against government endorsement of religion" and it "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred.*" *Id.* (citations omitted) (emphasis in original). The test consists of the reviewing court determining what message a challenged governmental ***715** policy or enactment conveys to a reasonable, objective observer who knows the policy's language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose. *McCreary County, Ky. v. ACLU,* 545 U.S. 844, 125 S.Ct. 2722, 2736–37, 162 L.Ed.2d 729 (2005) (objective observer "presumed to be familiar with the history of the government's actions and competent to learn what history has to show"); *Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266 (objective observer familiar with "implementation of" governmental action); *Selman,* 390 F.Supp.2d at 1306 (objective observer "familiar with the origins and context of the government-sponsored message at issue and the history of the community where the message is displayed").

In elaborating upon this "reasonable observer," the Third Circuit explained in *Modrovich,* 385 F.3d at 407, that "the reasonable observer is an informed citizen who is more knowledgeable than the average passerby." Moreover, in addition to knowing the challenged conduct's history, the observer is deemed able to "glean other relevant facts" from the face of the policy in light of its context. *Id.* at 407; *accord Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 779–781, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'Connor, J., concurring). Knowing the challenged policy's legislative history, the community's history, and the broader social and historical context in which the policy arose, the objective observer thus considers the publicly available evidence relevant to the purpose inquiry, but notably does not do so to ascertain, strictly speaking, what the governmental purpose actually was. *See, e.g., Selman,* 390 F.Supp.2d at 1306–07. Instead, the observer looks to that evidence to ascertain whether the policy "in fact conveys a message of endorsement or disapproval" of religion, irrespective of what the government might have intended by it. *Lynch,* 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring) ("The central issue in this case is whether [government] has endorsed Christianity by its [actions]. To answer that question, we must examine both what [the government] intended to communicate ... and what message [its conduct] actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the [government's] action."); *Freiler v. Tangipahoa Parish Bd. of Educ.,* 975 F.Supp. 819 (E.D.La.1997), *aff'd,* 185 F.3d 337 (5th Cir.1999); *Selman,* 390 F.Supp.2d at 1305–06.

We must now ascertain whether the ID Policy "in fact conveys a message of endorsement or disapproval" of religion, with the reasonable, objective observer being the hypothetical construct to consider this issue. *Lynch,* 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring). As the endorsement test is designed to ascertain the objective meaning of the statement that the District's conduct communicated in the community by focusing on how "the members of the listening audience" perceived the conduct, two inquiries must be made based upon the circumstances of this case. *Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266. First, we will consider "the message conveyed by the disclaimer to the students who are its intended

audience," from the perspective of an objective Dover Area High School student. At a minimum, the pertinent inquiry is whether an "objective observer" in the position of a student of the relevant age would "perceive official school support" for the religious activity in question. *Verbena United Methodist Church v. Chilton County Bd. of Educ.,* 765 F.Supp. 704, 711 (M.D.Ala.1991) (quoting *Bd. of Educ. of Westside Comm. Schools v. Mergens,* 496 U.S. 226, 249, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990)). We ***716** find it incumbent upon the Court to additionally judge Defendants' conduct from the standpoint of a reasonable, objective adult observer. This conclusion is based, in part, upon the revelation at trial that a newsletter explaining the ID Policy in detail was mailed by the Board to every household in the District, as well as the Board members' discussion and defense of the curriculum change in public school board meetings and in the media.

1. *An Objective Observer Would Know that ID and Teaching About "Gaps" and "Problems" in Evolutionary Theory are Creationist, Religious Strategies that Evolved from Earlier Forms of Creationism*

The history of the intelligent design movement (hereinafter "IDM") and the development of the strategy to weaken education of evolution by focusing students on alleged gaps in the theory of evolution is the historical and cultural background against which the Dover School Board acted in adopting the challenged ID Policy. As a reasonable observer, whether adult or child, would be aware of this social context in which the ID Policy arose, and such context will help to reveal the meaning of Defendants' actions, it is necessary to trace the history of the IDM.

It is essential to our analysis that we now provide a more expansive account of the extensive and complicated federal jurisprudential legal landscape concerning opposition to teaching evolution, and its historical origins. As noted, such opposition grew out of a religious tradition, Christian Fundamentalism that began as part of evangelical Protestantism's response to, among other things, Charles Darwin's exposition of the theory of evolution as a scientific explanation for the diversity of species. *McLean,* 529 F.Supp. at 1258; *see also, e.g., Edwards,* 482 U.S. at 590–92, 107 S.Ct. 2573. Subsequently, as the United States Supreme Court explained in *Epperson,* in an "upsurge of fundamentalist religious fervor of the twenties," 393 U.S. at 98, 89 S.Ct. 266 (citations omitted), state legislatures were pushed by religiously motivated groups to adopt laws prohibiting public schools from teaching evolution. *McLean,* 529 F.Supp. at 1259; *see Scopes,* 154 Tenn. 105, 289 S.W. 363 (1927). Between the 1920's and early 1960's, anti-evolutionary sentiment based upon a religious social movement resulted in formal legal sanctions to remove evolution from the classroom. *McLean,* 529 F.Supp. at 1259 (discussing a subtle but pervasive influence that resulted from anti-evolutionary sentiment concerning teaching biology in public schools).

As we previously noted, the legal landscape radically changed in 1968 when the Supreme Court struck down Arkansas's statutory prohibition against teaching evolution in *Epperson*, 393 U.S. 97, 89 S.Ct. 266. Although the Arkansas statute at issue did not include direct references to the Book of Genesis or to the fundamentalist view that religion should be protected from science, the Supreme Court concluded that "the motivation of the [Arkansas] law was the same ...: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man."

Edwards, 482 U.S. at 590, 107 S.Ct. 2573 (quoting *Epperson,* 393 U.S. at 109, 89 S.Ct. 266) (Arkansas sought to prevent its teachers from discussing the theory of evolution as it is contrary to the belief of some regarding the Book of Genesis.).

Post-*Epperson,* evolution's religious opponents implemented "balanced treatment" statutes requiring public school teachers who taught evolution to devote equal time to teaching the biblical view of creation; however, such statutes did not pass constitutional muster under the Establishment***717** Clause. *See, e.g., Daniel,* 515 F.2d at 487, 489, 491. In *Daniel,* the Sixth Circuit Court of Appeals held that by assigning a "preferential position for the Biblical version of creation" over "any account of the development of man based on scientific research and reasoning," the challenged statute officially promoted religion, in violation of the Establishment Clause. *Id.* at 489.

Next, and as stated, religious opponents of evolution began cloaking religious beliefs in scientific sounding language and then mandating that schools teach the resulting "creation science" or "scientific creationism" as an alternative to evolution. However, this tactic was likewise unsuccessful under the First Amendment. "Fundamentalist organizations were formed to promote the idea that the Book of Genesis was supported by scientific data. The terms 'creation science' and 'scientific creationism' have been adopted by these Fundamentalists as descriptive of their study of creation and the origins of man." *McLean,* 529 F.Supp. at 1259. In 1982, the district court in *McLean* reviewed Arkansas's balanced-treatment law and evaluated creation science in light of *Scopes, Epperson*, and the long history of Fundamentalism's attack on the scientific theory of evolution, as well as the statute's legislative history and historical context. The court found that creation science organizations were fundamentalist religious entities that "consider[ed] the introduction of creation science into the public schools part of their ministry." *Id.* at 1260. The court in *McLean* stated that creation science rested on a "contrived dualism" that recognized only two possible explanations for life, the scientific theory of evolution and biblical creationism, treated the two as mutually exclusive such that "one must either accept the literal interpretation of Genesis or else believe in the godless system of evolution," and accordingly viewed any critiques of evolution as evidence that necessarily supported biblical creationism. *Id.* at 1266. The court concluded that creation science "is simply not science" because it depends upon "supernatural intervention," which cannot be explained by natural causes, or be proven through empirical investigation, and is therefore neither testable nor falsifiable. *Id.* at 1267. Accordingly, the United States District Court for the Eastern District of Arkansas deemed creation science as merely biblical creationism in a new guise and held that Arkansas' balanced-treatment statute could have no valid secular purpose or effect, served only to advance religion, and violated the First Amendment. *Id.* at 1264, 1272–74.

Five years after *McLean* was decided, in 1987, the Supreme Court struck down Louisiana's balanced-treatment law in *Edwards* for similar reasons. After a thorough analysis of the history of fundamentalist attacks against evolution, as well as the applicable legislative history including statements made by the statute's sponsor, and taking the character of organizations advocating for creation science into consideration, the Supreme Court held that the state violated the Establishment Clause by "restructur[ing] the science curriculum to conform with a

particular religious viewpoint." *Edwards,* 482 U.S. at 593, 107 S.Ct. 2573.

Among other reasons, the Supreme Court in *Edwards* concluded that the challenged statute did not serve the legislature's professed purposes of encouraging academic freedom and making the science curriculum more comprehensive by "teaching all of the evidence" regarding origins of life because: the state law already allowed schools to teach any scientific theory, which responded to the alleged purpose of academic freedom; and if the legislature really had intended to make science education***718** more comprehensive, "it would have encouraged the teaching of all scientific theories about the origins of humankind" rather than permitting schools to forego teaching evolution, but mandating that schools that teach evolution must also teach creation science, an inherently religious view. *Id.* at 586, 588–89, 107 S.Ct. 2573. The Supreme Court further held that the belief that a supernatural creator was responsible for the creation of human kind is a religious viewpoint and that the Act at issue "advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety." *Id.* at 591, 596, 107 S.Ct. 2573. Therefore, as noted, the import of *Edwards* is that the Supreme Court made national the prohibition against teaching creation science in the public school system.

The concept of intelligent design (hereinafter "ID"), in its current form, came into existence after the *Edwards* case was decided in 1987. For the reasons that follow, we conclude that the religious nature of ID would be readily apparent to an objective observer, adult or child.

We initially note that John Haught, a theologian who testified as an expert witness for Plaintiffs and who has written extensively on the subject of evolution and religion, succinctly explained to the Court that the argument for ID is not a new scientific argument, but is rather an old religious argument for the existence of God. He traced this argument back to at least Thomas Aquinas in the 13th century, who framed the argument as a syllogism: Wherever complex design exists, there must have been a designer; nature is complex; therefore nature must have had an intelligent designer. (Trial Tr. vol. 9, Haught Test., 7–8, Sept. 30, 2005). Dr. Haught testified that Aquinas was explicit that this intelligent designer "everyone understands to be God." *Id.* The syllogism described by Dr. Haught is essentially the same argument for ID as presented by defense expert witnesses Professors Behe and Minnich who employ the phrase "purposeful arrangement of parts."

Dr. Haught testified that this argument for the existence of God was advanced early in the 19th century by Reverend Paley and defense expert witnesses Behe and Minnich admitted that their argument for ID based on the "purposeful arrangement of parts" is the same one that Paley made for design. (9:7–8 (Haught); Trial Tr. vol. 23, Behe Test., 55–57, Oct. 19, 2005; Trial Tr. vol. 38, Minnich Test., 44, Nov. 4, 2005). The only apparent difference between the argument made by Paley and the argument for ID, as expressed by defense expert witnesses Behe and Minnich, is that ID's "official position" does not acknowledge that the designer is God. However, as Dr. Haught testified, anyone familiar with Western religious thought would immediately make the association that the tactically unnamed designer is God, as the description of the designer in *Of*

Pandas and People (hereinafter " *Pandas* ") is a "master intellect," strongly suggesting a supernatural deity as opposed to any intelligent actor known to exist in the natural world. (P–11 at 85). Moreover, it is notable that both Professors Behe and Minnich admitted their personal view is that the designer is God and Professor Minnich testified that he understands many leading advocates of ID to believe the designer to be God. (21:90 (Behe); 38:36–38 (Minnich)).

Although proponents of the IDM occasionally suggest that the designer could be a space alien or a time-traveling cell biologist, no serious alternative to God as the designer has been proposed by members ***719** of the IDM, including Defendants' expert witnesses. (20:102–03 (Behe)). In fact, an explicit concession that the intelligent designer works outside the laws of nature and science and a direct reference to religion is *Pandas* ' rhetorical statement, "what kind of intelligent agent was it [the designer]" and answer: "On its own science cannot answer this question. It must leave it to religion and philosophy." (P–11 at 7; 9:13–14 (Haught)).

A significant aspect of the IDM is that despite Defendants' protestations to the contrary, it describes ID as a religious argument. In that vein, the writings of leading ID proponents reveal that the designer postulated by their argument is the God of Christianity. Dr. Barbara Forrest, one of Plaintiffs' expert witnesses, is the author of the book *Creationism's Trojan Horse.* She has thoroughly and exhaustively chronicled the history of ID in her book and other writings for her testimony in this case. Her testimony, and the exhibits which were admitted with it, provide a wealth of statements by ID leaders that reveal ID's religious, philosophical, and cultural content. The following is a representative grouping of such statements made by prominent ID proponents.[5]

5. Defendants contend that the Court should ignore all evidence of ID's lineage and religious character because the Board members do not personally know Jon Buell, President of the Foundation for Thought and Ethics (hereinafter "FTE"), the publisher of *Pandas,* or Phillip Johnson, nor are they familiar with the Wedge Document or the drafting history of *Pandas.* Defendants' argument lacks merit legally and logically.

The evidence that Defendants are asking this Court to ignore is exactly the sort that the court in *McLean* considered and found dispositive concerning the question of whether creation science was a scientific view that could be taught in public schools, or a religious one that could not. The *McLean* court considered writings and statements by creation science advocates like Henry Morris and Duane Gish, as well as the activities and mission statements of creationist think-tanks like the Biblical Science Association, the Institution for Creation Research, and the Creation Science Research Center. *McLean,* 529 F.Supp. at 1259–60. The court did not make the relevance of such evidence conditional on whether the Arkansas Board of Education knew the information. Instead, the court treated the evidence as speaking directly to the threshold question of what creation science was. Moreover, in *Edwards,* the Supreme Court adopted *McLean's* analysis of such evidence without reservation, and without any discussion of which details about creation science the defendant school board actually knew. *Edwards,* 482

U.S. at 590 n. 9, 107 S.Ct. 2573.

Phillip Johnson, considered to be the father of the IDM, developer of ID's "Wedge Strategy," which will be discussed below, and author of the 1991 book entitled *Darwin on Trial,* has written that "theistic realism" or "mere creation" are defining concepts of the IDM. This means "that God is objectively real as Creator and recorded in the biological evidence ..." (Trial Tr. vol. 10, Forrest Test., 80–81, Oct. 5, 2005; P–328). In addition, Phillip Johnson states that the "Darwinian theory of evolution contradicts not just the Book of Genesis, but every word in the Bible from beginning to end. It contradicts the idea that we are here because a creator brought about our existence for a purpose." (11:16–17 (Forrest); P–524 at 1). ID proponents Johnson, William Dembski, and Charles Thaxton, one of the editors of *Pandas,* situate ID in the Book of John in the New Testament of the Bible, which begins, "In the Beginning was the Word, and the Word was God." (11:18–20, 54–55 (Forrest); P–524; P–355; P–357). Dembski has written that ID is a "ground clearing operation" to allow Christianity to receive serious consideration, and "Christ is never an addendum to a scientific theory but always a completion." (11:50–53 (Forrest);***720** P–386; P–390). Moreover, in turning to Defendants' lead expert, Professor Behe, his testimony at trial indicated that ID is only a scientific, as opposed to a religious, project for him; however, considerable evidence was introduced to refute this claim. Consider, to illustrate, that Professor Behe remarkably and unmistakably claims that the *plausibility of the argument for ID depends upon the extent to which one believes in the existence of God.* (P–718 at 705) (emphasis added). As no evidence in the record indicates that any other scientific proposition's validity rests on belief in God, nor is the Court aware of any such scientific propositions, Professor Behe's assertion constitutes substantial evidence that in his view, as is commensurate with other prominent ID leaders, ID is a religious and not a scientific proposition.

Dramatic evidence of ID's religious nature and aspirations is found in what is referred to as the "Wedge Document." The Wedge Document, developed by the Discovery Institute's Center for Renewal of Science and Culture (hereinafter "CRSC"), represents from an institutional standpoint, the IDM's goals and objectives, much as writings from the Institute for Creation Research did for the earlier creation-science movement, as discussed in *McLean.* (11:26–28 (Forrest)); *McLean,* 529 F.Supp. at 1255. The Wedge Document states in its "Five Year Strategic Plan Summary" that the IDM's goal is to replace science as currently practiced with "theistic and Christian science." (P–140 at 6). As posited in the Wedge Document, the IDM's "Governing Goals" are to "defeat scientific materialism and its destructive moral, cultural, and political legacies" and "to replace materialistic explanations with the theistic understanding that nature and human beings are created by God." *Id.* at 4. The CSRC expressly announces, in the Wedge Document, a program of Christian apologetics to promote ID. A careful review of the Wedge Document's goals and language throughout the document reveals cultural and religious goals, as opposed to scientific ones. (11:26–48 (Forrest); P–140). ID aspires to change the ground rules of science to make room for religion, specifically, beliefs consonant with a particular version of Christianity.

In addition to the IDM itself describing ID as a religious argument, ID's religious nature is

evident because it involves a supernatural designer. The courts in *Edwards* and *McLean* expressly found that this characteristic removed creationism from the realm of science and made it a religious proposition. *Edwards,* 482 U.S. at 591–92, 107 S.Ct. 2573; *McLean,* 529 F.Supp. at 1265–66. Prominent ID proponents have made abundantly clear that the designer is supernatural.

Defendants' expert witness ID proponents confirmed that the existence of a supernatural designer is a hallmark of ID. First, Professor Behe has written that by ID he means "not designed by the laws of nature," and that it is "implausible that the designer is a natural entity." (P–647 at 193; P–718 at 696, 700). Second, Professor Minnich testified that for ID to be considered science, the ground rules of science have to be broadened so that supernatural forces can be considered. (38:97 (Minnich)). Third, Professor Steven William Fuller testified that it is ID's project to change the ground rules of science to include the supernatural. (Trial Tr. vol. 28, Fuller Test., 20–24, Oct. 24, 2005). Turning from defense expert witnesses to leading ID proponents, Johnson has concluded that science must be redefined to include the supernatural if religious challenges to evolution are to get a hearing. (11:8–15 (Forrest); P–429). Additionally, Dembski agrees that science is ruled by methodological naturalism and argues that ****721*** this rule must be overturned if ID is to prosper. (Trial Tr. vol. 5, Pennock Test., 32–34, Sept. 28, 2005).

Further support for the proposition that ID requires supernatural creation is found in the book *Pandas,* to which students in Dover's ninth grade biology class are directed. *Pandas* indicates that there are two kinds of causes, natural and intelligent, which demonstrate that intelligent causes are beyond nature. (P–11 at 6). Professor Haught, who as noted was the only theologian to testify in this case, explained that in Western intellectual tradition, non-natural causes occupy a space reserved for ultimate religious explanations. (9:13–14 (Haught)). Robert Pennock, Plaintiffs' expert in the philosophy of science, concurred with Professor Haught and concluded that because its basic proposition is that the features of the natural world are produced by a transcendent, immaterial, non-natural being, ID is a religious proposition regardless of whether that religious proposition is given a recognized religious label. (5:55–56 (Pennock)). It is notable that not one defense expert was able to explain how the supernatural action suggested by ID could be anything other than an inherently religious proposition. Accordingly, we find that ID's religious nature would be further evident to our objective observer because it directly involves a supernatural designer.

A "hypothetical reasonable observer," adult or child, who is "aware of the history and context of the community and forum" is also presumed to know that ID is a form of creationism. *Child Evangelism,* 386 F.3d at 531 (citations omitted); *Allegheny,* 492 U.S. at 624–25, 109 S.Ct. 3086. The evidence at trial demonstrates that ID is nothing less than the progeny of creationism. What is likely the strongest evidence supporting the finding of ID's creationist nature is the history and historical pedigree of the book to which students in Dover's ninth grade biology class are referred, *Pandas. Pandas* is published by an organization called FTE, as noted, whose articles of incorporation and filings with the Internal Revenue Service describe it as a religious, Christian organization. (P–461; P–28; P–566; P–633; Buell Dep. 1:13, July 8, 2005). *Pandas* was

written by Dean Kenyon and Percival Davis, both acknowledged creationists, and Nancy Pearcey, a Young Earth Creationist, contributed to the work. (10:102–08 (Forrest)).

As Plaintiffs meticulously and effectively presented to the Court, *Pandas* went through many drafts, several of which were completed prior to and some after the Supreme Court's decision in *Edwards,* which held that the Constitution forbids teaching creationism as science. By comparing the pre and post *Edwards* drafts of *Pandas,* three astonishing points emerge: (1) the definition for creation science in early drafts is identical to the definition of ID; (2) cognates of the word creation (creationism and creationist), which appeared approximately 150 times were deliberately and systematically replaced with the phrase ID; and (3) the changes occurred shortly after the Supreme Court held that creation science is religious and cannot be taught in public school science classes in *Edwards.* This word substitution is telling, significant, and reveals that a purposeful change of *words* was effected without any corresponding change in *content,* which directly refutes FTE's argument that by merely disregarding the words "creation" and "creationism," FTE expressly rejected creationism in *Pandas.* In early pre-*Edwards* drafts of *Pandas,* the term "creation" was defined as "various forms of life that began abruptly through an intelligent agency with their distinctive features intact—fish with fins and scales, birds with feathers, beaks, and ***722** wings, etc.," the very same way in which ID is defined in the subsequent published versions. (P–560 at 210; P–1 at 2–13; P–562 at 2–14, P–652 at 2–15; P–6 at 99–100; P–11 at 99–100; P–856.2.). This definition was described by many witnesses for both parties, notably including defense experts Minnich and Fuller, as "special creation" of kinds of animals, an inherently religious and creationist concept. (28:85–86 (Fuller); Minnich Dep. at 34, May 26, 2005; Trial Tr. vol. 1, Miller Test., 141–42, Sept. 26, 2005; 9:10 (Haught); Trial Tr. vol. 33, Bonsell Test., 54–56, Oct. 31, 2005). Professor Behe's assertion that this passage was merely a *description* of appearances in the fossil record is illogical and defies the weight of the evidence that the passage is a conclusion about how life began based upon an *interpretation* of the fossil record, which is reinforced by the content of drafts of *Pandas.*

The weight of the evidence clearly demonstrates, as noted, that the systemic change from "creation" to "intelligent design" occurred sometime in 1987, *after* the Supreme Court's important *Edwards* decision. This compelling evidence strongly supports Plaintiffs' assertion that ID is creationism re-labeled. Importantly, the objective observer, whether adult or child, would conclude from the fact that *Pandas* posits a master intellect that the intelligent designer is God.

Further evidence in support of the conclusion that a reasonable observer, adult or child, who is "aware of the history and context of the community and forum" is presumed to know that ID is a form of creationism concerns the fact that ID uses the same, or exceedingly similar arguments as were posited in support of creationism. One significant difference is that the words "God," "creationism," and "Genesis" have been systematically purged from ID explanations, and replaced by an unnamed "designer." Dr. Forrest testified and sponsored exhibits showing six arguments common to creationists. (10:140–48 (Forrest); P–856.5–856.10). Demonstrative charts introduced through Dr. Forrest show parallel arguments relating to the rejection of naturalism, evolution's threat to culture and society, "abrupt appearance" implying divine

creation, the exploitation of the same alleged gaps in the fossil record, the alleged inability of science to explain complex biological information like DNA, as well as the theme that proponents of each version of creationism merely aim to teach a scientific alternative to evolution to show its "strengths and weaknesses," and to alert students to a supposed "controversy" in the scientific community. (10:140–48 (Forrest)). In addition, creationists made the same argument that the complexity of the bacterial flagellum supported creationism as Professors Behe and Minnich now make for ID. (P–853; P–845; 37:155–56 (Minnich)). The IDM openly welcomes adherents to creationism into its "Big Tent," urging them to postpone biblical disputes like the age of the earth. (11:3–15 (Forrest); P–429). Moreover and as previously stated, there is hardly better evidence of ID's relationship with creationism than an explicit statement by defense expert Fuller that ID is a form of creationism. (Fuller Dep. at 67, June 21, 2005) (indicated that ID is a modern view of creationism).

Although contrary to Fuller, defense experts Professors Behe and Minnich testified that ID is not creationism, their testimony was primarily by way of bare assertion and it failed to directly rebut the creationist history of *Pandas* or other evidence presented by Plaintiffs showing the commonality between creationism and ID. The sole argument Defendants made to distinguish creationism from ID was their assertion that the term "creationism" applies only to arguments based on the ***723** Book of Genesis, a young earth, and a catastrophic Noaich flood; however, substantial evidence established that this is only one form of creationism, including the chart that was distributed to the Board Curriculum Committee, as will be described below. (P–149 at 2; 10:129–32 (Forrest); P–555 at 22–24).

Having thus provided the social and historical context in which the ID Policy arose of which a reasonable observer, either adult or child would be aware, we will now focus on what the objective student alone would know. We will accordingly determine whether an objective student would view the disclaimer read to the ninth grade biology class as an official endorsement of religion.

2. *Whether an Objective Student Would View the Disclaimer as a Official Endorsement of Religion*

The Supreme Court instructed in *Edwards* that it has been particularly "vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." 482 U.S. at 583–84, 107 S.Ct. 2573. The Supreme Court went on to state that:

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Id. (citing *Grand Rapids Sch. Dist. v. Ball,* 473 U.S. 373, 383, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985); *Wallace,* 472 U.S. at 60 n. 51, 105 S.Ct. 2479).

In ascertaining whether an objective Dover High School ninth grade student would view the

disclaimer as an official endorsement of religion, it is important to note that a reasonable, objective student is not a specific, actual student, or even an amalgam of actual students, but is instead a hypothetical student, one to whom the reviewing court imputes detailed historical and background knowledge, but also one who interprets the challenged conduct in light of that knowledge with the level of intellectual sophistication that a child of the relevant age would bring to bear. *See, e.g., Child Evangelism,* 386 F.3d at 531 ("[A] reasonable observer, 'aware of the history and context of the community and forum,' would know that [the school district] has a policy of assisting a broad range of community groups, that [the district] plays no role in composing the flyers that are sent home and does not pay for them, and that [the district's] teachers do not discuss the flyers in class." This detailed, sophisticated knowledge was imputed to elementary-school students.)(internal citations omitted); *Good News,* 533 U.S. at 119, 121 S.Ct. 2093 (Admonished not to proscribe religious activity "on the basis of what the youngest members of the audience might perceive.").

Plaintiffs accurately submit that reviewing courts often make no distinction between an adult observer and a student observer when deciding whether a public school's conduct conveys an unconstitutional message of religious endorsement. However, when such a distinction is drawn, as is appropriate to do under the circumstances of this case, courts have recognized that because students are more impressionable than adults, they may be systematically less effective than adults at recognizing when religious conduct is unofficial and therefore permissible. *See, e.g., Selman,* 390 F.Supp.2d at 1311 (textbook sticker stating that evolution was theory was particularly likely to convey message of endorsement "given the Sticker's intended audience, impressionable school ****724*** students"); *Joki v. Bd. of Educ.,* 745 F.Supp. 823, 831 (N.D.N.Y.1990) ("To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed."). Accordingly, the objective student standard is a means to ensure that courts exercise the particular vigilance that the Supreme Court has mandated for protecting impressionable children from religious messages that appear to carry official imprimatur; it is not a tool for excluding or ignoring material evidence.

After a careful review of the record and for the reasons that follow, we find that an objective student would view the disclaimer as a strong official endorsement of religion. Application of the objective student standard pursuant to the endorsement test reveals that an objective Dover High School ninth grade student will unquestionably perceive the text of the disclaimer, "enlightened by its context and contemporary legislative history," as conferring a religious concept on "her school's seal of approval." *Selman,* 390 F.Supp.2d at 1300; *Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266; *Edwards,* 482 U.S. at 594, 107 S.Ct. 2573 (in addition to "[t]he plain meaning of the [enactment's] words, enlightened by their context and the contemporaneous legislative history," the Supreme Court also looks for legislative purpose in "the historical context of the [enactment], and the specific sequence of events leading to [its] passage")(internal citations omitted); *see also Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266 ("Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.").

We arrive at this conclusion by initially considering the plain language of the disclaimer, paragraph by paragraph. The first paragraph reads as follows:

The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.

P–124. The evidence in this case reveals that Defendants do not mandate a similar pronouncement about *any other aspect of the biology curriculum or the curriculum for any other course,* despite the fact that state standards directly address numerous other topics covered in the biology curriculum and the students' other classes, and despite the fact that standardized tests cover such other topics as well. Notably, the unrefuted testimony of Plaintiffs' science education expert Dr. Alters, the only such expert to testify in the case *sub judice* explains, and the testimony of Drs. Miller and Padian confirms, the message this paragraph communicates to ninth grade biology students is that:

> [W]e have to teach this stuff[.] The other stuff we're just going to teach you, but now this one we have to say the Pennsylvania academic standards require[ ] students to ... eventually take a test. We'd rather not do it, but Pennsylvania academic standards ... require students to do this.

Trial Tr. vol. 14, Alters Test., 110–11, Oct. 12, 2005.

Stated another way, the first paragraph of the disclaimer directly addresses and disavows evolutionary theory by telling students that they have to learn about evolutionary theory because it is required by “Pennsylvania Academic Standards” and it will be tested; however, no similar disclaimer prefacing instruction is conducted regarding any other portion of the biology***725** curriculum nor any other course's curriculum.

The second paragraph of the disclaimer reads as follows:

> Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

P–124. This paragraph singles out evolution from the rest of the science curriculum and informs students that evolution, unlike anything else that they are learning, is “just a theory,” which plays on the “colloquial or popular understanding of the term [‘theory’] and suggest[ing] to the informed, reasonable observer that evolution is only a highly questionable ‘opinion’ or a ‘hunch.’ ” *Selman,* 390 F.Supp.2d at 1310; 14:110–12 (Alters); 1:92 (Miller). Immediately after students are told that “Darwin's Theory” is a theory and that it continues to be tested, they are told that “gaps” exist within evolutionary theory without any indication that other scientific theories might suffer the same supposed weakness. As Dr. Alters explained this paragraph is

both misleading and creates misconceptions in students about evolutionary theory by misrepresenting the scientific status of evolution and by telling students that they should regard it as singularly unreliable, or on shaky ground. (14:117 (Alters)). Additionally and as pointed out by Plaintiffs, it is indeed telling that even defense expert Professor Fuller agreed with this conclusion by stating that in his own expert opinion the disclaimer is misleading. (Fuller Dep. 110–11, June 21, 2005). Dr. Padian bluntly and effectively stated that in confusing students about science generally and evolution in particular, the disclaimer makes students "stupid." (Trial Tr. vol. 17, Padian Test., 48–52, Oct. 14, 2005).

In summary, the second paragraph of the disclaimer undermines students' education in evolutionary theory and sets the groundwork for presenting students with the District's favored religious alternative.

Paragraph three of the disclaimer proceeds to present this alternative and reads as follows:

> Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

P–124. Students are therefore provided information that contrasts ID with "Darwin's *view* " and are directed to consult *Pandas* as though it were a scientific text that provided a scientific account of, and empirical scientific evidence for, ID. The theory or "view" of evolution, which has been discredited by the District in the student's eyes, is contrasted with an alternative "explanation," as opposed to a "theory," that can be offered without qualification or cautionary note. The alternative "explanation" thus receives markedly different treatment from evolutionary "theory." In other words, the disclaimer relies upon the very same "contrived dualism" that the court in *McLean* recognized to be a creationist tactic that has "no scientific factual basis or legitimate educational purpose." *McLean,* 529 F.Supp. at 1266. [6]

6. The *McLean* court explained that:

> The approach to teaching "creation science" and "evolution science" ... is identical to the two-model approach espoused by the Institute for Creation Research and is taken almost verbatim from ICR writings. It is an extension of Fundamentalists' view that one must either accept the literal interpretation of Genesis or else believe in the godless system of evolution.

The two model approach of creationists is simply a *contrived dualism* which has no scientific factual basis or legitimate educational purpose. It assumes only two explanations for the origins of life and existence of man, plants and animals: it was either the work of a creator or it was not. Application of these two models, according to creationists, and the defendants, dictates that all scientific evidence which fails to support the theory of evolution is necessarily scientific evidence in support of creationism and is, therefore, creation science "evidence[.]" 529 F.Supp. at 1266 (footnote omitted)(emphasis added).

***726** The overwhelming evidence at trial established that ID is a religious view, a mere re-labeling of creationism, and not a scientific theory. As the Fifth Circuit Court of Appeals held in *Freiler,* an educator's "reading of a disclaimer that not only disavows endorsement of educational materials but also juxtaposes that disavowal with an urging to contemplate alternative religious concepts implies School Board approval of religious principles." *Freiler,* 185 F.3d at 348.

In the fourth and final paragraph of the disclaimer, students are informed of the following:

> With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

P–124.

Plaintiffs accurately submit that the disclaimer mimics the one that the Fifth Circuit struck down as unconstitutional in *Freiler* in two key aspects. First, while encouraging students to keep an open mind and explore alternatives to evolution, it offers no scientific alternative; instead, the only alternative offered is an inherently religious one, namely, ID. *Freiler,* 185 F.3d at 344–47 (disclaimer urging students to "exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion" referenced "Biblical version of Creation" as the only alternative theory, thus "encourag[ing] students to read and meditate upon religion in general" and the "Biblical version of Creation" in particular.) Whether a student accepts the Board's invitation to explore *Pandas,* and reads a creationist text, or follows the Board's other suggestion and discusses "Origins of Life" with family members, that objective student can reasonably infer that the District's favored view is a religious one, and that the District is accordingly sponsoring a form of religion. Second, by directing students to their families to learn about the "Origins of Life," the paragraph performs the exact same function as did the *Freiler* disclaimer: It "reminds school children that they can rightly maintain beliefs taught by their parents on the subject of the origin of life," thereby stifling the critical thinking that the class's study of evolutionary theory might otherwise prompt, to protect a religious view from what the Board considers to be a threat. *Id.* at 345 (because disclaimer effectively told students "that evolution as taught in the classroom need not affect what they already know," it sent a message that was "contrary to an intent to encourage critical thinking, which requires that students approach new concepts with an open mind and willingness to alter and shift existing viewpoints").

A thorough review of the disclaimer's plain language therefore conveys a strong message of religious endorsement to an objective Dover ninth grade student.

The classroom presentation of the disclaimer provides further evidence that it ***727** conveys a message of religious endorsement. It is important to initially note that as a result of the

teachers' refusal to read the disclaimer, school administrators were forced to make special appearances in the science classrooms to deliver it. No evidence was presented by any witness that the Dover students are presented with a disclaimer of any type in any other topic in the curriculum. An objective student observer would accordingly be observant of the fact that the message contained in the disclaimer is special and carries special weight. In addition, the objective student would understand that the administrators are reading the statement because the biology teachers refused to do so on the ground that they are legally and ethically barred from misrepresenting a religious belief as science, as will be discussed below. (Trial Tr. vol. 25, Nilsen Test., 56–57, Oct. 21, 2005; Trial Tr. vol. 35, Baksa Test., 38, Nov. 2, 2005). This would provide the students with an additional reason to conclude that the District is advocating a religious view in biology class.

Second, the administrators made the remarkable and awkward statement, as part of the disclaimer, that “there will be no other discussion of the issue and your teachers will not answer questions on the issue.” (P–124). Dr. Alters explained that a reasonable student observer would conclude that ID is a kind of “secret science that students apparently can't discuss with their science teacher” which he indicated is pedagogically “about as bad as I could possibly think of.” (14:125–27 (Alters)). Unlike anything else in the curriculum, students are under the impression that the topic to which they are introduced in the disclaimer, ID, is so sensitive that the students and their teachers are completely barred from asking questions about it or discussing it.[7]

> 7. Throughout the trial and in various submissions to the Court, Defendants vigorously argue that the reading of the statement is not “teaching” ID but instead is merely “making students aware of it.” In fact, one consistency among the Dover School Board members' testimony, which was marked by selective memories and outright lies under oath, as will be discussed in more detail below, is that they did not think they needed to be knowledgeable about ID because it was not being taught to the students. We disagree.
>
> Dr. Alters, the District's own science teachers, and Plaintiffs Christy Rehm and Steven Stough, who are themselves teachers, all made it abundantly clear by their testimony that an educator reading the disclaimer is engaged in teaching, even if it is colossally bad teaching. *See, e.g.,* Trial Tr. vol. 6, C. Rehm Test., 77, Sept. 28, 2005; Trial Tr. vol. 15, Stough Test., 139–40, Oct. 12, 2005. Dr. Alters rejected Dover's explanation that its curriculum change and the statement implementing it are not teaching. The disclaimer is a “mini-lecture” providing substantive misconceptions about the nature of science, evolution, and ID which “facilitates learning.” (14:120–23, 15:57–59 (Alters)). In addition, superintendent Nilsen agrees that students “learn” from the statement, regardless of whether it gets labeled as “teaching.” (26:39 (Nilsen)).
>
> Finally, even assuming *arguendo* that Defendants are correct that reading the statement is not “teaching” *per se,* we are in agreement with Plaintiffs that Defendants' argument is a red herring because the Establishment Clause forbids not just “teaching” religion,

but any governmental action that endorses or has the primary purpose or effect of advancing religion. The constitutional violation in *Epperson* consisted not of teaching a religious concept but of forbidding the teaching of a secular one, evolution, for religious reasons. *Epperson,* 393 U.S. at 103, 89 S.Ct. 266. In addition, the violation in *Santa Fe* was school sponsorship of prayer at an extracurricular activity, 530 U.S. at 307–09, 120 S.Ct. 2266, and the violation in *Selman* was embellishing students' biology textbooks with a warning sticker disclaiming evolution. 390 F.Supp.2d at 1312.

A third important issue concerning the classroom presentation of the disclaimer is the "opt out" feature. Students who do ***728** not wish to be exposed to the disclaimer and students whose parents do not care to have them exposed it, must "opt out" to avoid the unwanted religious message. Dr. Alters testified that the "opt out" feature adds "novelty," thereby enhancing the importance of the disclaimer in the students' eyes.[8] (14:123–25 (Alters)). Moreover, the stark choice that exists between submitting to state-sponsored religious instruction and leaving the public school classroom presents a clear message to students "who are nonadherents that they are outsiders, not full members of the political community." *Santa Fe,* 530 U.S. at 309–10, 120 S.Ct. 2266 (quotation marks omitted).

8. In fact, the "opt out" procedure, as will be detailed herein, is itself clumsy and thus noteworthy to students and their parents, as it involves the necessity for students to have a form signed by parents and returned to the classroom before the disclaimer is read. Despite the fact that if properly executed the "opt out" form would excuse a student from hearing the disclaimer, the need to review the form and have some minimal discussion at least between parent and child hardly obviates the impact of the disclaimer, whether heard or not in the classroom.

Accordingly, we find that the classroom presentation of the disclaimer, including school administrators making a special appearance in the science classrooms to deliver the statement, the complete prohibition on discussion or questioning ID, and the "opt out" feature all convey a strong message of religious endorsement.

An objective student is also presumed to know that the Dover School Board advocated for the curriculum change and disclaimer in expressly religious terms, that the proposed curriculum change prompted massive community debate over the Board's attempts to inject religious concepts into the science curriculum, and that the Board adopted the ID Policy in furtherance of an expressly religious agenda, as will be elaborated upon below. Additionally, the objective student is presumed to have information concerning the history of religious opposition to evolution and would recognize that the Board's ID Policy is in keeping with that tradition. Consider, for example, that the Supreme Court in *Santa Fe* stated it presumed that "every Santa Fe High School student understands clearly" that the school district's policy "is about prayer," and not student free speech rights as the school board had alleged, and the Supreme Court premised that presumption on the principle that "the history and ubiquity" of the graduation prayer practice "provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Santa Fe,*

530 U.S. at 315, 120 S.Ct. 2266; *Allegheny,* 492 U.S. at 630, 109 S.Ct. 3086; *see also Black Horse Pike,* 84 F.3d at 1486.

Importantly, the historical context that the objective student is presumed to know consists of a factor that weighed heavily in the Supreme Court's decision to strike down the balanced-treatment law in *Edwards,* specifically that "[o]ut of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects." 482 U.S. at 593, 107 S.Ct. 2573. Moreover, the objective student is presumed to know that encouraging the teaching of evolution as a theory rather than as a fact is one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations. *Selman,* 390 F.Supp.2d at 1308.

In summary, the disclaimer singles out the theory of evolution for special treatment, misrepresents its status in the scientific community, causes students to doubt its validity without scientific justification, presents students with a religious alternative***729** masquerading as a scientific theory, directs them to consult a creationist text as though it were a science resource, and instructs students to forego scientific inquiry in the public school classroom and instead to seek out religious instruction elsewhere. Furthermore, as Drs. Alters and Miller testified, introducing ID necessarily invites religion into the science classroom as it sets up what will be perceived by students as a "God-friendly" science, the one that explicitly mentions an intelligent designer, and that the "other science," evolution, takes no position on religion. (14:144–45 (Alters)). Dr. Miller testified that a false duality is produced: It "tells students ... quite explicitly, choose God on the side of intelligent design or choose atheism on the side of science." (2:54–55 (Miller)). Introducing such a religious conflict into the classroom is "very dangerous" because it forces students to "choose between God and science," not a choice that schools should be forcing on them. *Id.* at 55.

Our detailed chronology of what a reasonable, objective student is presumed to know has made abundantly clear to the Court that an objective student would view the disclaimer as a strong official endorsement of religion or a religious viewpoint. We now turn to whether an objective adult observer in the Dover community would perceive Defendants' conduct similarly.

3. *Whether an Objective Dover Citizen Would Perceive Defendants' Conduct to be an Endorsement of Religion*

The Court must consider whether an objective adult observer in the Dover community would perceive the challenged ID Policy as an endorsement of religion because the unrefuted evidence offered at trial establishes that although the disclaimer is read to students in their ninth grade biology classes, the Board made and subsequently defended its decision to implement the curriculum change publicly, thus casting the entire community as the "listening audience" for its religious message. *Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266. We are in agreement with Plaintiffs that when a governmental practice bearing on religion occurs within view of the entire community, the reasonable observer is an objective, informed adult within the community at large, even if the specific practice is directed at only a subset of that

community, as courts routinely look beyond the government's intended audience to the broader listening audience. Otherwise, government would be free and able to sponsor religious messages simply by declaring that those who share in the beliefs that it is espousing are the message's only intended recipients. *See Allegheny,* 492 U.S. at 597, 109 S.Ct. 3086 ("when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choice' ") (quoting *Ball,* 473 U.S. at 390, 105 S.Ct. 3216).[9] Accordingly, not only are parents and other Dover citizens part of the listening audience for the Board's curriculum change, ****730*** but they are part of its "intended audience" as well.

9. To further illustrate, we note the Third Circuit Court of Appeals' decision in *Tenafly Eruv Ass'n v. Borough of Tenafly,* 309 F.3d 144 (3d Cir.2002). In *Tenafly,* the Third Circuit applied the endorsement test to the question of whether a town would violate the Establishment Clause if it allowed a group of Orthodox Jews to attach markers to utility poles for religious reasons. Although the markers "were attached for the benefit of other Orthodox Jews, not the general public," the Third Circuit nonetheless performed the endorsement inquiry from the standpoint of a reasonable, informed, objective observer in the community at large. *Id.* at 161–62, 174–78. This inquiry performed by the court is logical because although Orthodox Jews were the markers' "intended audience" in the sense that they were the ones for whose benefit the markers were placed, the markers appeared on utility polices where anyone in the community might see them and attempt to ascertain their meaning, as well as the government's relationship to them. *Id.* at 162.

First, the Board brought the public into the debate over whether to include ID in the curriculum as it proposed, advocated, and ultimately approved the ID Policy in public school board meetings. These meetings were such that members of the public not only attended them, but also had the opportunity to offer public comment on the proposal. In those Board meetings, open to the public at large, several Dover School Board members advocated for the ID Policy in expressly religious terms, with their comments reported extensively in the local newspapers, as will be discussed in detail below. Second, at least two Board members, William Buckingham and Heather Geesey, defended the proposed curriculum change in the media in expressly religious terms.

Moreover, it is notable that the Board sent a newsletter to every household in Dover in February 2005 "produced to help explain the changes in the biology curriculum" and prepared in conjunction with defense counsel, the Thomas More Law Center. (P–127). Typically, the Board sent out a newsletter in the Dover area approximately four times a year and in February 2005, the Board unanimously voted to mail a specialized newsletter to the community. (Trial Tr. vol. 15, C. Sneath Test., 98–99, 136, Oct. 12, 2005; P–82). Although formatted like a typical district newsletter, an objective adult member of the Dover community is presumed to understand this mailing as an aggressive advocacy piece denigrating the scientific theory of evolution while advocating ID. Within this newsletter, the initial entry under the heading

"Frequently Asked Questions" demeans Plaintiffs for protecting their Constitutional rights as it states, "A small minority of parents have objected to the recent curriculum change by arguing that the Board has acted to impose its own religious beliefs on students." (P–127 at 1). Religion is again mentioned in the second "Frequently Asked Question" as it poses the question "Isn't ID simply religion in disguise?" *Id.* The newsletter suggests that scientists engage in trickery and doublespeak about the theory of evolution by stating, "The word evolution has several meanings, and those supporting Darwin's theory of evolution use that confusion in definition to their advantage." *Id.* The newsletter additionally makes the claim that ID is a scientific theory on par with evolution and other scientific theories by explaining, "The theory of intelligent design (ID) is a scientific theory that differs from Darwin's view, and is endorsed by a growing number of credible scientists." *Id.* at 2. Evolution is subsequently denigrated and claims that have not been advanced, must less proven in the scientific community, are elaborated upon in the newsletter. "In simple terms, on a molecular level, scientists have discovered a purposeful arrangement of parts, which cannot be explained by Darwin's theory. In fact, since the 1950s, advances in molecular biology and chemistry have shown us that living cells, the fundamental units of life processes, cannot be explained by chance." *Id.* The newsletter suggests that evolution has atheistic implications by indicating that "Some have said that before Darwin, 'we thought a benevolent God had created us. Biology took away our status as made in the image of God' ... or 'Darwinism ***731** made it possible to be an intellectually fulfilled atheist.' " *Id.* Finally and notably, the newsletter all but admits that ID is religious by quoting Anthony Flew, described as a "world famous atheist who now believes in intelligent design," as follows: "My whole life has been guided by the principle of Plato's Socrates: Follow the evidence where it leads." *Id.*

The February 2005 newsletter was mailed to every household in Dover. Even those individuals who had no children, never attended a Dover Board meeting, and never concerned themselves with learning about school policies, were directly confronted and made the "listening audience" for the District's announcement of its sponsorship of a religious viewpoint. Thus, the February 2005 newsletter was an astonishing propaganda discourse which succeeded in advising the few individuals who were by that time not aware that a firestorm had erupted over ID in Dover.

In addition to being aware of the public debate, over whether to include ID in the biology curriculum, the public board meetings where such proposed curriculum change was advanced in expressly religious terms, and receiving a newsletter providing detailed information about the ID Policy, the District assigned Dover parents a special role regarding the ID Policy. Parents of ninth grade biology students who are subject to the ID Policy are sent a letter when their children are taking biology, "asking if anyone ha[s] a problem with the [disclaimer] statement," and calling on them to decide whether to allow their children to remain in the classroom and hear the religious message or instead to direct their children to leave the room. (P–124). When parents must give permission for their children to participate in an activity, the Supreme Court has held that the parents are the relevant audience for purposes of the endorsement. *See Good News,* 533 U.S. at 115, 121 S.Ct. 2093 (parents are relevant audience for determining whether presence of after-school Bible club at public elementary school conveyed message of religious endorsement because the parents had to give children permission to participate in club); *see*

also Rusk v. Crestview Local Sch. Dist., 379 F.3d 418, 421 (6th Cir.2004) (parents are audience for flyers distributed to elementary-school students because parents must give permission for children to participate in advertised activities). The converse must also be true, when parents must decide whether to withhold permission to participate in an activity or course of instruction, they remain the relevant audience for ascertaining whether government is communicating a message favoring religion.

An objective adult member of the Dover community would also be presumed to know that ID and teaching about supposed gaps and problems in evolutionary theory are creationist religious strategies that evolved from earlier forms of creationism, as we previously detailed. The objective observer is therefore aware of the social context in which the ID Policy arose and considered in light of this history, the challenged ID Policy constitutes an endorsement of a religious view for the reasons that follow.

First, the disclaimer's declaration that evolution “is a theory ... not a fact” has the cultural meaning that the *Selman* court explained: “[W]hether evolution [is] referenced as a theory or a fact is ... a loaded issue with religious undertones,” reflecting “a lengthy debate between advocates of evolution and proponents of religious theories of origin[.]” It is “one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations.” *Selman,* 390 F.Supp.2d at 1304, 1307–08 (citing ****732** Edwards,* 482 U.S. at 624, 107 S.Ct. 2573) (Scalia, J., dissenting) (noting that balanced-treatment act's sponsor opposed evolution being taught as fact because it would communicate to students that “science has proved their religious beliefs false”); *Freiler,* 975 F.Supp. at 824 (noting school board members' concern with teaching evolution as fact because many students in district believed in biblical view of creation). A reasonable observer is presumed to know the social meaning of the theory-not-fact deliberate word choice and would “perceive the School Board to be aligning itself with proponents of religious theories of origin,” thus “communicat[ing] to those who endorse evolution that they are political outsiders, while ... communicat[ing] to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders.” *Selman,* 390 F.Supp.2d at 1308.

Second, the Dover School Board singles out the scientific theory of evolution, specifically and repeatedly targeting it as a “theory” with “[g]aps,” “problems,” and inadequate empirical support. In singling out the one scientific theory that has historically been opposed by certain religious sects, the Board sent the message that it “believes there is some problem peculiar to evolution,” and “[i]n light of the historical opposition to evolution by Christian fundamentalists and creationists[,] ... the informed, reasonable observer would infer the School Board's problem with evolution to be that evolution does not acknowledge a creator.” *Id.* at 1309.

Third, it is readily apparent to the Court that the entire community became intertwined in the controversy over the ID Policy. The Board's actions from June 2004 through October 18, 2004, the date the Board approved the curriculum change, were consistently reported in news articles in the two local newspapers, the *York Daily Record* and the *York Dispatch.* (P–44/P–804; P–45/P–805; P–46/P–790; P–47/P–791; P–51/P–792; P–53/P–793; P–54/P–806; P–55; P–795;

P–807; P–809; P–797).[10] Most of the Plaintiffs testified that they did not attend the 2004 Board meetings that preceded the curriculum change and became aware of the Board's actions only after reading about them in the local newspapers. Tammy Kitzmiller, Beth Eveland, Cindy Sneath, Steven Stough, and Joel Lieb all first learned of the Board's actions regarding the biology curriculum and textbook from the news articles.[11] (Trial Tr. vol. 3, Kitzmiller Test., 114, Sept. 27, 2005; Trial Tr. vol. 6, Eveland Test., 93–94, Sept. 28, 2005; 15:77–78 ©. Sneath; 15:113–14 (Stough); Trial Tr. vol. 17, Leib Test., 143, Oct. 14, 2005).

10. Two exhibit numbers separated by a slash indicates that Plaintiffs introduced different formats of the same article under different exhibit numbers.

11. In fact, Stough testified that he read the *York Daily Record* and the *York Dispatch* every day, including on the internet while he was away on vacation, to follow the Board's actions relating to the biology curriculum change. (15:112–13; 16:4 (Stough)).

The news reports in the York newspapers were followed by numerous letters to the editor and editorials published in the same papers. (P–671; P–672; P–674; P–675). Although Defendants have strenuously objected to Plaintiffs' introduction of the letters to the editor and editorials from the *York Daily Record* and the *York Dispatch* addressing the curriculum controversy, we will admit such materials into evidence and consider them pursuant to the endorsement test and *Lemon's* effect prong. The letters and editorials are not offered for the truth of what is contained therein, but they are probative of the perception***733** of the community at large. They reveal that the entire community has consistently and unwaveringly understood the controversy to concern whether a religious view should be taught as science in the Dover public school system. Moreover, and as will be explained below, the letters to the editor and editorials are relevant and probative of the community's collective social judgment that the challenged conduct advances religion. *Epperson,* 393 U.S. at 108 n. 16, 89 S.Ct. 266.[12]

12. In addition, the charts summarizing the letters to the editor and editorials from the *York Daily Record* and the *York Dispatch* are admitted under Fed. R. Evid. 1006 as summaries of voluminous materials.

As previously noted, the Supreme Court held in *Santa Fe* that a public school district's conduct touching on religion should be evaluated under the endorsement test from the standpoint of how the “listening audience” would view it; and, if members of the listening audience would perceive the district's conduct as endorsing religion or a particular religious view, then the conduct violates the Establishment Clause. *Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266. Because the endorsement inquiry is not about the perceptions of particular individuals, Plaintiffs do not argue before the Court that any particular letter or editorial, or the views expressed therein, can or should supplant this Court's consideration of the curriculum change from the standpoint of a reasonable observer. *See Pinette,* 515 U.S. at 779, 115 S.Ct. 2440 (O'Connor, J., concurring in part and concurring in judgment). Instead, the Court looks to the hypothetical reasonable observer as a “personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.” *Id.* at 780, 115 S.Ct. 2440.

The 225 letters to the editor and sixty-two editorials that Plaintiffs have offered constitute what Plaintiffs' counsel believe to be the entire set of such materials published in the York newspapers serving the Dover community during the period from June 1, 2004 through September 1, 2005, which includes the time period from the first Board meetings in which the proposal to change the biology curriculum was announced through the approximate starting date of the trial in this case. We have been presented with no reason to doubt this assertion. The *York Daily Record* published 139 letters to the editor regarding the Board's actions and eighty-six of those letters addressed the issues in religious terms. (16:18–20 (Stough)). The *York Daily Record* published forty-three editorials regarding the Board's actions and twenty-eight of such editorials addressed the issues in religious terms. (P–674; 16:22–24 (Stough)). The *York Dispatch* published eighty-six letters to the editor regarding the Board's actions, sixty of which addressed the issue in religious terms. (16:24 (Stough)). The *York Dispatch* published nineteen editorials regarding the Board's actions, seventeen of which addressed the issues in religious terms. *Id.* at 25.

The 225 letters to the editor and sixty-two editorials from the *York Daily Record* and *York Dispatch* that Plaintiffs offered at trial and which we have admitted for consideration in our analysis of the endorsement test and *Lemon's* effect prong, show that hundreds of individuals in this small community felt it necessary to publish their views on the issues presented in this case for the community to see. Moreover, a review of the letters and editorials at issue reveals that in letter after letter and editorial after editorial, community members postulated that ID is an inherently religious concept, that the writers viewed the decision of whether to incorporate***734** it into the high school biology curriculum as one which implicated a religious concept, and therefore that the curriculum change has the effect of placing the government's imprimatur on the Board's preferred religious viewpoint. (P–671–72, 674–75). These exhibits are thus probative of the fact that members of the Dover community perceived the Board as having acted to promote religion, with many citizens lined up as either for the curriculum change, on religious grounds, or against the curriculum change, on the ground that religion should not play a role in public school science class. Accordingly, the letters and editorials are relevant to, and provide evidence of, the Dover community's collective social judgment about the curriculum change because they demonstrate that "[r]egardless of the listener's support for, or objection to," the curriculum change, the community and hence the objective observer who personifies it, cannot help but see that the ID Policy implicates and thus endorses religion.

It is additionally important to note that our determination to consider the letters and editorials is in line with the Supreme Court's decision in *Epperson.* In *Epperson,* the Supreme Court pointed to letters to the editor in a local newspaper as support for its conclusion that "fundamentalist sectarian conviction was and is" the reason that Arkansas enacted its statutory prohibition against teaching evolution in public schools. *Epperson,* 393 U.S. at 108, 89 S.Ct. 266. The Supreme Court quoted from three letters published in the *Arkansas Gazette* to show that the public "fear[ed] that teaching of evolution would be 'subversion of Christianity,' and that it would cause school children 'to disrespect the Bible.' " *Id.* at 108 n. 16, 89 S.Ct. 266.[13]

13. The Supreme Court treated the letters as evidence not only of the community's view that evolutionary theory should be banned because of its perceived religious implications, but also of the public pressures driving the Arkansas legislature to adopt the measure. The Court therefore viewed them as, among other things, shedding light on the legislative purpose underlying the anti-evolution statute.

Plaintiffs accurately submit that in *Modrovich,* the Third Circuit Court of Appeals departed from *Epperson* by treating as irrelevant to the purpose inquiry letters from citizens to county officials on the grounds that (1) the letters were not authored by official decision-makers and (2) most of the letters were received after the county made its policy decision. *Modrovich,* 385 F.3d at 412 & n. 4. Importantly, here, Plaintiffs do not offer the letters as purpose evidence, nor will they be considered as such, nor do they ask the Court to find that they prove Defendants' religious purpose for changing the curriculum. Instead, Plaintiffs offer the evidence pursuant to the endorsement test and *Lemon's* effect prong.

Accordingly, taken in the aggregate, the plethora of letters to the editor and editorials from the local York newspapers constitute substantial additional evidence that the entire community became intertwined in the controversy of the ID Policy at issue and that the community collectively perceives the ID Policy as favoring a particular religious view. As a result of the foregoing analysis, we conclude that an informed, objective adult member of the Dover community aware of the social context in which the ID Policy arose would view Defendants' conduct and the challenged Policy to be a strong endorsement of a religious view.

We have now found that both an objective student and an objective adult member of the Dover community would perceive Defendants' conduct to be a strong endorsement of religion pursuant to the endorsement test. Having so concluded, we find it incumbent upon the Court to further address an additional issue raised by Plaintiffs, which is whether ID is science.***735** To be sure, our answer to this question can likely be predicted based upon the foregoing analysis. While answering this question compels us to revisit evidence that is entirely complex, if not obtuse, after a six week trial that spanned twenty-one days and included countless hours of detailed expert witness presentations, the Court is confident that no other tribunal in the United States is in a better position than are we to traipse into this controversial area. Finally, we will offer our conclusion on whether ID is science not just because it is essential to our holding that an Establishment Clause violation has occurred in this case, but also in the hope that it may prevent the obvious waste of judicial and other resources which would be occasioned by a subsequent trial involving the precise question which is before us.

4. *Whether ID is Science*

After a searching review of the record and applicable caselaw, we find that while ID arguments may be true, a proposition on which the Court takes no position, ID is not science. We find that ID fails on three different levels, any one of which is sufficient to preclude a determination that ID is science. They are: (1) ID violates the centuries-old ground rules of science by invoking and permitting supernatural causation; (2) the argument of irreducible complexity, central to ID, employs the same flawed and illogical contrived dualism that doomed creation science in the

1980's; and (3) ID's negative attacks on evolution have been refuted by the scientific community. As we will discuss in more detail below, it is additionally important to note that ID has failed to gain acceptance in the scientific community, it has not generated peer-reviewed publications, nor has it been the subject of testing and research.

Expert testimony reveals that since the scientific revolution of the 16th and 17th centuries, science has been limited to the search for natural causes to explain natural phenomena. (9:19–22 (Haught); 5:25–29 (Pennock); 1:62 (Miller)). This revolution entailed the rejection of the appeal to authority, and by extension, revelation, in favor of empirical evidence. (5:28 (Pennock)). Since that time period, science has been a discipline in which testability, rather than any ecclesiastical authority or philosophical coherence, has been the measure of a scientific idea's worth. (9:21–22 (Haught); 1:63 (Miller)). In deliberately omitting theological or “ultimate” explanations for the existence or characteristics of the natural world, science does not consider issues of “meaning” and “purpose” in the world. (9:21 (Haught); 1:64, 87 (Miller)). While supernatural explanations may be important and have merit, they are not part of science. (3:103 (Miller); 9:19–20 (Haught)). This self-imposed convention of science, which limits inquiry to testable, natural explanations about the natural world, is referred to by philosophers as “methodological naturalism” and is sometimes known as the scientific method. (5:23, 29–30 (Pennock)). Methodological naturalism is a “ground rule” of science today which requires scientists to seek explanations in the world around us based upon what we can observe, test, replicate, and verify. (1:59–64, 2:41–43 (Miller); 5:8, 23–30 (Pennock)).

As the National Academy of Sciences (hereinafter “NAS”) was recognized by experts for both parties as the “most prestigious” scientific association in this country, we will accordingly cite to its opinion where appropriate. (1:94, 160–61 (Miller); 14:72 (Alters); 37:31 (Minnich)). NAS is in agreement that science is limited to empirical, observable and ultimately testable data: “Science is a particular way of knowing about the world. In science, explanations***736** are restricted to those that can be inferred from the confirmable data—the results obtained through observations and experiments that can be substantiated by other scientists. Anything that can be observed or measured is amenable to scientific investigation. Explanations that cannot be based upon empirical evidence are not part of science.” (P–649 at 27).

This rigorous attachment to “natural” explanations is an essential attribute to science by definition and by convention. (1:63 (Miller); 5:29–31 (Pennock)). We are in agreement with Plaintiffs' lead expert Dr. Miller, that from a practical perspective, attributing unsolved problems about nature to causes and forces that lie outside the natural world is a “science stopper.” (3:14–15 (Miller)). As Dr. Miller explained, once you attribute a cause to an untestable supernatural force, a proposition that cannot be disproven, there is no reason to continue seeking natural explanations as we have our answer. *Id.*

ID is predicated on supernatural causation, as we previously explained and as various expert testimony revealed. (17:96 (Padian); 2:35–36 (Miller); 14:62 (Alters)). ID takes a natural phenomenon and, instead of accepting or seeking a natural explanation, argues that the explanation is supernatural. (5:107 (Pennock)). Further support for the conclusion that ID is

predicated on supernatural causation is found in the ID reference book to which ninth grade biology students are directed, *Pandas. Pandas* states, in pertinent part, as follows:

Darwinists object to the view of intelligent design *because it does not give a natural cause explanation* of how the various forms of life started in the first place. Intelligent design means that various forms of life began abruptly, through an intelligent agency, with their distinctive features already intact—fish with fins and scales, birds with feathers, beaks, and wings, etc.

P–11 at 99–100 (emphasis added). Stated another way, ID posits that animals did not evolve naturally through evolutionary means but were created abruptly by a non-natural, or supernatural, designer. Defendants' own expert witnesses acknowledged this point. (21:96–100 (Behe); P–718 at 696, 700) ("implausible that the designer is a natural entity"); 28:21–22 (Fuller) ("... ID's rejection of naturalism and commitment to supernaturalism ..."); 38:95–96 (Minnich) (ID does not exclude the possibility of a supernatural designer, including deities).

It is notable that defense experts' own mission, which mirrors that of the IDM itself, is to change the ground rules of science to allow supernatural causation of the natural world, which the Supreme Court in *Edwards* and the court in *McLean* correctly recognized as an inherently religious concept. *Edwards,* 482 U.S. at 591–92, 107 S.Ct. 2573; *McLean,* 529 F.Supp. at 1267. First, defense expert Professor Fuller agreed that ID aspires to "change the ground rules" of science and lead defense expert Professor Behe admitted that his broadened definition of science, which encompasses ID, would also embrace astrology. (28:26 (Fuller); 21:37–42 (Behe)). Moreover, defense expert Professor Minnich acknowledged that for ID to be considered science, the ground rules of science have to be broadened to allow consideration of supernatural forces. (38:97 (Minnich)).

Prominent IDM leaders are in agreement with the opinions expressed by defense expert witnesses that the ground rules of science must be changed for ID to take hold and prosper. William Dembski, for instance, an IDM leader, proclaims that science is ruled by methodological naturalism and argues that this rule must ***737** be overturned if ID is to prosper. (5:32–37 (Pennock)); P–341 at 224 ("Indeed, entire fields of inquiry, including especially in the human sciences, will need to be rethought from the ground up in terms of intelligent design.").

The Discovery Institute, the think tank promoting ID whose CRSC developed the Wedge Document, acknowledges as "Governing Goals" to "defeat scientific materialism and its destructive moral, cultural and political legacies" and "replace materialistic explanations with the theistic understanding that nature and human beings are created by God." (P–140 at 4). In addition, and as previously noted, the Wedge Document states in its "Five Year Strategic Plan Summary" that the IDM's goal is to replace science as currently practiced with "theistic and Christian science." *Id.* at 6. The IDM accordingly seeks nothing less than a complete scientific revolution in which ID will supplant evolutionary theory.[14]

> 14. Further support for this proposition is found in the Wedge Strategy, which is composed of three phases: Phase I is scientific research, writing and publicity; Phase II is

> publicity and opinion-making; and Phase III is cultural confrontation and renewal. (P–140 at 3). In the "Five Year Strategic Plan Summary," the Wedge Document explains that the social consequences of materialism have been "devastating" and that it is necessary to broaden the wedge with a positive scientific alternative to materialistic scientific theories, which has come to be called the theory of ID. "Design theory promises to reverse the stifling dominance of the materialist worldview, and to replace it with a science consonant with Christian and theistic convictions." *Id.* at 6. Phase I of the Wedge Strategy is an essential component and directly references "scientific revolutions." Phase II explains that alongside a focus on influential opinion-makers, "we also seek to build up a popular base of support among our natural constituency, namely, Christians. We will do this primarily through apologetics seminars. We intend these to encourage and equip believers with new scientific evidence that support the faith, as well as to 'popularize' our ideas in the broader culture." *Id.* Finally, Phase III includes pursuing possible legal assistance "in response to resistance to the integration of design theory into public school science curricula." *Id.* at 7.

Notably, every major scientific association that has taken a position on the issue of whether ID is science has concluded that ID is not, and cannot be considered as such. (1:98–99 (Miller); 14:75–78 (Alters); 37:25 (Minnich)). Initially, we note that NAS, the "most prestigious" scientific association in this country, views ID as follows:

Creationism, intelligent design, and other claims of supernatural intervention in the origin of life or of species are not science because they are not testable by the methods of science. These claims subordinate observed data to statements based on authority, revelation, or religious belief. Documentation offered in support of these claims is typically limited to the special publications of their advocates. These publications do not offer hypotheses subject to change in light of new data, new interpretations, or demonstration of error. This contrasts with science, where any hypothesis or theory always remains subject to the possibility of rejection or modification in the light of new knowledge.

P–192 at 25. Additionally, the American Association for the Advancement of Science (hereinafter "AAAS"), the largest organization of scientists in this country, has taken a similar position on ID, namely, that it "has not proposed a scientific means of testing its claims" and that "the lack of scientific warrant for so-called 'intelligent design theory' makes it improper to include as part of science education ..." (P–198). Not a single expert witness over the course of the six week trial identified one ***738** major scientific association, society or organization that endorsed ID as science. What is more, defense experts concede that ID is not a theory as that term is defined by the NAS and admit that ID is at best "fringe science" which has achieved no acceptance in the scientific community. (21:37–38 (Behe); Fuller Dep. at 98–101, June 21, 2005; 28:47 (Fuller); Minnich Dep. at 89, May 26, 2005).

It is therefore readily apparent to the Court that ID fails to meet the essential ground rules that limit science to testable, natural explanations. (3:101–03 (Miller); 14:62 (Alters)). Science cannot be defined differently for Dover students than it is defined in the scientific community

as an affirmative action program, as advocated by Professor Fuller, for a view that has been unable to gain a foothold within the scientific establishment. Although ID's failure to meet the ground rules of science is sufficient for the Court to conclude that it is not science, out of an abundance of caution and in the exercise of completeness, we will analyze additional arguments advanced regarding the concepts of ID and science.

ID is at bottom premised upon a false dichotomy, namely, that to the extent evolutionary theory is discredited, ID is confirmed. (5:41 (Pennock)). This argument is not brought to this Court anew, and in fact, the same argument, termed "contrived dualism" in *McLean,* was employed by creationists in the 1980's to support "creation science." The court in *McLean* noted the "fallacious pedagogy of the two model approach" and that "[i]n efforts to establish 'evidence' in support of creation science, the defendants relied upon the same false premise as the two model approach ... all evidence which criticized evolutionary theory was proof in support of creation science." *McLean,* 529 F.Supp. at 1267, 1269. We do not find this false dichotomy any more availing to justify ID today than it was to justify creation science two decades ago.

ID proponents primarily argue for design through negative arguments against evolution, as illustrated by Professor Behe's argument that "irreducibly complex" systems cannot be produced through Darwinian, or any natural, mechanisms. (5:38–41 (Pennock); 1:39, 2:15, 2:35–37, 3:96 (Miller); 16:72–73 (Padian); 10:148 (Forrest)). However, we believe that arguments against evolution are not arguments for design. Expert testimony revealed that just because scientists cannot explain today how biological systems evolved does not mean that they cannot, and will not, be able to explain them tomorrow. (2:36–37 (Miller)). As Dr. Padian aptly noted, "absence of evidence is not evidence of absence." (17:45 (Padian)). To that end, expert testimony from Drs. Miller and Padian provided multiple examples where *Pandas* asserted that no natural explanations exist, and in some cases that none could exist, and yet natural explanations have been identified in the intervening years. It also bears mentioning that as Dr. Miller stated, just because scientists cannot explain every evolutionary detail does not undermine its validity as a scientific theory as no theory in science is fully understood. (3:102 (Miller)).

As referenced, the concept of irreducible complexity is ID's alleged scientific centerpiece. Irreducible complexity is a negative argument against evolution, not proof of design, a point conceded by defense expert Professor Minnich. (2:15 (Miller); 38:82 (Minnich)) (irreducible complexity "is not a test of intelligent design; it's a test of evolution"). Irreducible complexity additionally fails to make a positive scientific case for ID, as will be elaborated upon below.

****739*** We initially note that irreducible complexity as defined by Professor Behe in his book *Darwin's Black Box* and subsequently modified in his 2001 article entitled "Reply to My Critics," appears as follows:

> By irreducibly complex I mean a single system which is composed of several well-matched, interacting parts that contribute to the basic function, wherein the removal of

> any one of the parts causes the system to effectively cease functioning. An irreducibly complex system cannot be produced directly by slight, successive modifications of a precursor system, because any precursor to an irreducibly complex system that is missing a part is by definition nonfunctional ... Since natural selection can only choose systems that are already working, then if a biological system cannot be produced gradually it would have to arise as an integrated unit, in one fell swoop, for natural selection to have anything to act on.

P–647 at 39; P–718 at 694. Professor Behe admitted in “Reply to My Critics” that there was a defect in his view of irreducible complexity because, while it purports to be a challenge to natural selection, it does not actually address “the task facing natural selection.” (P–718 at 695). Professor Behe specifically explained that “[t]he current definition puts the focus on removing a part from an already-functioning system,” but “[t]he difficult task facing Darwinian evolution, however, would not be to remove parts from sophisticated pre-existing systems; it would be to bring together components to make a new system in the first place.” *Id.* In that article, Professor Behe wrote that he hoped to “repair this defect in future work;” however, he has failed to do so even four years after elucidating his defect. *Id.;* 22:61–65 (Behe).

In addition to Professor Behe's admitted failure to properly address the very phenomenon that irreducible complexity purports to place at issue, natural selection, Drs. Miller and Padian testified that Professor Behe's concept of irreducible complexity depends on ignoring ways in which evolution is known to occur. Although Professor Behe is adamant in his definition of irreducible complexity when he says a precursor “missing a part is by definition nonfunctional,” what he obviously means is that it will not function in the same way the system functions when all the parts are present. For example in the case of the bacterial flagellum, removal of a part may prevent it from acting as a rotary motor. However, Professor Behe excludes, by definition, the possibility that a precursor to the bacterial flagellum functioned not as a rotary motor, but in some other way, for example as a secretory system. (19:88–95 (Behe)).

As expert testimony revealed, the qualification on what is meant by “irreducible complexity” renders it meaningless as a criticism of evolution. (3:40 (Miller)). In fact, the theory of evolution proffers exaptation as a well-recognized, well-documented explanation for how systems with multiple parts could have evolved through natural means. Exaptation means that some precursor of the subject system had a different, selectable function before experiencing the change or addition that resulted in the subject system with its present function (16:146–48 (Padian)). For instance, Dr. Padian identified the evolution of the mammalian middle ear bones from what had been jawbones as an example of this process. (17:6–17 (Padian)). By defining irreducible complexity in the way that he has, Professor Behe attempts to exclude the phenomenon of exaptation by definitional fiat, ignoring as he does so abundant evidence which refutes his argument.

740 Notably, the NAS has rejected Professor Behe's claim for irreducible complexity by using the following cogent reasoning:

> [S]tructures and processes that are claimed to be “irreducibly” complex typically are not on closer inspection. For example, it is incorrect to assume that a complex structure or biochemical process can function only if all its components are present and functioning as we see them today. Complex biochemical systems can be built up from simpler systems through natural selection. Thus, the “history” of a protein can be traced through simpler organisms ... The evolution of complex molecular systems can occur in several ways. Natural selection can bring together parts of a system for one function at one time and then, at a later time, recombine those parts with other systems of components to produce a system that has a different function. Genes can be duplicated, altered, and then amplified through natural selection. The complex biochemical cascade resulting in blood clotting has been explained in this fashion.

P–192 at 22.

As irreducible complexity is only a negative argument against evolution, it is refutable and accordingly testable, unlike ID, by showing that there are intermediate structures with selectable functions that could have evolved into the allegedly irreducibly complex systems. (2:15–16 (Miller)). Importantly, however, the fact that the negative argument of irreducible complexity is testable does not make testable the argument for ID. (2:15 (Miller); 5:39 (Pennock)). Professor Behe has applied the concept of irreducible complexity to only a few select systems: (1) the bacterial flagellum; (2) the blood-clotting cascade; and (3) the immune system. Contrary to Professor Behe's assertions with respect to these few biochemical systems among the myriad existing in nature, however, Dr. Miller presented evidence, based upon peer-reviewed studies, that they are not in fact irreducibly complex.

First, with regard to the bacterial flagellum, Dr. Miller pointed to peer-reviewed studies that identified a possible precursor to the bacterial flagellum, a subsystem that was fully functional, namely the Type–III Secretory System. (2:8–20 (Miller); P–854.23–854.32). Moreover, defense expert Professor Minnich admitted that there is serious scientific research on the question of whether the bacterial flagellum evolved into the Type–III Secretary System, the Type–III Secretory System into the bacterial flagellum, or whether they both evolved from a common ancestor. (38:12–16 (Minnich)). None of this research or thinking involves ID. (38:12–16 (Minnich)). In fact, Professor Minnich testified about his research as follows: “we're looking at the function of these systems and how they could have been derived one from the other. And it's a legitimate scientific inquiry.” (38:16 (Minnich)).

Second, with regard to the blood-clotting cascade, Dr. Miller demonstrated that the alleged irreducible complexity of the blood-clotting cascade has been disproven by peer-reviewed studies dating back to 1969, which show that dolphins' and whales' blood clots despite missing a part of the cascade, a study that was confirmed by molecular testing in 1998. (1:122–29 (Miller); P–854.17–854.22). Additionally and more recently, scientists published studies showing that in puffer fish, blood clots despite the cascade missing not only one, but three parts. (1:128–29 (Miller)). Accordingly, scientists in peer-reviewed publications have refuted Professor Behe's predication about the alleged irreducible complexity of the blood-clotting

cascade. ***741*** Moreover, cross-examination revealed that Professor Behe's redefinition of the blood-clotting system was likely designed to avoid peer-reviewed scientific evidence that falsifies his argument, as it was not a scientifically warranted redefinition. (20:26–28, 22:112–25 (Behe)).

The immune system is the third system to which Professor Behe has applied the definition of irreducible complexity. Although in *Darwin's Black Box,* Professor Behe wrote that not only were there no natural explanations for the immune system at the time, but that natural explanations were impossible regarding its origin. (P–647 at 139; 2:26–27 (Miller)). However, Dr. Miller presented peer-reviewed studies refuting Professor Behe's claim that the immune system was irreducibly complex. Between 1996 and 2002, various studies confirmed each element of the evolutionary hypothesis explaining the origin of the immune system. (2:31 (Miller)). In fact, on cross-examination, Professor Behe was questioned concerning his 1996 claim that science would never find an evolutionary explanation for the immune system. He was presented with fifty-eight peer-reviewed publications, nine books, and several immunology textbook chapters about the evolution of the immune system; however, he simply insisted that this was still not sufficient evidence of evolution, and that it was not “good enough.” (23:19 (Behe)).

We find that such evidence demonstrates that the ID argument is dependent upon setting a scientifically unreasonable burden of proof for the theory of evolution. As a further example, the test for ID proposed by both Professors Behe and Minnich is to grow the bacterial flagellum in the laboratory; however, no-one inside or outside of the IDM, including those who propose the test, has conducted it. (P–718; 18:125–27 (Behe); 22:102–06 (Behe)). Professor Behe conceded that the proposed test could not approximate real world conditions and even if it could, Professor Minnich admitted that it would merely be a test of evolution, not design. (22:107–10 (Behe); 2:15 (Miller); 38:82 (Minnich)).

We therefore find that Professor Behe's claim for irreducible complexity has been refuted in peer-reviewed research papers and has been rejected by the scientific community at large. (17:45–46 (Padian); 3:99 (Miller)). Additionally, even if irreducible complexity had not been rejected, it still does not support ID as it is merely a test for evolution, not design. (2:15, 2:35–40 (Miller); 28:63–66 (Fuller)).

We will now consider the purportedly “positive argument” for design encompassed in the phrase used numerous times by Professors Behe and Minnich throughout their expert testimony, which is the “purposeful arrangement of parts.” Professor Behe summarized the argument as follows: We infer design when we see parts that appear to be arranged for a purpose. The strength of the inference is quantitative; the more parts that are arranged, the more intricately they interact, the stronger is our confidence in design. The appearance of design in aspects of biology is overwhelming. Since nothing other than an intelligent cause has been demonstrated to be able to yield such a strong appearance of design, Darwinian claims notwithstanding, the conclusion that the design seen in life is real design is rationally justified. (18:90–91, 18:109–10 (Behe); 37:50 (Minnich)). As previously indicated, this argument is merely

a restatement of the Reverend William Paley's argument applied at the cell level. Minnich, Behe, and Paley reach the same conclusion, that complex organisms must have been designed using the same reasoning, except that Professors Behe and Minnich ***742** refuse to identify the designer, whereas Paley inferred from the presence of design that it was God. (1:6–7 (Miller); 38:44, 57 (Minnich)). Expert testimony revealed that this inductive argument is not scientific and as admitted by Professor Behe, can never be ruled out. (2:40 (Miller); 22:101 (Behe); 3:99 (Miller)).

Indeed, the assertion that design of biological systems can be inferred from the "purposeful arrangement of parts" is based upon an analogy to human design. Because we are able to recognize design of artifacts and objects, according to Professor Behe, that same reasoning can be employed to determine biological design. (18:116–17, 23:50 (Behe)). Professor Behe testified that the strength of the analogy depends upon the degree of similarity entailed in the two propositions; however, if this is the test, ID completely fails.

Unlike biological systems, human artifacts do not live and reproduce over time. They are non-replicable, they do not undergo genetic recombination, and they are not driven by natural selection. (1:131–33 (Miller); 23:57–59 (Behe)). For human artifacts, we know the designer's identity, human, and the mechanism of design, as we have experience based upon empirical evidence that humans can make such things, as well as many other attributes including the designer's abilities, needs, and desires. (D–251 at 176; 1:131–33 (Miller); 23:63 (Behe); 5:55–58 (Pennock)). With ID, proponents assert that they refuse to propose hypotheses on the designer's identity, do not propose a mechanism, and the designer, he/she/it/they, has never been seen. In that vein, defense expert Professor Minnich agreed that in the case of human artifacts and objects, we know the identity and capacities of the human designer, but we do not know any of those attributes for the designer of biological life. (38:44–47 (Minnich)). In addition, Professor Behe agreed that for the design of human artifacts, we know the designer and its attributes and we have a baseline for human design that does not exist for design of biological systems. (23:61–73 (Behe)). Professor Behe's only response to these seemingly insurmountable points of disanalogy was that the inference still works in science fiction movies. (23:73 (Behe)).

It is readily apparent to the Court that the only attribute of design that biological systems appear to share with human artifacts is their complex appearance, i.e. if it looks complex or designed, it must have been designed. (23:73 (Behe)). This inference to design based upon the appearance of a "purposeful arrangement of parts" is a completely subjective proposition, determined in the eye of each beholder and his/her viewpoint concerning the complexity of a system. Although both Professors Behe and Minnich assert that there is a quantitative aspect to the inference, on cross-examination they admitted that there is no quantitative criteria for determining the degree of complexity or number of parts that bespeak design, rather than a natural process. (23:50 (Behe); 38:59 (Minnich)). As Plaintiffs aptly submit to the Court, throughout the entire trial only one piece of evidence generated by Defendants addressed the strength of the ID inference: the argument is less plausible to those for whom God's existence is in question, and is much less plausible for those who deny God's existence. (P–718 at 705).

Accordingly, the purported positive argument for ID does not satisfy the ground rules of science which require testable hypotheses based upon natural explanations. (3:101–03 (Miller)). ID is reliant upon forces acting outside of the natural world, forces that we cannot see, replicate, control or test, which have produced changes ***743** in this world. While we take no position on whether such forces exist, they are simply not testable by scientific means and therefore cannot qualify as part of the scientific process or as a scientific theory. (3:101–02 (Miller)).

It is appropriate at this juncture to address ID's claims against evolution. ID proponents support their assertion that evolutionary theory cannot account for life's complexity by pointing to real gaps in scientific knowledge, which indisputably exist in all scientific theories, but also by misrepresenting well-established scientific propositions. (1:112, 1:122, 1:136–37 (Miller); 16:74–79, 17:45–46 (Padian)).

Before discussing Defendants' claims about evolution, we initially note that an overwhelming number of scientists, as reflected by every scientific association that has spoken on the matter, have rejected the ID proponents' challenge to evolution. Moreover, Plaintiffs' expert in biology, Dr. Miller, a widely-recognized biology professor at Brown University who has written university-level and high-school biology textbooks used prominently throughout the nation, provided unrebutted testimony that evolution, including common descent and natural selection, is "overwhelmingly accepted" by the scientific community and that every major scientific association agrees. (1:94–100 (Miller)). As the court in *Selman* explained, "evolution is more than a *theory* of origin in the context of science. To the contrary, evolution is the dominant *scientific* theory of origin accepted by the majority of scientists." *Selman,* 390 F.Supp.2d at 1309 (emphasis in original). Despite the scientific community's overwhelming support for evolution, Defendants and ID proponents insist that evolution is unsupported by empirical evidence. Plaintiffs' science experts, Drs. Miller and Padian, clearly explained how ID proponents generally and *Pandas* specifically, distort and misrepresent scientific knowledge in making their anti-evolution argument.

In analyzing such distortion, we turn again to *Pandas,* the book to which students are expressly referred in the disclaimer. Defendants hold out *Pandas* as representative of ID and Plaintiffs' experts agree in that regard. (16:83 (Padian); 1:107–08 (Miller)). A series of arguments against evolutionary theory found in *Pandas* involve paleontology, which studies the life of the past and the fossil record. Plaintiffs' expert Professor Padian was the only testifying expert witness with any expertise in paleontology.[15] His testimony therefore remains unrebutted. Dr. Padian's demonstrative slides, prepared on the basis of peer-reviewing scientific literature, illustrate how *Pandas* systematically distorts and misrepresents established, important evolutionary principles.

15. Moreover, the Court has been presented with no evidence that either Defendants' testifying experts or any other ID proponents, including *Pandas'* authors, have such paleontology expertise as we have been presented with no evidence that they have published peer-reviewed literature or presented such information at scientific

conferences on paleontology or the fossil record. (17:15–16 (Padian)).

We will provide several representative examples of this distortion. First, *Pandas* misrepresents the "dominant form of understanding relationships" between organisms, namely, the tree of life, represented by classification determined via the method of cladistics. (16:87–97 (Padian); P–855.6–855.19). Second, *Pandas* misrepresents "homology," the "central concept of comparative biology," that allowed scientists to evaluate comparable parts among organisms for classification purposes for hundreds of years. (17:27–40 (Padian); P–855.83–855.102). Third, *Pandas* fails to ***744** address the well-established biological concept of exaptation, which involves a structure changing function, such as fish fins evolving fingers and bones to become legs for weight-bearing land animals. (16:146–48 (Padian)). Dr. Padian testified that ID proponents fail to address exaptation because they deny that organisms change function, which is a view necessary to support abrupt-appearance. *Id.* Finally, Dr. Padian's unrebutted testimony demonstrates that *Pandas* distorts and misrepresents evidence in the fossil record about pre-Cambrian-era fossils, the evolution of fish to amphibians, the evolution of small carnivorous dinosaurs into birds, the evolution of the mammalian middle ear, and the evolution of whales from land animals. (16:107–17, 16:117–31, 16:131–45, 17:6–9, 17:17–27 (Padian); P–855.25–855.33, P–855.34–855.45, P–855.46–855.55, P–855.56–866.63, P–855.64–855.82).

In addition to Dr. Padian, Dr. Miller also testified that *Pandas* presents discredited science. Dr. Miller testified that *Pandas* ' treatment of biochemical similarities between organisms is "inaccurate and downright false" and explained how *Pandas* misrepresents basic molecular biology concepts to advance design theory through a series of demonstrative slides. (1:112 (Miller)). Consider, for example, that he testified as to how *Pandas* misinforms readers on the standard evolutionary relationships between different types of animals, a distortion which Professor Behe, a "critical reviewer" of *Pandas* who wrote a section within the book, affirmed. (1:113–17 (Miller); P–854.9–854.16; 23:35–36 (Behe)).[16] In addition, Dr. Miller refuted *Pandas* ' claim that evolution cannot account for new genetic information and pointed to more than three dozen peer-reviewed scientific publications showing the origin of new genetic information by evolutionary processes. (1:133–36 (Miller); P–245). In summary, Dr. Miller testified that *Pandas* misrepresents molecular biology and genetic principles, as well as the current state of scientific knowledge in those areas in order to teach readers that common descent and natural selection are not scientifically sound. (1:139–42 (Miller)).

16. Additionally, testimony provided by Professor Behe revealed an increasing gap between his portrayal of ID theory and how it is presented in *Pandas.* Although he is a "critical reviewer" of the work, he disagrees with language provided in the text, including but not limited to the text's very definition of ID. (P–11 at 99–100).

Accordingly, the one textbook to which the Dover ID Policy directs students contains outdated concepts and badly flawed science, as recognized by even the defense experts in this case.

A final indicator of how ID has failed to demonstrate scientific warrant is the complete absence of peer-reviewed publications supporting the theory. Expert testimony revealed that the peer

review process is “exquisitely important” in the scientific process. It is a way for scientists to write up their empirical research and to share the work with fellow experts in the field, opening up the hypotheses to study, testing, and criticism. (1:66–69 (Miller)). In fact, defense expert Professor Behe recognizes the importance of the peer review process and has written that science must “publish or perish.” (22:19–25 (Behe)). Peer review helps to ensure that research papers are scientifically accurately, meet the standards of the scientific method, and are relevant to other scientists in the field. (1:39–40 (Miller)). Moreover, peer review involves scientists submitting a manuscript to a scientific journal in the field, journal editors soliciting critical reviews from other experts in the field and deciding whether ***745** the scientist has followed proper research procedures, employed up-to-date methods, considered and cited relevant literature and generally, whether the researcher has employed sound science.

The evidence presented in this case demonstrates that ID is not supported by any peer-reviewed research, data or publications. Both Drs. Padian and Forrest testified that recent literature reviews of scientific and medical-electronic databases disclosed no studies supporting a biological concept of ID. (17:42–43 (Padian); 11:32–33 (Forrest)). On cross-examination, Professor Behe admitted that: “There are no peer reviewed articles by anyone advocating for intelligent design supported by pertinent experiments or calculations which provide detailed rigorous accounts of how intelligent design of any biological system occurred.” (22:22–23 (Behe)). Additionally, Professor Behe conceded that there are no peer-reviewed papers supporting his claims that complex molecular systems, like the bacterial flagellum, the blood-clotting cascade, and the immune system, were intelligently designed. (21:61–62 (complex molecular systems), 23:4–5 (immune system), and 22:124–25 (blood-clotting cascade) (Behe)). In that regard, there are no peer-reviewed articles supporting Professor Behe's argument that certain complex molecular structures are “irreducibly complex.” [17] (21:62, 22:124–25 (Behe)). In addition to failing to produce papers in peer-reviewed journals, ID also features no scientific research or testing. (28:114–15 (Fuller); 18:22–23, 105–06 (Behe)).

> 17. The one article referenced by both Professors Behe and Minnich as supporting ID is an article written by Behe and Snoke entitled “Simulating evolution by gene duplication of protein features that require multiple amino acid residues.” (P–721). A review of the article indicates that it does not mention either irreducible complexity or ID. In fact, Professor Behe admitted that the study which forms the basis for the article did not rule out many known evolutionary mechanisms and that the research actually might support evolutionary pathways if a biologically realistic population size were used. (22:41–45 (Behe); P–756).

After this searching and careful review of ID as espoused by its proponents, as elaborated upon in submissions to the Court, and as scrutinized over a six week trial, we find that ID is not science and cannot be adjudged a valid, accepted scientific theory as it has failed to publish in peer-reviewed journals, engage in research and testing, and gain acceptance in the scientific community. ID, as noted, is grounded in theology, not science. Accepting for the sake of argument its proponents', as well as Defendants' argument that to introduce ID to students will encourage critical thinking, it still has utterly no place in a science curriculum. Moreover, ID's

backers have sought to avoid the scientific scrutiny which we have now determined that it cannot withstand by advocating that the *controversy,* but not ID itself, should be taught in science class. This tactic is at best disingenuous, and at worst a canard. The goal of the IDM is not to encourage critical thought, but to foment a revolution which would supplant evolutionary theory with ID.

To conclude and reiterate, we express no opinion on the ultimate veracity of ID as a supernatural explanation. However, we commend to the attention of those who are inclined to superficially consider ID to be a true "scientific" alternative to evolution without a true understanding of the concept the foregoing detailed analysis. It is our view that a reasonable, objective observer would, after reviewing both the voluminous record in this case, and our narrative, reach the inescapable conclusion ***746** that ID is an interesting theological argument, but that it is not science.

F. *Application of the Lemon Test to the ID Policy*

Although we have found that Defendants' conduct conveys a strong message of endorsement of the Board members' particular religious view, pursuant to the endorsement test, the better practice in this Circuit is for this Court to also evaluate the challenged conduct separately under the *Lemon* test.[18] *See Child Evangelism,* 386 F.3d at 530–35; *Modrovich,* 385 F.3d at 406; *Freethought,* 334 F.3d at 261.

> 18. As previously noted, both parties concede that the *Lemon* test is applicable to the case *sub judice.*

As articulated by the Supreme Court, under the *Lemon* test, a government-sponsored message violates the Establishment Clause of the First Amendment if: (1) it does not have a secular purpose; (2) its principal or primary effect advances or inhibits religion; or (3) it creates an excessive entanglement of the government with religion. *Lemon,* 403 U.S. at 612–13, 91 S.Ct. 2125. As the *Lemon* test is disjunctive, either an improper purpose or an improper effect renders the ID Policy invalid under the Establishment Clause.[19]

> 19. Plaintiffs are not claiming excessive entanglement. Accordingly, Plaintiffs argue that the ID Policy is violative of the first two prongs of the *Lemon* test, the purpose and effect prongs.

We will therefore consider whether (1) Defendants' primary purpose was to advance religion or (2) the ID Policy has the primary effect of promoting religion.

1. *Purpose Inquiry*

Initially, we note that the central inquiry is whether the District has shown favoritism toward religion generally or any set of religious beliefs in particular:

The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.

McCreary, 125 S.Ct. at 2733 (quoting *Epperson,* 393 U.S. at 104, 89 S.Ct. 266). As the Supreme Court instructed in *Edwards, Lemon's* purpose prong "asks whether government's actual purpose is to endorse or disapprove of religion. A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose." *Edwards,* 482 U.S. at 583, 107 S.Ct. 2573 (quoting *Lynch,* 465 U.S. at 690, 104 S.Ct. 1355) (O'Connor, J., concurring).

The purpose inquiry involves consideration of the ID Policy's language, "enlightened by its context and contemporaneous legislative history [,]" including, in this case, the broader context of historical and ongoing religiously driven attempts to advance creationism while denigrating evolution. [20] *Selman,* 390 F.Supp.2d at 1300; ***747** *Edwards,* 482 U.S. at 590–92, 594–95, 107 S.Ct. 2573 (in addition to "[t]he plain meaning of the [enactment's] words, enlightened by their context and the contemporaneous legislative history," Supreme Court also looks for legislative purposes in "the historical context of the [enactment], and the specific sequence of events leading to [its] passage"); *see also Epperson,* 393 U.S. at 98–101, 89 S.Ct. 266; *McLean,* 529 F.Supp. at 1263 (looking to history of Christian Fundamentalism nationally and to Arkansas' "long history of official opposition to evolution which is motivated by adherence to Fundamentalist beliefs," and holding that, "[i]n determining the legislative purpose of a statute, courts may consider evidence of the historical context of the Act, the specific sequence of events leading up to passage of Act, departures from normal procedural sequences, substantive departures from the normal, and contemporaneous statements of the legislative sponsor.") (citations omitted).

> 20. We disagree with Defendants' assertions that the Court must first look for the Board's purpose in the plain text of the challenged Policy and may consider other indicia of purpose only if the Policy is ambiguous as to purpose. Similarly, we do not find that individual Board members' statements are irrelevant as a matter of law or that they cannot be considered as part of the legislative history because they are not statements by the full Board in its collective, corporate capacity.

First, as Plaintiffs submit, at the most superficial level, Defendants' "look at the text alone" approach is on its face inapposite because ID is not defined in the Policy. Accordingly, even if this Court was limited to the disclaimer's language, which as stated we find that we are not, statutory interpretation canons would require consideration of the Policy's legislative history and historical context to ascertain what is meant by the term ID. Second, with regard to Defendants' contention that we should exclude individual Board members' statements from the legislative history on the ground that they are not full pronouncements by the Board, the Supreme Court has consistently held not only that legislative history can and must be considered in ascertaining legislative purpose under *Lemon,* but also that statements by a measure's sponsors and chief proponents are strong indicia of such purpose. *McCreary,* 125 S.Ct. at 2734 (although courts do not engage in "psychoanalysis of a drafter's heart of hearts,"

they routinely and properly look to individual legislators' public statements to determine legislative purpose); *Edwards,* 482 U.S. at 586–88, 107 S.Ct. 2573 (reliance upon a statute's text and the detailed public comments of its sponsor when determining the purpose of a state law requiring creationism to be taught alongside evolution).

The disclaimer's plain language, the legislative history, and the historical context in which the ID Policy arose, all inevitably lead to the conclusion that Defendants consciously chose to change Dover's biology curriculum to advance religion. We have been presented with a wealth of evidence which reveals that the District's purpose was to advance creationism, an inherently religious view, both by introducing it directly under the label ID and by disparaging the scientific theory of evolution, so that creationism would gain credence by default as the only apparent alternative to evolution, for the reasons that follow.

We will begin the *Lemon* purpose inquiry by providing a detailed chronology of the events that transpired in Dover leading up to the enactment of the ID Policy at issue.

We will initially supply background information on the composition of the Board, which consists of nine seats. The nine members of the Board in 2004 were Alan Bonsell, William Buckingham, Sheila Harkins, Jane Cleaver, Heather Geesey, Angie Yingling, Noel Wenrich, Jeff Brown, and Casey Brown. Wenrich and Cleaver resigned on October 4, 2004, Casey and Jeff Brown resigned on October 18, 2004, and Yingling resigned verbally in November 2004 and in writing February 2005. (Trial Tr. vol. 34, Harkins Test., 113, Nov. 2, 2005; Cleaver Dep. at 15, June 9, 2005). During 2004, Bonsell was President of the Board and as President, he appointed Buckingham to be Chair of the Board's Curriculum Committee. (32:86–87 (Bonsell); 34:39 (Harkins)). As Board President, Bonsell also served as an *ex officio* member of the Curriculum Committee. (32:116 (Bonsell)).

**748* a. *Beginning in January 2002, Bonsell Made Repeated Expressions of Interest to Inject Religion into the Dover Schools*

The Board held a retreat on January 9, 2002, several weeks after Bonsell joined the Board. Superintendent Nilsen's contemporaneous notes reveal that Bonsell identified “creationism” as his number one issue and “school prayer” as his number two issue. (P–21). Although Bonsell claims he cannot recall raising such subjects but does not dispute that he did, in fact, raise them, the overwhelming evidence indicates that he raised the issues of creationism and school prayer during the January 2002 Board retreat.[21]

> 21. Consider, to illustrate, that Casey Brown testified she recalled that Bonsell “expressed a desire to look into bringing prayer and faith back into the schools,” that Bonsell mentioned the Bible and creationism, and felt “there should be a fair and balanced presentation within the curriculum.” (Trial Tr. vol. 7, C. Brown Test., 17–18, Sept. 29, 2005).

The Board held another retreat the following year, on March 26, 2003, in which Bonsell again raised the issue of “creationism” as an issue of interest as reflected in Dr. Nilsen's

contemporaneous notes. (35:50–53 (Baksa); P–25). For the second, consecutive time, Bonsell does not dispute that he raised the issue but his testimony indicates that he cannot recall doing so, despite the fact that Jeff Brown, Barrie Callahan, Bertha Spahr, and Assistant Superintendent Baksa testified otherwise. (32:75 (Bonsell); Trial Tr. vol. 8, J. Brown Test., 50–51, Sept. 29, 2005) (Recalled Bonsell say at the March 26, 2003 retreat that he felt creationism "belonged in biology class alongside evolution."); 3:126–27 (B. Callahan) (Her testimony and notes took during the March 26, 2003 retreat reveal that Bonsell said he wanted creationism taught 50/50 with evolution in biology class.).

In fact, Trudy Peterman, then principal of Dover High School, sent a memo to Assistant Superintendent Baksa and Science Department Chair Bertha Spahr with a copy sent to Dr. Nilsen on April 1, 2003. This memo reports that Peterman learned from Spahr that Baksa said on March 31, 2003, that an unidentified Board member "wanted fifty percent of the topic of evolution to involve the teaching of Creationism." (P–26). Although defense witnesses testified that Peterman was known to exaggerate situations, the weight of the evidence reveals that the essential content of the memo was indeed accurate.

In that regard, Barrie Callahan's testimony and handwritten notes from the March 26, 2003 retreat find corroboration in Superintendent Nilsen's contemporaneous note that Bonsell raised the issue of "creationism," as do they in the Peterman memo. Additionally, Spahr confirmed that she had a conversation with Baksa, as reported in the Peterman memo, and that Baksa told her Bonsell wanted to have creationism share equal time with evolution in the curriculum. (13:72–73 (Spahr)). Third, Baksa confirmed that he had a conversation with Spahr, as reported in the Peterman memo, in which he told her that Bonsell was looking "for a 50/50 split with Darwin and some alternative." (35:53–56 (Baksa)).

Although Baksa claims he does not recall Bonsell identifying "creationism" as the subject with which he wanted to share equal time with evolution, nor that Bonsell mentioned "creationism" at any time up until April 1, 2003, we do not find his testimony on this point to be credible. We accordingly find that Bonsell is clearly the unnamed Board member referred to in Peterman's memo who wanted fifty percent of the topic of evolution to involve the teaching of creationism.

***749** Apart from two consecutive Board retreats, Bonsell raised the issue of creationism on numerous other occasions as well. When he ran for the Board in 2001, Bonsell told Jeff Brown he did not believe in evolution, that he wanted creationism taught side-by-side with evolution in biology class, and that taking prayer and Bible reading out of school was a mistake which he wanted reinstated in the Dover public schools. (8:48–49 (J. Brown)). Subsequently, Bonsell told Jeff Brown he wanted to be on the Board Curriculum Committee because he had concerns about teaching evolution and he wanted to see some changes in that area. (8:55 (J. Brown)). Additionally, Nilsen complained to Jeff Brown that each Board President had a new set of priorities and Bonsell's priority was that of creationism. (8:53 (J. Brown)). It is notable, and in fact incredible that Bonsell disclaimed any interest in creationism during his testimony, despite the admission by his counsel in Defendants' opening statement that Bonsell had such an

interest. (1:19). Simply put, Bonsell repeatedly failed to testify in a truthful manner about this and other subjects. Finally, Bonsell not only wanted prayer in schools and creationism taught in science class, he also wanted to inject religion into the social studies curriculum, as evidenced by his statement to Baksa that he wanted students to learn more about the Founding Fathers and providing Baksa with a book entitled *Myth of Separation* by David Barton.[22] (36:14–15, 17 (Baksa), P–179).

> 22. Moreover, in an email to one of the social studies teachers on October 19, 2004, the day after the Board passed the resolution at issue, Baksa said: "all kidding aside, be careful what you ask for. I've been given a copy of the *Myth of Separation* by David Barton to review from Board members. Social Studies curriculum is next year. Feel free to borrow my copy to get an idea where the board is coming from." (36:14 (Baksa); P–91).

b. *Fall 2003—Bonsell Confronted Teachers About Evolution*

Shortly after Baksa took a position with the DASD in the fall of 2002, he and Bonsell, then Chair of the Board Curriculum Committee, had discussions in which Bonsell expressed concern about the teaching of evolution, the presentation of Darwin in a biology textbook used at Dover, and felt that Darwin was presented as a fact, not a theory. (26:62–64 (Baksa); 35:55 (Baksa)). Prior to the fall of 2003, Baksa discussed Bonsell's evolutionary concerns with the teachers, including Bonsell's problem with the teaching of the origin of life, by which Bonsell meant how species change into other species, aspects of the theory of evolution also known as macroevolution and speciation. (35:66–68 (Baksa)).

Baksa then arranged for a meeting between Bonsell and science teachers in the fall of 2003 in which Jennifer Miller, the senior biology teacher, acted as spokesperson for the teachers. (Trial Tr. vol. 12, J. Miller, 107–09, Oct. 6, 2005; 35:68 (Baksa)). Miller testified that Bonsell was specifically concerned that the teachers conveyed information to students in opposition to what parents presented at home leaving students with the impression that "somebody is lying." (12:111 (J. Miller)). Miller explained that evolution is taught as change over time with emphasis upon origin of species, not origin of life. Bonsell left the meeting with the understanding that the "origins of life" is not taught, which pleased him because the concept of common ancestry offends his personal religious belief that God created man and other species in the forms they now exist and that the earth is only thousands of years old. (33:54–58, 115 (Bonsell)).

Prior to the fall of 2003, no Dover administrator or Board member had ever ***750** met with the biology teachers and questioned them as to how they taught evolution, or any other aspect of biology. (Trial Tr. vol. 36, Linker Test., 75, Nov. 3, 2005). The result of the unprecedented fall 2003 meeting was that it had an impact upon how biology teachers subsequently taught evolution in Dover. First, before the meeting with Bonsell, biology teacher Robert Linker had a practice of explaining that creationism was based on "Bibles, religion, [and] Biblical writings," noting that it was illegal to discuss creation in public school. (36:83 (Linker)). After the meeting, however, Linker changed his prior practice by ceasing any mention of creationism at the beginning of the evolution section, as did he stop using helpful Discovery Channel evolution

videos as teaching aides. (36:82–85 (Linker)). Linker testified that he changed his practices in the classroom because the unusual meeting with Bonsell alerted him to a controversy surrounding how he taught evolution. (36:84–85 (Linker)). Linker additionally testified that Jen Miller, a senior biology teacher, changed her practice of having the students create an evolution time-line in the hallway, which addressed how various species developed over millions of years. (36:86–87 (Linker)).

Therefore, although Defendants have asserted that the ID Policy has the secular purposes of promoting critical thinking and improving science education, the opposite of such purposes occurred in fact as biology teachers had already began to omit teaching material regarding the theory of evolution in the months preceding the adoption of the ID Policy.

c. *Early 2004—Buckingham's Contacts with the Discovery Institute*

At some point before June 2004, Seth Cooper, an attorney with the Discovery Institute contacted Buckingham and two subsequent calls occurred between the Discovery Institute and Buckingham. Although Buckingham testified that he only sought legal advice which was provided in the phone calls, for which Defendants asserted the attorney-client privilege, Buckingham and Cooper discussed the legality of teaching ID and gaps in Darwin's theory. (29:133–143 (Buckingham); 30:9 (Buckingham)). The Discovery Institute forwarded Buckingham a DVD, videotape, and book which he provided to Nilsen to give the science teachers. (29:130–131 (Buckingham); 25:100–01 (Nilsen); 26:114–15 (Baksa)). Late in the 2003–04 school year, Baksa arranged for the science teachers to watch a video from the Discovery Institute entitled “Icons of Evolution” and at a subsequent point, two lawyers from the Discovery Institute made a legal presentation to the Board in executive session. (Trial Tr. vol. 4, B. Rehm Test., 48–49, Sept. 27, 2005; 33:111–12 (Bonsell)).

d. *June 2003 to June 2004—Board Delayed Purchasing the Biology Textbook*

In June 2003, the Board approved funds for new science textbooks, including a biology textbook, the 2002 edition of *Biology* written by Plaintiffs' lead expert Kenneth Miller; however, the Board did not approve the purchase of such biology textbook despite its recommendation by the faculty and administration. (3:130–31 (B. Callahan); 29:33 (Buckingham)). In fact, Buckingham testified that as of June 2004, the Board was delaying approval of *Biology* because of the book's treatment of evolution and the fact that it did not cover any alternatives to the theory of evolution. (29:33–34 (Buckingham)).

e. *June 2004 Board Meetings—Buckingham and Other Board Members Spoke in Favor of Teaching Creationism*

Plaintiffs introduced evidence that at public school board meetings held on June ***751** 7, 2004 and June 14, 2004, members of the Board spoke openly in favor of teaching creationism and disparaged the theory of evolution on religious grounds. On these important points, Plaintiffs introduced the testimony of Plaintiffs Fred and Barrie Callahan, Bryan and Christy Rehm, Beth Eveland, former school Board members Casey and Jeff Brown and William Buckingham, teachers Bertha Spahr and Jennifer Miller, and newspaper reporters Heidi Bernhard–Bubb and Joseph Maldonado. We are in agreement with Plaintiffs that with the exception of Buckingham,

the testimony of these witnesses was both credible and convincing, as will be discussed below.

We will now provide our findings regarding the June 7, 2004 Board meeting. First, the approval of several science textbooks appeared on the agenda for the meeting, but not approval for the biology textbook. (P–42 at 8–9). After Barrie Callahan asked whether the Board would approve the purchase of the 2002 edition of the textbook entitled *Biology,* Buckingham told Callahan that the book was "laced with Darwinism" and spoke in favor of purchasing a textbook that included a balance of creationism and evolution. (P–46/P–790; 35:76–78 (Baksa); 24:45–46 (Nilsen); 3:135–36 (B. Callahan); 4:51–52 (B. Rehm); 6:62–63 ©. (Rehm); 7:25–26 ©. (Brown)). With surprising candor considering his otherwise largely inconsistent and non-credible testimony, Buckingham did admit that he made this statement. Second, Buckingham said that the Board Curriculum Committee would look for a book that presented a balance between creationism and evolution. (P–45/P–805; Trial Tr. vol. 30, Bernhard–Bubb Test., 96, Oct. 27, 2005; P–46/P–790; Trial Tr. vol. 31, Maldonado Test., 59–60, Oct. 28, 2005). Third, Bonsell said that there were only two theories that could possibly be taught, creationism and evolution, and as long as both were taught as theories there would be no problems for the District. (P–46/P–790; 6:65 ©. (Rehm)). Fourth, Buckingham spoke in favor of having a biology book that included creationism. (P–47/P–791; 8:60–61 (J. Brown); 7:33 ©. (Brown); 3:137–38 (B. Callahan); 30:89–90, 105–06, 110–11 (Bernhard–Bubb); 31:60, 66 (Maldonado)). Fifth, both Wenrich and Bonsell spoke in favor of having a biology book that included creationism. (P–47/P–791; 8:60 (J. Brown); 7:33 ©. (Brown); 30:89–90, 105–06, 110–11 (Bernhard–Bubb); 31:66 (Maldonado); 3:137–38 (B. Callahan)). Sixth, Superintendent Nilsen said that the District was looking for a textbook that presented "all options and theories" and never challenged the accuracy of that quotation. (25:119–20 (Nilsen)). Seventh, Buckingham testified that he had previously said the separation of church and state is a myth and not something that he supports. (P–44/P–804; P–47/P–791; 3:141–42 (B. Callahan); 7:32–33 ©. (Brown); 31:66–67 (Maldonado)). Buckingham also said: "It is inexcusable to have a book that says man descended from apes with nothing to counterbalance it." (P–44/P–804; 30:77–78 (Bernhard–Bubb)). Finally, after the meeting, Buckingham stated: "This country wasn't founded on Muslim beliefs or evolution. This country was founded on Christianity and our students should be taught as such." (P–46/P–790; 31:63 (Maldonado)).

We will now provide our findings regarding the June 14, 2004 Board meeting. Initially, we note that the subject of the biology textbook did not appear on the agenda of the meeting but members of the public made comments, and the Board continued to debate the subject of the biology textbook. Second, Buckingham's wife, Charlotte, gave a speech that exceeded the normal time protocols during the public comment section in which she explained ***752*** that "evolution teaches nothing but lies," quoted from Genesis, asked "how can we allow anything else to be taught in our schools," recited gospel verses telling people to become born again Christians, and stated that evolution violated the teachings of the Bible. (P–53/P–793; 4:55–56 (B. Rehm); 6:71 ©. (Rehm); 7:34–35 ©. (Brown); 8:104–05 (F. Callahan); 8:63 (J. Brown); 30:107–08 (Bernhard–Bubb); 31:76–77 (Maldonado); 33:37–43 (Bonsell); 29:82–83 (Buckingham); 12:125 (J. Miller); 13:84 (Spahr)). In her deposition, Charlotte Buckingham admitted that she made a speech at the June 14, 2004 Board meeting in which she argued that

creationism as set forth in Genesis should be taught at Dover High School and that she read quotations from scripture as part of her speech. ©. Buckingham Dep. at 19–22, April 15, 2005. During this religious speech at a public Board meeting, Board members Buckingham and Geesey said “amen.” (7:35 ©. (Brown)). Third, Buckingham stood by his opposition to the 2002 edition of the textbook entitled *Biology.* Fourth, Bonsell and Wenrich said they agreed with Buckingham that creationism should be taught to balance evolution. (P–806/P–54). Fifth, Buckingham made several outwardly religious statements, which include the following remarks. “Nowhere in the Constitution does it call for a separation of church and state.” He explained that this country was founded on Christianity. Buckingham concedes that he said “I challenge you (the audience) to trace your roots to the monkey you came from.” He said that while growing up, his generation read from the Bible and prayed during school. He further said “liberals in black robes” were “taking away the rights of Christians” and he said words to the effect of “2,000 years ago someone died on a cross. Can't someone take a stand for him?” (P–806/P–54; 12:126 (J. Miller); 13:85 (Spahr); 30:105–07 (Bernhard–Bubb); P–793/P–53; 31:75–76, 78–79 (Maldonado); 29:71 (Buckingham); 35:81–82 (Baksa); 6:73 ©. (Rehm); 4:54–55 (B. Rehm); 6:96 (Eveland); 7:26–27 ©. (Brown); 8:63 (J. Brown); 8:105–06 (F. Callahan)).

Finally, although Buckingham, Bonsell, and other defense witnesses denied the reports in the news media and contradicted the great weight of the evidence about what transpired at the June 2004 Board meetings, the record reflects that these witnesses either testified inconsistently, or lied outright under oath on several occasions, and are accordingly not credible on these points.

f. *June 2004—Board Curriculum Committee Meeting*

Near the end of the school year in June 2004, the Board Curriculum Committee met with the teachers to discuss a list of Buckingham's concerns about the textbook *Biology.* (12:114–15 (J. Miller); 35:82 (Baksa); P–132). All of Buckingham's concerns related to the theory of evolution and included such objections as the reference to a species of finch known as Darwin's finch simply because it referred to Darwin and his viewpoint that the textbook did not give “balanced presentation,” by which he meant that it did not include the “theory of creationism with God as creator of all life.” (7:45–48 ©. (Brown)).

A large part of the meeting addressed Buckingham's concern that the teachers were teaching what he referred to as “origins of life,” apparently including the origin of species and common ancestry. Jen Miller reiterated that the teachers do not address origins of life, only origin of species. (12:118–120 (J. Miller)).

Also at the meeting Baksa provided those in attendance with several documents including a survey of biology books ****753*** used in private religious schools in York County, a product profile of a biology textbook used at Bob Jones University, and a document entitled “Beyond the Evolution vs. Creation Debate.” The second page of the “Beyond the Evolution vs. Creation Debate” document reads “Views on the Origin of the Universe and Life” and it explains the difference between “Young Earth Creationism (Creation Science),” “Progressive Creationism (Old Earth Creation),” “Evolutionary Creation (Theistic Creation),” “Deistic Evolution (Theistic

Evolution)," and "Dysteleological Evolution (Atheistic Evolution)." Interestingly and notably, the example provided under the Progressive Creation (Old Earth Creation) is that of the "Intelligent Design Movement, Phillip Johnson, Michael Behe." (P–149).

Accordingly, as accurately submitted by Plaintiffs, we find that the Board Curriculum Committee knew as early as June 2004 that ID was widely considered by numerous observers to be a form of creationism. We do not find it coincidental that based upon the previously recited statements and history, some form of creationism was precisely what the Committee wanted to inject into Dover's science classrooms.

Moreover, at the meeting, although the teachers had already watched the video "Icons of Evolution" from the Discovery Institute, at Buckingham's insistence they agreed to review it again and consider using in class any portions that aligned with their curriculum. (26:122 (Baksa)). Although Baksa believed that the teachers had already determined there were no parts in the video that would be appropriate for use in class, the teachers capitulated in order to secure Buckingham's approval to purchase the much needed biology textbook. (35:93–94 (Baksa)).

In the midst of this panoply, there arose the astonishing story of an evolution mural that was taken from a classroom and destroyed in 2002 by Larry Reeser, the head of buildings and grounds for the DASD. At the June 2004 meeting, Spahr asked Buckingham where he had received a picture of the evolution mural that had been torn down and incinerated. Jen Miller testified that Buckingham responded: "I gleefully watched it burn." (12:118 (J. Miller)). Buckingham disliked the mural because he thought it advocated the theory of evolution, particularly common ancestry. (26:120 (Baksa)). Burning the evolutionary mural apparently was insufficient for Buckingham, however. Instead, he demanded that the *teachers agree that there would never again be a mural depicting evolution in any of the classrooms and in exchange, Buckingham would agree to support the purchase of the biology textbook in need by the students.* (36:56–57 (Baksa) (emphasis added)).

Finally, Baksa's testimony revealed that there was some mention of the words "intelligent design" at the meeting but he cannot recall who raised the subject. In fact, to the best of his knowledge at the time, ID amounted to nothing more than two words replacing one word, creationism, used by Buckingham at a Board meeting earlier that month. (35:96–98 (Baksa)). Baksa's testimony supports Plaintiffs' argument that at a point in June 2004, creationism began to morph into ID in the minds of the Board's thought leaders.

g. *July 2004—Buckingham Contacted Richard Thompson and Learned about Pandas*

At some point before late July 2004, Buckingham contacted the Thomas More Law Center (hereinafter "TMLC") for the purpose of seeking legal advice and spoke ***754** with Richard Thompson, President and Chief Counsel for the TMLC. (30:10–12 (Buckingham)). The TMLC proposed to represent the Board, and Buckingham accepted the offer on the Board's behalf. Buckingham and the Board first learned of the creationist textbook *Pandas* from Richard Thompson at some point before late July 2004. (29:107–08 (Buckingham); 30:10–12, 15–16

(Buckingham)).

h. *July 2004—New Edition of Biology Textbook Discovered*

In July 2004, after the teachers discovered that there was a 2004 edition of the textbook *Biology* available, the Board agreed to defer consideration of purchasing a new textbook at its July 12, 2004 meeting until it could review the 2004 edition. (12:127 (J. Miller); 13:30 (Spahr)). In July 2004, Spahr, Miller, and Baksa met to review the 2004 edition and compared the sections on evolution with those found in the 2002 edition. They then created a document delineating the differences. (12:127–29 (J. Miller)).

i. *August 2004—Buckingham and Other Board Members Tried to Prevent Purchase of Standard Biology Textbook*

On August 2, 2004 the Board met and one of the agenda items was the approval of the 2004 edition of *Biology.* A few days prior to this meeting, Casey Brown received a telephone call from Baksa who told her that Buckingham recommended that the District purchase *Pandas* as a supplemental textbook. (7:52–53 ©. (Brown); 8:64 (J. Brown)). Jeff Brown then went to Harkins' home to pick up a copy of *Pandas* at which point she told him that she wanted the school District to purchase the book. (8:65 (J. Brown)).

Subsequently, at the August 2, 2004 meeting, Buckingham opposed the purchase of *Biology,* which was recommended by the faculty and administration, unless the Board also approved the purchase of *Pandas* as a companion text. Only eight members of the Board were present on August 2, 2004 and the initial vote to approve the purchase of *Pandas* failed on a four to four vote with Buckingham, Harkins, Geesey, and Yingling voting for it. (8:68 (J. Brown); 29:105–06 (Buckingham); P–67). After Buckingham stated that he had five votes in favor of purchasing *Pandas* and if the Board approved the purchase of *Pandas,* he would release his votes to also approve the purchase of *Biology,* Yingling changed her vote and the motion to approve the purchase of *Biology* passed. (P–67; 8:68–69 (J. Brown)). At trial, Buckingham testified that at the meeting he specifically said “if he didn't get his book, the district would not get the biology book.” (29:106 (Buckingham)).

j. *August 26, 2004—Solicitor's Warning to Board*

On August 26, 2004, Board Solicitor Stephen S. Russell sent an email to Nilsen which indicated he spoke with Richard Thompson of the TMLC and that “[t]hey refer to the creationism issue as ‘intelligent design.’ ” (P–70). The email proceeded to explain the following:

> They [TMLC] have background knowledge and have talked to school boards in West Virginia and Michigan about possible litigation. However, nothing has come about in either state. This suggests to me that no one is adopting the textbook because, if they were, one can safely assume there would have been a legal challenge by someone somewhere ... *I guess my main concern at the moment, is that even if use of the text is purely voluntary, this may still make it very difficult to win a case.* I say this because one of the common themes in ****755*** some of the U.S. Supreme Court decisions, especially dealing with silent meditation, is that even though something is voluntary, it still causes

> a problem because the practice, whatever it may be, was initiated for religious reasons. One of the best examples comes out of the silent meditation cases in Alabama which the court struck down because the record showed that the statute in question was enacted for religious reasons. *My concern for Dover is that in the last several years there has been a lot of discussion, news print, etc. for putting religion back in the schools. In my mind this would add weight to a lawsuit seeking to enjoin whatever the practice might be.*

Id. (emphasis added). Nilsen subsequently shared this email with everyone present at the Board Curriculum Committee meeting on August 30, 2004, including Buckingham, Bonsell, and Harkins. (25:135–36 (Nilsen)). Additionally, both Nilsen and Baksa admitted that they knew the email referred to the news reports of the June 2004 meetings. (25:135–36, 138–39 (Nilsen); 35:105–06, 111–12 (Baksa)).

There is no evidence that the Board heeded even one iota of the Solicitor's detailed and prudent warning. We also find the email to be persuasive, additional evidence that the Board knew that ID is considered a form of creationism.

k. *August 30, 2004—Board Curriculum Committee Forced Pandas on the Teachers as Reference Text*

On August 30, 2004, the Board Curriculum Committee met with Spahr, Miller, Nilsen, Baksa, Bonsell, Buckingham, Harkins, and Casey Brown with the principal subject of discussion being *Pandas* and how it would be used in the classroom. (12:134 (J. Miller)). Although Spahr expressed concern that the textbook taught ID, which she equated with creationism, Buckingham wanted *Pandas* to be used in the classroom as a comparison text side-by-side the standard biology textbook. (12:135 (J. Miller); 29:104–05 (Buckingham)). Despite the fact that the teachers strongly opposed using *Pandas* as a companion text, they agreed that *Pandas* could be placed in the classroom as a reference text as a compromise with the Board. (29:111 (Buckingham); 12:136 (J. Miller); 13:88 (Spahr)). Baksa testified that no one could construe the teachers as having supported *Pandas* in any way, reference text or otherwise, which is evidenced by Jen Miller's statement that if the teachers compromised with the Board, “maybe this will go away again.” (35:120 (Baksa); 12:136 (J. Miller)). It is patently evident that by this point, the teachers were both weary from the extended contention concerning the teaching of evolution, and wary of retribution in the event they persisted in opposing Buckingham and his cohorts on the Board.

Baksa testified that during this time period he researched *Pandas* and ID, which included directing his secretary to go to the webpage for the Institute for Creation Research. (35:113–14 (Baksa); D–35). The afore-referenced webpage states that *Pandas* “contains interpretations of classic evidences in harmony with the creation model” and he testified on cross-examination that he was aware of such information when he researched *Pandas.* (35:114–15 (Baksa)). The fact that Baksa contradicted this testimony on re-direct and stated that he had never read the webpage has an unfortunate and negative impact on his credibility in this case.

l. *October 2004—Arrangement for Donation of Sixty Copies of Pandas*

The October 4, 2004 Board meeting agenda indicated that Nilsen had accepted ***756** a donation of 60 copies of the text *Pandas.* (P–78 at 9). There is no evidence that Bonsell, Buckingham or any other individual disclosed the source of the donation until it was finally admitted at trial, despite the fact that Larry Snook, a former Board member, inquired as to the source of the donation at a November 2004 Board meeting. (30:47 (Buckingham); 33:30 (Bonsell)).

The testimony at trial stunningly revealed that Buckingham and Bonsell tried to hide the source of the donations because it showed, at the very least, the extraordinary measures taken to ensure that students received a creationist alternative to Darwin's theory of evolution. To illustrate, we note that at January 3, 2005 depositions taken pursuant to an order of this Court so Plaintiffs could decide whether to seek a temporary restraining order, upon repeated questioning by Plaintiffs' counsel on this point, *neither Buckingham nor Bonsell provided any information about Buckingham's involvement in the donation or about a collection he took at his church.* (30:50–56 (Buckingham); 33:31–35 (Bonsell) (emphasis added)). Buckingham actually made a plea for donations to purchase *Pandas* at his church, the Harmony Grove Community Church, on a Sunday before services and a total of $850 was collected as a result. (30:38–40 (Buckingham)). As proof of such donation amount, Plaintiffs introduced into evidence a check in the amount of $850 indorsed to Donald Bonsell, Alan Bonsell's father, drawn on Buckingham's account jointly held with his wife, with the notation "Of Pandas and People" appearing on the check. (P–80; 30:46–47 (Buckingham)). Alan Bonsell gave the money to his father who purchased the books. (33:131–32 (Bonsell)). When Spahr received the shipment of books and began to unpack them, she discovered a catalogue from the company that sold the books listing *Pandas* under "Creation Science." (13:94–5 (Spahr); P–144 at 29).

When we were moved to question Bonsell regarding this sequence of events at trial, he testified that his father served as the conduit for the funds from Buckingham's church because: "He agreed to—he said that he would take it, I guess, off the table or whatever, because of seeing what was going on, and with Mrs. Callahan complaining at the Board meetings not using funds or whatever." (33:129 (Bonsell)).

As we will discuss in more detail below, the inescapable truth is that both Bonsell and Buckingham lied at their January 3, 2005 depositions about their knowledge of the source of the donation for *Pandas,* which likely contributed to Plaintiffs' election not to seek a temporary restraining order at that time based upon a conflicting and incomplete factual record. This mendacity was a clear and deliberate attempt to hide the source of the donations by the Board President and the Chair of the Curriculum Committee to further ensure that Dover students received a creationist alternative to Darwin's theory of evolution. We are accordingly presented with further compelling evidence that Bonsell and Buckingham sought to conceal the blatantly religious purpose behind the ID Policy.

m. *October 7, 2004—Board Curriculum Committee Drafted Curriculum Change*

In September 2004, acting on instructions of the Board, Baksa prepared a change to the biology curriculum which stated: "Students will be made aware of gaps in Darwin's theory and of other

theories of evolution" and contained no reference text. (P–73; 35:122 (Baksa)). The Court has been presented with no evidence that the Board asked Baksa to initiate such changes to the biology curriculum to ***757** improve science education in the Dover school system, as will be elaborated upon below.

The Board Curriculum Committee met on October 7, 2004 to discuss changing the biology curriculum, without inviting the science teachers. (35:124 (Baksa)). As Casey Brown was absent, the Board members present with Baksa were Buckingham, Bonsell, and Harkins, and the meeting involved a discussion of various positions regarding the proposed curriculum change. (P–81; 35:125 (Baksa); 29:113 (Buckingham)). The Board Curriculum Committee ultimately adopted, within a matter of minutes, Bonsell's alternative, which states: "Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution, including but not limited to intelligent design." (P–82; 35:125 (Baksa)). The Board Curriculum Committee's proposed change also called for *Pandas* to be cited as a reference text. (35:125 (Baksa)). The curriculum change proposed by the Board Curriculum Committee and the change proposed by the administration and accepted by the science faculty, were circulated to the full Board by memoranda dated October 13, 2004. (P–84A; P–84B).

n. *October 18, 2004—Curriculum Change Resolution Passed*

On October 18, 2004, the Board passed by a 6–3 vote, a resolution that amended the biology curriculum as follows:

> Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught.

In addition, the Board resolution stated that this subject is to be covered in lecture form with *Pandas* to be a reference book. (7:89–90 ©. (Brown); P–88; P–209 at 1646; P–84C). Board members Bonsell, Buckingham, Harkins, Geesey, Cleaver, and Yingling voted for the resolution with Noel Wenrich and Casey and Jeff Brown voting against it. (7:89–90 ©. (Brown); P–88).

Compelling evidence was presented at trial that in passing the resolution the Board deviated from its regular practice in important respects. "The normal procedures were not followed at all in making this change." (7:79 ©. (Brown)). First, the Board typically addressed curriculum changes an entire year in advance of implementation; however, the change to the biology curriculum was initiated during the 2004–05 school year to be effective that year. (7:78–79 ©. (Brown)). Second, standard Board practice dictated two meetings to be held per month, a planning meeting in which items for consideration were listed on its agenda *before* they were listed for resolution on the agenda at the action meeting held later in the month. The change to the biology curriculum, however, was placed on the Board's agenda for the first time during an action meeting, which several witnesses testified to be irregular. (7:24–25, 77–78 ©. (Brown); 26:11 (Nilsen); 4:3–5 (B. Callahan); 29:118 (Buckingham)). Third, Board practice called for the District Curriculum Committee to meet and discuss the proposed curriculum change, which Nilsen suggested in this case; however, not surprisingly, the Board overruled that suggestion.

(7:72–73 ©. (Brown); 26:8–10 (Nilsen)). Although the administration did send the proposed change to the District Curriculum Committee and received feedback from two members, including an opposition and a request for the District Curriculum to meet, no evidence has been presented that either suggestion was acted upon by the Board. (P–151; D–67; 7:80–82 ©. (Brown); 35:7–8 (Baksa)). Finally, the Board brazenly chose not to follow the advice of their only science-education resources***758** as the teachers were not included in the process of drafting the language adopted by the Board Curriculum Committee. (7:82–83 ©. (Brown)).

In addition to deviating from standard Board practice in multiple respects, defense witnesses testified that the rush to bring the curriculum change to a vote occurred because the issue had been debated for the previous six months and more importantly, the Board was about to lose two Board members, Wenrich and Cleaver, who had been a part of those discussions. (26:10–12 (Nilsen); 33:113–14 (Bonsell)). The record contains no evidence of any public Board meetings in which the Board discussed ID; however, the evidence does show that the Board discussed creationism within that six month period. In fact, the evidence reveals that Buckingham wanted the Board to vote on the resolution on October 18, 2004 because he thought he had sufficient votes to pass the resolution adopted at the October 7, 2004 Board Curriculum Committee meeting. (29:113–16 (Buckingham)).

Prior to the vote at the October 18, 2004 meeting, science teachers Spahr and Miller, as well as members of the public spoke outwardly against the curriculum change. (13:41–42 (J. Miller); 13:88–93 (Spahr)). Spahr made clear in her statement to the Board that the teachers' agreement to point out “flaws/problems with Darwin's theory,” not to teach origins of life, and to have *Pandas* available as a reference text, were all compromises with the Board Curriculum Committee, after what she described as “a long and tiresome process.” (13:91–92 (Spahr)). She additionally stated that the change was being railroaded through without input from the teachers or the District Curriculum Committee, and no member of the administration or Board disagreed. (13:91–93 (Spahr); 35:126 (Baksa)). Finally, Spahr warned the full Board that ID amounted to creationism and could not be taught legally. (24:102 (Nilsen); 35:14–15 (Baksa)).

Baksa provided highly pertinent information concerning the position of the teachers throughout this process. He testified that the teachers did not support *Pandas* in any way, but that they made compromises to insure the purchase of the biology book entitled *Biology.* (35:119–20 (Baksa)). Also, he testified that any suggestion the teachers supported any part of the curriculum change must be soundly rejected. (35:20–21 (Baksa)). The unrebutted evidence reveals that the teachers had to make unnecessary sacrifices and compromises advantageous toward Board members, who were steadfastly working to inject religion in the classroom, so that their students would have a biology textbook that should have been approved as a matter of course.

Remarkably, the 6–3 vote at the October 18, 2004 meeting to approve the curriculum change occurred with absolutely no discussion of the concept of ID, no discussion of how presenting it to students would improve science education, and no justification was offered by any Board member for the curriculum change. (26:21 (Nilsen); 35:127–38 (Baksa); 8:36 ©. (Brown); 8:76

(J. Brown); 12:139–40 (J. Miller); 13:102 (Spahr); 32:25–26, 40 (Cleaver); 30:23–25 (Buckingham); 31:182–83 (Geesey); 34:124–26 (Harkins); 6:105–06 (Eveland)). Furthermore, Board members somewhat candidly conceded that they lacked sufficient background in science to evaluate ID, and several of them testified with equal frankness that they failed to understand the substance of the curriculum change adopted on October 18, 2004. (31:175, 181–82 (Geesey); 32:49–50 (Cleaver); 34:117–18, 124–25 (Harkins)).

In fact, one unfortunate theme in this case is the striking ignorance concerning ***759** the concept of ID amongst Board members. Conspicuously, Board members who *voted for* the curriculum change testified at trial that they had utterly no grasp of ID. To illustrate, consider that Geesey testified she did not understand the substance of the curriculum change, yet she voted for it. (31:181–82 (Geesey); 29:11–12 (Buckingham); Buckingham Dep. 1:59–61, January 3, 2005; 34:48–49 (Harkins); 33:112–13 (Bonsell); 26:21 (Nilsen)). Moreover, as she indicated on multiple occasions, in voting for the curriculum change, Geesy deferred completely to Bonsell and Buckingham. (31:154–55, 161–62, 168, 184–87, 190 (Geesey)). Second, Buckingham, Chair of the Curriculum Committee at the time, admitted that he had no basis to know whether ID amounted to good science as of the time of his first deposition, which was two and a half months after the ID Policy was approved, yet he voted for the curriculum change. (30:32–33 (Buckingham)). Third, Cleaver voted for the curriculum change despite the teachers' objections, based upon assurances from Bonsell. (32:23–25 (Cleaver)). Cleaver admittedly knew nothing about ID, including the words comprising the phrase, as she consistently referred to ID as “intelligence design” throughout her testimony. In addition, Cleaver was bereft of any understanding of *Pandas* except that Spahr had said it was not a good science book which should not be used in high school. (32:45–46 (Cleaver)). In addition, Superintendent Nilsen's entire understanding of ID was that “evolution has a design.” (26:49–50 (Nilsen)).

Despite this collective failure to understand the concept of ID, which six Board members nonetheless felt was appropriate to add to ninth grade biology class to improve science education, the Board never heard from any person or organization with scientific expertise about the curriculum change, save for consistent but unwelcome advices from the District's science teachers who uniformly opposed the change. (29:109 (Buckingham)). In disregarding the teachers' views, the Board ignored undeviating opposition to the curriculum change by the one resource with scientific expertise immediately at its disposal. The only outside organizations which the Board consulted prior to the vote were the Discovery Institute and TMLC, and it is clear that the purpose of these contacts was to obtain legal advice, as opposed to science education information. (33:111–12 (Bonsell); 29:130, 137–43, 30:10–14 (Buckingham)). The Board received no materials, other than *Pandas,* to assist them in making their vote. Nor did anyone on the Board or in the administration ever contact the NAS, the AAAS, the National Science Teachers' Association, the National Association of Biology Teachers, or any other organization for information about ID or science education before or after voting for the curriculum change. (33:113 (Bonsell); 30:24–27 (Buckingham)). While there is no requirement that a school board contact any of the afore-referenced organizations prior to enacting a curriculum change, in this case a simple glance at any one of their websites for

additional information about ID and any potential it may have to improve science education would have provided helpful information to Board members who admittedly had no comprehension whatsoever of ID. As Dr. Alters' expert testimony demonstrated, all of these organizations have information about teaching evolution readily available on the internet and they include statements opposing the teaching of ID. (14:74–99 (Alters)).

Although the resolution passed, it was not without opposition. Both the Superintendent and Assistant Superintendent, Nilsen and Baksa, opposed the curriculum change. (35:126 (Baksa)). Baksa testified ***760** that he still feels the curriculum change was wrong. (35:127 (Baksa)). Both Casey and Jeff Brown, who voted against the resolution, resigned at the conclusion of the October 18, 2004 Board meeting. The following excerpt from Casey Brown's poignant resignation speech speaks volumes about what had occurred within the Board by that time:

> There has been a slow but steady marginalization of some board members. Our opinions are no longer valued or listened to. Our contributions have been minimized or not acknowledged at all. A measure of that is the fact that I myself have been twice asked within the past year if I was "born again." No one has, nor should have the right, to ask that of a fellow board member. An individual's religious beliefs should have no impact on his or her ability to serve as a school board director, nor should a person's beliefs be used as a yardstick to measure the value of that service.
>
> However, it has become increasingly evident that it is the direction the board has now chosen to go, holding a certain religious belief is of paramount importance.

7:92–93(c). (Brown).

Additionally, at the following meeting, Board member Wenrich, who opposed the expedited vote on October 18, 2004 and engaged in parliamentary measures to have the vote delayed until the community could properly debate the issue while considering the science teachers' position, resigned and stated the following:

> I was referred to as unpatriotic, and my religious beliefs were questioned. I served in the U.S. Army for 11 years and six years on the board. Seventeen years of my life have been devoted to public service, and my religion is personal. It's between me, God, and my pastor.

P–810; 30:126–30 (Bernhard–Bubb); 4:11–12 (B. Callahan).

The evidence clearly reveals that Board members who voted in favor of the curriculum change blindly adopted the recommendations of the architects of the ID Policy, Bonsell and Buckingham, with respect to their decision to incorporate it as part of the high school biology curriculum, while disregarding opposition by the science teachers and administration. (31:154–68 (Geesey)).

o. *Development of Statement to be Read to Students*

After the curriculum was changed, Baksa was given the task of preparing a statement to be read to students before the evolution unit in biology commenced. The persuasive evidence presented at trial demonstrates that the final version of the statement communicated a very different message about the theory of evolution than the language that Baksa and senior science teacher Jen Miller proposed. (36:27 (Baksa)).

First, Baksa's initial draft of the statement described Darwin's theory of evolution as the " *dominant scientific theory;* " however, the Board removed such language from the final version. (D–91; 36:22–24 (Baksa)). Second, Baksa's draft stated that "there are gaps in Darwin's theory for which there is *yet* no evidence;" however, the Board selectively edited out the word "yet" so that the statement is read in a considerably different light to be "there are gaps in Darwin's theory for which there is no evidence." (D–91; 36:26–28 (Baksa)). Third, after Jen Miller reviewed the statement at Baksa's suggestion, she suggested that language be added that there is a "significant amount of evidence" supporting Darwin's theory. Although Baksa felt this was an accurate statement about the scientific theory of ***761** evolution, he removed such language because he understood that the Board would not approve it as written. (D–91; 36:24–26 (Baksa)).

As previously noted, the final version of the statement prepared by Defendants to be read to students in ninth grade biology class states, as follows:

> The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.
>
> Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.
>
> Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.
>
> With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

P–124.

Subsequently, on January 6, 2005, the teachers sent a memo to the Board requesting that they be released from any obligation to read the statement. (36:97 (Linker)). The memo provides, in relevant part, as follows:

> You have indicated that students may "opt-out" of this portion [the statement read to students at the beginning of the biology evolution unit] of the class and that they will be excused and monitored by an administrator. We respectfully exercise our right to "opt-out" of the statement portion of the class. We will relinquish the classroom to an administrator and we will monitor our own students. This request is based upon our considered opinion that reading the statement violates our responsibilities as professional educators as set forth in the Code of Professional Practice and Conduct for Educators[.]
>
> INTELLIGENT DESIGN IS NOT SCIENCE. INTELLIGENT DESIGN IS NOT BIOLOGY. INTELLIGENT DESIGN IS NOT AN ACCEPTED SCIENTIFIC THEORY.
>
> I believe that if I as the classroom teacher read the required statement, my students will inevitably (*and understandably*) believe that Intelligent Design is a valid scientific theory, perhaps on par with the theory of evolution. That is not true. To refer the students to "Of Pandas and People" as if it is a scientific resource breaches my ethical obligation to provide them with scientific knowledge that is supported by recognized scientific proof or theory.

P–121 (emphasis in original).

Administrators were thus compelled to read the statement to ninth graders at Dover High School in January 2005 because of the refusal by the teachers to do so. (25:56–57 (Nilsen); 35:38 (Baksa)). The administrators read the statement again in June 2005. By that time, Defendants had modified the statement to refer to other, unnamed books in the library that relate to ID; however *Pandas* remains the only book identified by name in the statement. Defendants offered no evidence concerning whether the other books can be found in the library, including ***762** whether they are placed near *Pandas.* (P–131; 35:40, 42–43 (Baksa)).

p. *Newsletter Published by the Board*

As we previously explained in detail, the Board mailed a newsletter to the entire Dover community in February 2005, which was prepared in conjunction with the TMLC. (P–127). Additionally, on April 23, 2005, lead defense expert Professor Behe made a presentation on ID to Dover citizens at the Board's request. (Joint Stip. of Fact ¶ 11).

q. *Effect of Board's Actions on Plaintiffs*

Plaintiffs provided compelling testimony as to the harm caused by the Board's ID Policy on their children, families, and themselves in consistent, but personal ways. Plaintiffs believe that ID is an inherently religious concept and that its inclusion in the District's science curriculum interferes with their rights to teach their children about religion. (3:118–19 (Kitzmiller); 4:13–15 (B. Callahan); 6:77–78(c). (Rehm); 6:106 (Eveland); 16:26, 30 (Stough); 17:147–48 (Leib)). Plaintiffs additionally testified that their children confront challenges to their religious beliefs at school because of the Board's actions, that the Board's actions have caused conflict within the

family unit, and that there is discord in the community. (6:77–78 (Rehm); 6:38–39 (Smith); 17:146–47 (Leib)).

The testimony of Joel Leib, whose family has lived in Dover for generations, is representative of the Plaintiffs' harm caused by the Board's actions in enacting the ID Policy.

> Well, it's driven a wedge where there hasn't been a wedge before. People are afraid to talk to people for fear, and that's happened to me. They're afraid to talk to me because I'm on the wrong side of the fence.

17:146–47 (Leib).

Moreover, Board members and teachers opposing the curriculum change and its implementation have been confronted directly. First, Casey Brown testified that following her opposition to the curriculum change on October 18, 2004, Buckingham called her an atheist and Bonsell told her that she would go to hell. (7:94–95; 8:32(c). (Brown)). Second, Angie Yingling was coerced into voting for the curriculum change by Board members accusing her of being an atheist and un-Christian. (15:95–97 (Sneath)). In addition, both Bryan Rehm and Fred Callahan have been confronted in similarly hostile ways, as have teachers in the DASD. (4:93–96 (B. Rehm); 8:115–16 (F. Callahan); 14:34–35 (Spahr)).

r. *Defendants Presented No Convincing Evidence that They were Motived by Any Valid Secular Purpose*

Although Defendants attempt to persuade this Court that each Board member who voted for the biology curriculum change did so for the secular purpose of improving science education and to exercise critical thinking skills, their contentions are simply irreconcilable with the record evidence. Their asserted purposes are a sham, and they are accordingly unavailing, for the reasons that follow.

We initially note that the Supreme Court has instructed that while courts are "normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards,* 482 U.S. at 586–87, 107 S.Ct. 2573 (citing *Wallace,* 472 U.S. at 64, 105 S.Ct. 2479)(Powell, J., concurring); *id.* at 75, 105 S.Ct. 2479 (O'Connor, J., concurring in judgment). ****763*** Although as noted Defendants have consistently asserted that the ID Policy was enacted for the secular purposes of improving science education and encouraging students to exercise critical thinking skills, the Board took none of the steps that school officials would take if these stated goals had truly been their objective. The Board consulted no scientific materials. The Board contacted no scientists or scientific organizations. The Board failed to consider the views of the District's science teachers. The Board relied solely on legal advice from two organizations with demonstrably religious, cultural, and legal missions, the Discovery Institute and the TMLC. Moreover, Defendants' asserted secular purpose of improving science education is belied by the fact that most if not all of the Board members who voted in favor of the biology curriculum change conceded that they still do not know, nor have they ever known, precisely what ID is. To assert a secular purpose against this backdrop is

ludicrous.

Finally, although Defendants have unceasingly attempted in vain to distance themselves from their own actions and statements, which culminated in repetitious, untruthful testimony, such a strategy constitutes additional strong evidence of improper purpose under the first prong of the *Lemon* test. As exhaustively detailed herein, the thought leaders on the Board made it their considered purpose to inject some form of creationism into the science classrooms, and by the dint of their personalities and persistence they were able to pull the majority of the Board along in their collective wake.

Any asserted secular purposes by the Board are a sham and are merely secondary to a religious objective. *McCreary,* 125 S.Ct. at 2735; *accord, e.g., Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266 ("it is ... the duty of the courts to 'distinguish a sham secular purpose from a sincere one.' " (citation omitted)); *Edwards,* 482 U.S. at 586–87, 107 S.Ct. 2573 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."). Defendants' previously referenced flagrant and insulting falsehoods to the Court provide sufficient and compelling evidence for us to deduce that any allegedly secular purposes that have been offered in support of the ID Policy are equally insincere.

Accordingly, we find that the secular purposes claimed by the Board amount to a pretext for the Board's real purpose, which was to promote religion in the public school classroom, in violation of the Establishment Clause.

2. *Effect Inquiry*

Although Defendants' actions have failed to pass constitutional muster under the endorsement test and pursuant to the purpose prong of *Lemon,* thus making further inquiry unnecessary, we will briefly address the final *Lemon* prong relevant to our inquiry, which is effect, in the interest of completeness. The Supreme Court has instructed the following with regard to the *Lemon* effect prong:

> The core notion animating the requirement that ... [an official act's] "principal or primary effect ... be one that neither advances nor inhibits religion," is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.

***764** *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 9, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989)(plurality op.)(internal citations omitted).

While the Third Circuit formally treats the endorsement test and the *Lemon* test as distinct inquiries to be treated in succession, it has continued to recognize the relationship between the

two. Moreover, because the *Lemon* effect test largely covers the same ground as the endorsement test, we will incorporate our extensive factual findings and legal conclusions made under the endorsement analysis by reference here, in accordance with Third Circuit practice. *Freethought,* 334 F.3d at 269 (The court noted that "effect under the *Lemon* test is cognate to endorsement," and hence the court did not hesitate simply to "incorporate [its] discussion of endorsement" into the effect analysis.).

To briefly reiterate, we first note that since ID is not science, the conclusion is inescapable that the only real effect of the ID Policy is the advancement of religion. *See McLean,* 529 F.Supp. at 1272. Second, the disclaimer read to students "has the effect of implicitly bolstering alternative religious theories of origin by suggesting that evolution is a problematic theory even in the field of science." *Selman,* 390 F.Supp.2d at 1308–09. Third, reading the disclaimer not only disavows endorsement of educational materials but also "juxtaposes that disavowal with an urging to contemplate alternative religious concepts implies School Board approval of religious principles." *Freiler,* 185 F.3d at 348.

The effect of Defendants' actions in adopting the curriculum change was to impose a religious view of biological origins into the biology course, in violation of the Establishment Clause.

G. *Challenge under Pennsylvania Constitution*

In addition to the Establishment Clause challenge, Plaintiffs assert that Defendants' actions in enacting the ID Policy violate their rights under the Pennsylvania Constitution, specifically Art. I, § 3.[23]

> 23. Although Plaintiffs' complaint asserts violations of their constitutional rights under Art. I, § 3, as well as Art. III, §§ 15 and 29, Plaintiffs' post-trial submissions only reference Art. I, § 3. We will accordingly consider whether Plaintiffs' rights were violated pursuant to Art. I, § 3 of the Pennsylvania Constitution.

Article I, § 3 of the Pennsylvania Constitution states the following:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Pa. Const. Art. I, § 3 (2005).

As we explained in our March 10, 2005 Order, the Pennsylvania Supreme Court has opined in *Springfield Sch. Dist. v. Commonwealth of Pa.,* 483 Pa. 539, 397 A.2d 1154, 1170 (1979), that

the provisions of Art. I, § 3 do not exceed the limitations in the First Amendment's Establishment Clause. *See also Wiest v. Mt. Lebanon Sch. Dist.,* 457 Pa. 166, 320 A.2d 362, 366 (1974), *cert. denied,* 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974). In discussing the provisions of Art. I, § 3, the Pennsylvania Supreme Court explained:

> The principles enunciated in this part of our Constitution reflected a concern for the protection of the religious freedoms of Pennsylvanians long before the first amendment to the United States Constitution***765** was made applicable to the states through the fourteenth amendment ... The protection of rights and freedoms secured by this section of our Constitution, however, does not transcend the protection of the first amendment of the United States Constitution.

Wiest, 320 A.2d at 366.

Consequently, our discussion of the issues raised under the federal constitution applies with equal vigor to the issues raised by Plaintiffs that are grounded in our state constitution. In light of this Court's prior ruling that the ID Policy violates the Establishment Clause of the First Amendment, the Court likewise concludes that the ID Policy is violative of Plaintiffs' rights under the Pennsylvania Constitution.

H. *Conclusion*

The proper application of both the endorsement and *Lemon* tests to the facts of this case makes it abundantly clear that the Board's ID Policy violates the Establishment Clause. In making this determination, we have addressed the seminal question of whether ID is science. We have concluded that it is not, and moreover that ID cannot uncouple itself from its creationist, and thus religious, antecedents.

Both Defendants and many of the leading proponents of ID make a bedrock assumption which is utterly false. Their presupposition is that evolutionary theory is antithetical to a belief in the existence of a supreme being and to religion in general. Repeatedly in this trial, Plaintiffs' scientific experts testified that the theory of evolution represents good science, is overwhelmingly accepted by the scientific community, and that it in no way conflicts with, nor does it deny, the existence of a divine creator.

To be sure, Darwin's theory of evolution is imperfect. However, the fact that a scientific theory cannot yet render an explanation on every point should not be used as a pretext to thrust an untestable alternative hypothesis grounded in religion into the science classroom or to misrepresent well-established scientific propositions.

The citizens of the Dover area were poorly served by the members of the Board who voted for the ID Policy. It is ironic that several of these individuals, who so staunchly and proudly touted their religious convictions in public, would time and again lie to cover their tracks and disguise the real purpose behind the ID Policy.

With that said, we do not question that many of the leading advocates of ID have *bona fide* and deeply held beliefs which drive their scholarly endeavors. Nor do we controvert that ID should continue to be studied, debated, and discussed. As stated, our conclusion today is that it is unconstitutional to teach ID as an alternative to evolution in a public school science classroom.

Those who disagree with our holding will likely mark it as the product of an activist judge. If so, they will have erred as this is manifestly not an activist Court. Rather, this case came to us as the result of the activism of an ill-informed faction on a school board, aided by a national public interest law firm eager to find a constitutional test case on ID, who in combination drove the Board to adopt an imprudent and ultimately unconstitutional policy. The breathtaking inanity of the Board's decision is evident when considered against the factual backdrop which has now been fully revealed through this trial. The students, parents, and teachers of the Dover Area School District deserved better than to be dragged into this legal maelstrom, with its resulting utter waste of monetary and personal resources.

***766** To preserve the separation of church and state mandated by the Establishment Clause of the First Amendment to the United States Constitution, and Art. I, § 3 of the Pennsylvania Constitution, we will enter an order permanently enjoining Defendants from maintaining the ID Policy in any school within the Dover Area School District, from requiring teachers to denigrate or disparage the scientific theory of evolution, and from requiring teachers to refer to a religious, alternative theory known as ID. We will also issue a declaratory judgment that Plaintiffs' rights under the Constitutions of the United States and the Commonwealth of Pennsylvania have been violated by Defendants' actions. Defendants' actions in violation of Plaintiffs' civil rights as guaranteed to them by the Constitution of the United States and 42 U.S.C. § 1983 subject Defendants to liability with respect to injunctive and declaratory relief, but also for nominal damages and the reasonable value of Plaintiffs' attorneys' services and costs incurred in vindicating Plaintiffs' constitutional rights.

NOW, THEREFORE, IT IS ORDERED THAT:

1. A declaratory judgment is hereby issued in favor of Plaintiffs pursuant to 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. § 1983 such that Defendants' ID Policy violates the Establishment Clause of the First Amendment of the Constitution of the United States and Art. I, § 3 of the Constitution of the Commonwealth of Pennsylvania.

2. Pursuant to Fed. R. Civ. P. 65, Defendants are permanently enjoined from maintaining the ID Policy in any school within the Dover Area School District.

3. Because Plaintiffs seek nominal damages, Plaintiffs shall file with the Court and serve on Defendants, their claim for damages and a verified statement of any fees and/or costs to which they claim entitlement. Defendants shall have the right to object to any such fees and costs to the extent provided in the applicable statutes and court rules.

Griswold v. Driscoll, 616 F.3d 53 (Federal appeals court, 1st Circuit 2010).

The issue is whether a decision by the Commissioner of Elementary and Secondary Education of Massachusetts to revise an advisory "curriculum guide" (by deleting his own earlier revision) in response to political pressure violated the First Amendment. We hold that it did not and affirm the judgment of the district court.

The well-pleaded facts in the plaintiffs' complaint, taken as true, *see Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortgage Fin. Corp.,* 246 F.3d 1, 4–5 (1st Cir.2001), together with documents attached and cited, *see Stein v. Royal Bank of Canada,* 239 F.3d 389, 392 (1st Cir.2001), tell the following story. A 1998 Massachusetts statute required the State Board of Elementary and Secondary Education to "formulate recommendations on curricular material on genocide and human rights issues, and guidelines for the teaching of such material." 1998 Mass. Acts 1154. The law instructed the Board to "consult with practicing [educators], as well as experts knowledgeable in [such] issues" and provided a non-exhaustive list of topics for possible consideration, including the "Armenian genocide." The final product was to be "filed" with legislative officials "not later than March 1, 1999," and made "available to all school districts in the commonwealth on an advisory basis."

On January 15, 1999, the Commissioner, appellee David Driscoll, circulated a draft of the "Massachusetts Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues" to members of the Board for review and comment. The Commissioner is "the secretary to the board, its chief executive officer and the chief state school officer for elementary and secondary education," but he is subject to the Board's authority, being removable by a majority vote. Mass. Gen. Laws ch. 15, § 1F. Driscoll's draft Guide explicitly referred to "the Armenian genocide," provided references to a number of relevant teaching resources, and stated by way of "background information" that the "Muslim Turkish Ottoman Empire destroyed large portions of its Christian Armenian minority population" in the late nineteenth and early twentieth centuries.

Four days after the draft Guide circulated, a local Turkish cultural group asked Driscoll and the Board to revise the Guide ***55** to present what they considered to be a more "objective study of history" by including references to the "contra-genocide perspective," according to which the fate of Ottoman Armenians did not reflect a policy of genocide. This group (along with others representing different constituencies) also addressed the Board at a public meeting held on January 26.

As a consequence, a number of changes were made to the Guide, including the addition of citations to several resources arguing the contra-genocide thesis and the deletion of the background information.[1] The revised version of the Guide was submitted to legislative officials on March 1, 1999, as the statute directed. Driscoll's cover letter indicated that the Board had reviewed the Guide and voted to accept it at the January 26 meeting.[2]

1. A section of the Guide recommending "Selected Print Resources for Teachers and High School Students" was also removed. This section had recommended five resources in "Armenian Studies."

2. The complaint alleges that the Board "voted to adopt the Guide, as presented [at the January 26 meeting] with certain alterations." But recommendations for the additional contra-genocide references were not made until the next month. It therefore appears that specific references added to the revised Guide were not reviewed by the Board but were rather simply later approved by Driscoll.

Attempts to change the Guide did not stop. In June, representatives of Armenian descendants in Massachusetts asked the governor in a letter to remove references to pro-Turkish sources, and before the month was out, Driscoll issued a second revised version of the Guide.[3] This new revision was shorn of "all references to Turkish websites, except for [that of] the Turkish Embassy," in what the plaintiffs describe as an "obviou[s]," if incomplete, attempt to "appease the political opposition to anything appearing to be 'Turkish.' " In response to the predictable complaint from Turkish groups, Driscoll and the Chairman of the Board, appellee James E. Peyser, replied that the legislative language required the Board to "address the Armenian genocide and not to debate whether or not [it] occurred." They took the position, accordingly, that the Guide could not refer to any source calling the genocide into question, including the previously listed website of the Turkish embassy.

3. This final version of the Guide is dated simply "June 1999," making it unclear whether the final revisions were made before or after the June 12 letter to the governor. Nevertheless, the plaintiffs allege that Driscoll "acted in response to political pressure" by the Armenian group, a state politician who had written to the Board in February (before the revised Guide with the contra-genocide references was filed), and the governor.

The most recent version of the Guide instructs that "[c]urriculum, instruction, and classroom assessment about genocide and human rights issues should be based on factual content aligned with the material in the Massachusetts Curriculum Framework." It lists relevant "main topics" from the History and Social Science Framework, and "subtopics" including the "Armenian Genocide." The Guide advises that "[a]lthough some [relevant] information ... is contained in textbooks, teachers wishing to explore these topics must find further information from other sources," and it concludes with a list of organizations, presumably intended as possible sources. The list includes The Children's Museum in Boston, Amnesty International, and the United Nations. Several Armenian groups are listed; no Turkish organization is.

The appellants, a collection of students, parents, teachers, and the Assembly of Turkish American Associations (ATAA, ***56** one of the Turkish groups that had complained to Driscoll), filed this suit in 2005. Their complaint alleged that revisions to the Guide made after its submission to legislative officials (that is, the removal of the contra-genocide references) violated their First Amendment rights to "inquire, teach and learn free from viewpoint

discrimination" (in the case of the students and parents) and to speak (in the case of the ATAA, whose website was removed from the revised Guide). The district court dismissed the complaint. The court first held that ATAA's claims were barred by the applicable three-year statute of limitations, see *Poy v. Boutselis,* 352 F.3d 479, 483 (1st Cir.2003), because the alleged violation of its rights occurred in 1999 when its website was removed from the Guide. The district court then held that the Guide was a form of government speech and, as such, exempt from First Amendment scrutiny. The court understood this conclusion to resolve overlapping questions of both the individual plaintiffs' standing and the merits of their constitutional challenge. We affirm the district court, although our reasoning differs slightly at times.

First, we agree with the district court that ATAA's suit is time-barred. ATAA does not claim a right to have its website included in the Guide; it says, rather, that the website, once included, could not be "excised to further a political agenda." The allegedly unconstitutional action therefore occurred in 1999 when the website was removed. The appellants' subsequent refusal to take further action to reverse that decision establishes neither an ongoing policy and practice nor an independent act of "excis[ion]." *Cf. Tobin v. Liberty Mut. Ins. Co.,* 553 F.3d 121, 131–32 (1st Cir.2009).

Second, as for the issue of individual plaintiffs' standing, we see this as a case in which the dispositive questions of standing and statement of cognizable claim are difficult to disentangle. *See McConnell v. FEC,* 540 U.S. 93, 227, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *overruled on other grounds, Citizens United v. FEC,* 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). If one sees the complaint as pleading a First Amendment library claim that may or may not ultimately be supported by evidence about the curriculum guide, the opportunity for a distinct analysis of standing is clear. But we think the equally straightforward reading is that of a curriculum guide claim that should be treated like one about a library, in which case pleading cognizable injury and stating a cognizable claim resist distinction. We therefore think it prudent to dispose of both standing and merits issues together.

The briefing and argument have urged two competing metaphors upon us, with contrasting constitutional implications: that the Guide is a virtual school library established for the benefit of students as well as teachers; and its contrary, that the Guide is an element of the curriculum itself. While neither figure of speech fits exactly, we think classification of the Guide as part of the state curriculum is the better choice.

The library metaphor, if accepted, would subject the decision to remove the references to contra-genocide material to First Amendment review under *Board of Education, Island Trees Union Free School District No. 26 v. Pico,* 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). There, a local board of education instructed the school superintendent to cull certain books from high school and junior high school libraries under circumstances suggesting that the order was based more on patriotism and religion than educational suitability. ***57** Students brought an action claiming that the mandated removal interfered with a First Amendment right of access to ideas free of interference from political pressure exerted through administrative authority

above the school level. *Id.* at 857–59, 102 S.Ct. 2799 (opinion of Brennan, J.). A fragmented majority affirmed an appellate order that the case proceed to trial, contrary to the district court's award of summary judgment to the board of education. A plurality concluded that a school board could not remove books from a library for the purpose of denying students access to ideas unpopular with board members, and found the question of the board's motivation for the removal order (viewpoint politics vs. education quality) to be a triable fact issue. *Id.* at 869–75, 102 S.Ct. 2799. *Pico's* rule of decision, however, remains unclear; three members of the plurality recognized and emphasized a student's right to free enquiry in the library, *id.* at 863–69, 102 S.Ct. 2799, but Justice Blackmun disclaimed any reliance on location and resorted to a more basic principle that a state may not discriminate among ideas for partisan or political reasons, *id.* at 878–79, 102 S.Ct. 2799, and Justice White concurred in the judgment without announcing any position on the substantive First Amendment claim, *id.* at 883–84, 102 S.Ct. 2799. But whatever special consideration is due to claims of library censorship, that issue need not be resolved here, for even on the assumption that some version of the plurality view is good law, this case would not fit within the plurality's scheme of library protection.

So far as it appears from the *Pico* opinions, books in the school library were chosen by someone at the particular school, but in any event not by the school district's board of education. *See id.* at 860, 102 S.Ct. 2799 (opinion of Brennan, J.) (noting that one judge on the Second Circuit panel "treated the case as involving an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters" (internal quotation marks omitted)). The pressure to remove the books considered offensive was exerted through the board against the schools through procedures that might have been "highly irregular and ad hoc," *id.* at 875, 102 S.Ct. 2799; that is, the schools were overruled by superior administrative authority, in what appeared to be a substitution of the customary process for determining school library content. *See id.* at 874, 102 S.Ct. 2799 (noting allegations that the board "ignored ... the views of librarians and teachers within the ... [s]chool system [and] the advice of the Superintendent of Schools" (internal quotation marks omitted)). It is this fact of improper interference from above that raised the specter of "official suppression of ideas," *id.* at 871, 102 S.Ct. 2799 (emphasis omitted), and may also explain, in part, the plurality's distinction between removal and acquisition of library books, *see, e.g., id.* at 862, 102 S.Ct. 2799.[4]

> 4. Of course, the *Pico* plurality did not suggest that all school board interference with library collections would be improper. To the contrary, the plurality acknowledged that "local school boards have a substantial legitimate role to play in the determination of school library content," and it identified several "criteria that appear on their face to be permissible" bases for school board action, "educational suitability, good taste, relevance, and appropriateness to age and grade level." 457 U.S. at 869, 873, 102 S.Ct. 2799 (internal quotation marks omitted). *Pico* provides no ground for calling into question school board decisions to remove library books based on such criteria, even if the decisions are made through unusual procedures.

Here, the administrative structure through which external force was brought to bear was different. We may assume for ****58*** argument that the Guide might be considered as a library of

sorts and that the political leverage exerted by the Armenian groups was equivalent to the pressure brought by the parent group upon members of the school board in *Pico. See id.* at 856, 102 S.Ct. 2799. But the missing step is the decisive act by a superior official overruling the authority that determines content in the normal course (in this case, the Board). According to the allegations, the governor and a state senator high-handedly channeled the reaction of the Armenian groups, but the revision dropping the contra-genocide references was made by the same authority that included them earlier, the Commissioner (and, moreover, appears to have been made before the Guide was made available to school districts).[5]

> 5. The plaintiffs allege that Commissioner Driscoll's decision to delete the contra-genocide references was never voted on by the Board, but this fact does not distinguish it from the initial decision to include the references. *See supra* n. 2. Further, even if the Board had approved the initial addition of the references, the Commissioner is not the Board's boss (in fact, he is answerable to the Board), a fact that precludes any inference that the Board's original action was overridden in some way outside the authorized or normal course in which source materials for teaching are recommended by the state government.

Hence, to find a First Amendment entitlement by these plaintiffs would be a quantum extension of even the three-judge portion of the *Pico* plurality, regardless of any doctrinal effect of Justice Blackmun's or Justice White's concurrences. We would have to hold that any compliant response to an expression of political opinion critical of a school library's selection of books would violate a First Amendment right to free enquiry on the part of library patrons, and even if we limited such a rule to pressure exerted by political office-holders, we would be acting beyond any arguable authority of *Pico.*

Of course, merely calling the plaintiffs' position a leap from *Pico* and leaving it at that would beg the question whether we should take the leap, but *Pico* addresses that issue in its explicit proviso that, however much discretion may be limited in the instance of the library, where “the regime of voluntary inquiry ... holds sway,” a school board “might well defend [a] claim of absolute discretion in matters of *curriculum* by reliance on their duty to inculcate community values.” *Id.* at 869, 102 S.Ct. 2799. Although the extent of political autonomy in setting curriculum is not spelled out any further in *Pico,* the seriousness of the plurality's reservation of curricular autonomy free of review by a court for viewpoint discrimination is underscored by three strands of Supreme Court case law.

The first emphasizes the role of public schools in the “preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests,” *Ambach v. Norwick,* 441 U.S. 68, 76–77, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) (collecting cases); *see also Bethel Sch. Dist. No. 403 v. Fraser* 478 U.S. 675, 681, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). The second acknowledges that “[s]tates and local school boards are generally afforded considerable discretion in operating public schools,” *Edwards v. Aguillard,* 482 U.S. 578, 583, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), and that federal courts “do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not

directly and sharply implicate basic constitutional values," *Epperson v. Arkansas* 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). And the third is the developing body of law recognizing the government's authority to choose viewpoints when the ***59** government itself is speaking. *See, e.g., Pleasant Grove City v. Summum,* 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009).

When it comes to judicial supervision of school curriculums, all three lines point in the same direction and against extending the *Pico* plurality's notion of non-interference with school libraries as a constitutional basis for limiting the discretion of state authorities to set curriculum.[6] Here there is no denying that the State Board of Education may properly exercise curricular discretion, and the only question on the motion to dismiss is whether the pleadings allow for any doubt about the status of the Guide as an element of curriculum. We think they do not.

> 6. We find our decision against extending *Pico* here to be in line with the positions taken by at least two other Courts of Appeals. *See Chiras v. Miller,* 432 F.3d 606 (5th Cir.2005) (textbook selection); *Downs v. L.A. Unified Sch. Dist.,* 228 F.3d 1003 (9th Cir.2000) (content of school bulletin board). In both of those cases, the courts viewed the speech at issue as government speech. We need not decide that the Guide is government speech to resolve this case, but we think that while the doctrine is still at an adolescent stage of imprecision, *see Summum,* 129 S.Ct. at 1139 (Stevens, J., concurring) (describing it as "recently minted"), it would run counter to the thrust of Supreme Court authority and our own recent decision in *Sutliffe v. Epping School District,* 584 F.3d 314 (2009) (town website is government speech), to extend *Pico's* even less precise rule to the drafting and revision of school curriculums.

There are only two apparent arguments against treating the Guide as curricular, that is, as a component of the specifications that inform teachers about what to teach. First, although the Guide describes itself as one for "choosing and using curricular materials," the Board has made it available for viewing by students. But though students have access to the Guide (and its text at one time spoke of it as referring to resources for "students" as well as teachers),[7] the overwhelmingly obvious point of the Guide is to provide teachers with a framework and sources of materials for teaching "genocide and human rights issues" as a subpart of the existing curriculum, for which no standard text or anthology is assumed to be available or sufficient. Thus, the Guide instructs that "[i]t is to be used in conjunction with" the pre-existing curriculums for history, social science and language arts and it highlights relevant portions of those curricular specifications. The fact that students also have access to the Guide and may use it as a resource on their own does not make it any less part of the curriculum. In fact, as the Guide points out, all Massachusetts curricular frameworks are on the Department of Education's website.

> 7. The draft version of the Guide contained a section dedicated to "selected print resources for teachers and high school students." That section does not appear in subsequent versions, including the one submitted to legislative officials in March 1999.

The second objection to the Guide's classification as curriculum lies in its failure to claim consistently that it occupies the entire field of legitimate source material. Although instruction is supposed to be “aligned” with a framework that speaks of genocide, *supra* at 55, the terms of the Guide allow teachers to look beyond it, and its directions to sources with a particular point of view are not meant to declare other positions out of bounds in study or discussion. It also speaks, in other words, in keeping with open enquiry, which is the object of a general library collection. But the disclaimer of exclusiveness, even considered alone, does not untie the Guide from its curricular purpose; it merely leaves the Guide saying in effect that, “This is a good place to look when you flesh out topics in the state curriculum relating to genocide and human rights issues.”***60** The appellants' argument, if adopted, might actually have the effect of foreclosing future opportunities for open enquiry in the classroom. A ruling in their favor might induce school boards to limit the permissible materials for teaching any subject likely to generate heat, simply to foreclose suits under *Pico* when they modified references or specifications later. (The other alternative, of course, would be never to make changes, but we do not see the prospect of curricular ossification as any more comforting.) Regardless, a non-exclusive guide to teachers does not resemble a covert library whose shelves limit how far its intended student patrons can range around on their own, and there is no apparent reason to treat the Guide's open-ended character as entailing a limit on the Commonwealth's discretion to modify it.

The revisions to the Guide after its submission to legislative officials, even if made in response to political pressure, did not implicate the First Amendment. The judgment of the district court is affirmed.

So ordered.

Evans-Marshall v. Board of Education, 624 F.3d 332 (Federal appeals court, 6th Circuit 2010).

Does a public high school teacher have a First (and Fourteenth) Amendment right "to select books and methods of instruction for use in the classroom without interference from public officials"? Yes, says the teacher, Shelley Evans–Marshall. No, says the Tipp City Board of Education. Because the right to free speech protected by the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools made "pursuant to" their official duties, *Garcetti v. Ceballos,* 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), we affirm the judgment rejecting this claim as a matter of law.

I.

In 2000, the Tipp City Board of Education hired Evans–Marshall to teach English and to supervise Tippecanoe High School's literary magazine, BirchBark, for the 2000–2001 school year. The Board renewed her contract for the 2001–2002 school year, when Evans–Marshall taught English to 9th and 11th grade students and a creative writing course to 11th and 12th grade students. At the beginning of the fall semester, Evans–Marshall assigned Ray Bradbury's *Fahrenheit 451* to her 9th graders. To the end of exploring the book's theme of government censorship,***335** she distributed a list compiled by the American Library Association of the "100 Most Frequently Challenged Books." Students divided into groups, and Evans–Marshall asked each group to pick a book from the list, to investigate the reasons why the book was challenged and to lead an in-class debate about the book. Two groups chose *Heather Has Two Mommies* by Lesléa Newman.

A parent complained about *Heather Has Two Mommies,* and the principal, Charles Wray, asked Evans–Marshall to tell the students to choose a different book. She complied, explaining to her class that "they were in a unique position to ... use this experience as source material for their debate because they were in the ... position of having actually experienced censorship in preparing to debate censorship." R.31–2 at 342–43. After the class completed the *Fahrenheit 451* unit, Evans–Marshall assigned *Siddhartha* by Hermann Hesse and used it as the basis for in-class discussions about "spirituality, Buddhism, romantic relationships, personal growth, [and] familial relationships." R.31–1 at 101.

At the October 2001 meeting of the school board, twenty-five or so parents complained about the curricular choices in the schools, including *Siddhartha* and the book-censorship assignment. The next day, Principal Wray called a meeting of the English department and told Evans–Marshall that she was "on the hot seat." R.31–1 at 64. Nearly 100 parents, as well as the local news media, attended the board's November meeting. For over an hour, parents expressed concerns about books in the curriculum and in the school libraries. While the parents mentioned many books, they raised particular objections to the materials in Evans–Marshall's classroom and her teaching methods. Superintendent John Zigler explained that the school board had purchased many of the materials, including *Siddhartha,* several years before, making it difficult to criticize Evans–Marshall for teaching a book the school board had bought. "You should be embarrassed," one parent responded, referring to the explicit language and sexual

themes in the book. R.46 at 1:32:20. Another parent complained that she had asked for an alternative assignment—instead of *Siddhartha*—and "was given three books," two of which "were for a four-to-eight year old." R.46 at 1:33:40. "I'm not going to put my daughter through this," the parent added, explaining that she thought Evans–Marshall was "punish[ing] my daughter." R.46 at 1:33:40. A group of parents presented the board with a 500–signature petition calling for "decency and excellence" in the classroom. R.46 at 0:29:00, 0:55:00.

The meeting was not one-sided. A member of the board—a parent himself—warned that the school district's policies about potentially objectionable material "have to be well thought out because what you might find offensive, I might not." R.46 at 1:41:40. Another board member reminded the group that, as elected officials, the board "must walk the middle of the road to some extent," even if the community might "err ... on the conservative side." R.46 at 0:20:45. And a parent who made a formal statement said that he "[did not] condone" the behavior of some of the more vocal parents and trusted that school officials "want what's best for our kids." R.46 at 0:22:00.

The matter did not end there. In teaching creative writing, Evans–Marshall maintained a file of student writing samples that she shared with students who asked for additional guidance on assignments. Running low on copies of some of the samples, she sent three of them to support staff to be copied. A member of the copy room staff, apparently not a ***336** friend, showed the writing samples to Wray, saying he "ought to read this." R.33–1 at 76. After reading the papers, Wray called Evans–Marshall to his office. When she arrived, he waved two of the writing samples in his hand, one a first-hand account of a rape, the other a story about a young boy who murdered a priest and desecrated a church. "[A]re you going to use these in class after everything that's happened?" he shouted. R.31–1 at 84. Evans–Marshall explained that the writing samples were not intended for in-class distribution and that she would refrain from sharing the papers if he wanted. Wray said that he did not like the materials she was using in her classroom or the themes of her in-class discussions and that he "intended to rei[n] it in." R.41 at 24–25.

The two soon had another argument in the school library about Evans–Marshall's plans to give a final exam involving group discussions and student self-evaluations. Evans–Marshall asked Wray to give her a model exam so she could "give [him] back exactly what [he] want[ed]," R.31–1 at 43, prompting Wray to call her a "smart a—," *id.* at 41–42. The next day, Evans–Marshall complained to Superintendent Zigler about Wray's behavior. Zigler told her to meet with Wray after the semester break to work things out and offered to speak with Wray in the meantime. He also said that she should feel free to file a formal grievance if things had not been worked out by January.

Things did not work out by January. Wray and Evans–Marshall talked, but they fell back into the same channels of disagreement. Evans–Marshall asked whether there was anything aside from her curricular decisions that bothered Wray. "I'll see what other issues I can come up with," Wray responded, "for your evaluation next week." R.31–1 at 52–53. Wray's evaluations criticized Evans–Marshall's attitude and demeanor as well as her "[u]se of material that is

pushing the limits of community standards." R.31–5 at 38–39. Evans–Marshall filed written objections to Wray's evaluations and a grievance with Superintendent Zigler.

At its March 2002 meeting, the school board voted unanimously not to renew Evans–Marshall's contract. She requested an explanation, and the school board sent her a letter on April 9, 2002, saying that her non-renewal was "due to problems with communication and teamwork." R.31–6 at 10. At Evans–Marshall's request, the board held a formal hearing about the employment decision. Principal Wray, Superintendent Zigler and Evans–Marshall all testified, and the board again voted unanimously not to renew her contract.

(The alert reader may notice that some of the factual allegations raised in Evans–Marshall's complaint and addressed in our first decision do not appear here. *See Evans–Marshall v. Bd. of Educ.,* 428 F.3d 223, 226–27 (6th Cir.2005) (*Evans–Marshall I*). The distinction between a Civil Rule 12(b)(6) and a Civil Rule 56 appeal explains the difference. As is often the case, discovery will confirm the accuracy of some allegations and disprove others. We recount today only the allegations in the complaint backed up by "the pleadings, the discovery and disclosure materials on file, and any affidavits." Fed. R. Civ. P. 56(c)(2).)

In March 2003, Evans–Marshall filed this § 1983 action against the school board, Wray and Zigler. She alleged that the school board and other defendants had retaliated against her "curricular and pedagogical choices," infringing her First Amendment right "to select books and methods of instruction for use in the classroom without interference from public officials."***337** R.1 ¶¶ 32, 36. The defendants moved to dismiss the complaint for failure to state a claim under Civil Rule 12(b)(6), but the district court held that Evans–Marshall had sufficiently alleged a First Amendment violation. We affirmed. *Evans–Marshall I,* 428 F.3d 223.

After discovery by both sides, the defendants again moved for summary judgment, arguing that the Supreme Court's intervening decision in *Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), and the unrebutted facts gleaned from discovery foreclosed Evans–Marshall's claim. In the alternative, they sought summary judgment on the ground that the school board should prevail under the balancing test announced in *Pickering v. Board of Education,* 391 U.S. 563, 572–73, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), or that there was no causal link between Evans–Marshall's curricular choices and the non-renewal of her contract. The district court granted the defendants' summary judgment motion. It declined to apply *Garcetti* to the dispute and held that Evans–Marshall's teaching methods and curricular choices survived the *Pickering* balancing test. But it concluded that she had not provided sufficient evidence "link[ing] her teaching" methods and curricular choices to "the Board's decision to not renew her contract." R.52 at 47.

II.

This free-speech-retaliation case implicates two competing intuitions. On the one side, doesn't a teacher have the First Amendment right to choose her own reading assignments, decide how they should be taught and above all be able to teach a unit on censorship without being censored or otherwise retaliated against? On the other side, doesn't a school board have the

final say over what is taught, and how, in the public schools for which it is responsible? Who wins depends on which line of legal authority controls.

A.

In free-speech retaliation cases arising in the employment context, we ask three questions: Was the individual involved in "constitutionally protected" activity—here activity protected by the free speech clause of the First Amendment? *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Would the employer's conduct discourage individuals of "ordinary firmness" from continuing to do what they were doing? *Bloch v. Ribar,* 156 F.3d 673, 678 (6th Cir.1998); *see Bart v. Telford,* 677 F.2d 622, 625 (7th Cir.1982). Was the employee's exercise of constitutionally protected rights "a motivating factor" behind the employer's conduct? *Mt. Healthy,* 429 U.S. at 287, 97 S.Ct. 568. The claimant must win each point to prevail.

The first question requires some elaboration. Three Supreme Court cases define the contours of the free-speech rights of public employees.

The "matters of public concern" requirement. The First Amendment protects the speech of employees only when it involves "matters of public concern." *Connick v. Myers,* 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). In *Connick,* an assistant district attorney, after learning that her supervisor planned to transfer her, solicited information from her colleagues about the office's transfer policy, about office morale and about whether supervisors had pressured anyone to participate in political campaigning. *Id.* at 141, 103 S.Ct. 1684. When the supervisor fired her for refusing to accept the transfer, she sued, alleging retaliation against protected speech, namely her initiation of the survey. *Id.* In rejecting her claim, the Court explained***338** that not all employee speech is protected, only speech that "fairly [may be] considered as relating to" issues "of political, social, or other concern to the community." *Id.* at 146, 103 S.Ct. 1684. When, by contrast, an employee's speech does not relate to a matter of public concern, public officials enjoy "wide latitude" in responding to it without "intrusive oversight by the judiciary in the name of the First Amendment." *Id.*

The "balancing" requirement. If the employee establishes that her speech touches "matters of public concern," a balancing test determines whether the employee or the employer wins. *See Pickering,* 391 U.S. at 568, 88 S.Ct. 1731. In *Pickering,* the Court considered the claim of a high school teacher whom the principal fired after the teacher wrote a letter to the local newspaper, criticizing the school board's budgetary decisions. *Id.* at 564, 88 S.Ct. 1731. In resolving the claim, the Court "balance[d] ... the interests of the teacher, as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. 1731. Reasoning that there was no relationship between the contents of the letter and the "proper performance of [the teacher's] daily duties in the classroom," the Court ruled for the teacher, concluding that the school board's interests did not outweigh his desire to "contribute to public debate" like any other citizen. *Id.* at 572–73, 88 S.Ct. 1731.

The "pursuant to" requirement. In the last case in the trilogy, a prosecutor reviewed a private complaint that a police officer's affidavit used to obtain a search warrant contained several misrepresentations. *Garcetti,* 547 U.S. at 413–14, 126 S.Ct. 1951. After confirming that the affidavit contained serious falsehoods, the prosecutor wrote a memo to his superiors about his findings, recommended that the office dismiss the case and eventually testified to the same effect at a hearing to suppress the evidence discovered during the search. *Id.* at 414–15, 126 S.Ct. 1951. In the aftermath of these and other actions, the prosecutor claimed that the office retaliated against him by transferring him to another courthouse and by denying him a promotion. *Id.* at 415, 126 S.Ct. 1951. In rejecting his free-speech claim, the Court did not deny that the prosecutor's speech related to a matter of "public concern" under *Connick,* and it did not take on the lower court's reasoning that *Pickering* balancing favored the employee. It instead concluded that the First Amendment did not apply. "The controlling factor," the Court reasoned, "is that his expressions were made *pursuant to* his duties as a calendar deputy," making the relevant speaker the government entity, not the individual. *Id.* at 421, 126 S.Ct. 1951 (emphasis added). "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*

B.

A First Amendment claimant must satisfy *each* of these requirements: the *Connick* "matter of public concern" requirement, the *Pickering* "balancing" requirement and the *Garcetti* "pursuant to" requirement. Evans–Marshall clears the first two of these hurdles but not the third.

The content of Evans–Marshall's speech "relat[ed] to ... matter[s] of political, social, or other concern to the community." ***339** *Connick,* 461 U.S. at 146, 103 S.Ct. 1684. A teacher's curricular speech, we have said on several occasions, ordinarily covers these matters. *See Evans–Marshall I,* 428 F.3d at 230–31; *Cockrel v. Shelby County Sch. Dist.,* 270 F.3d 1036, 1052 (6th Cir.2001); *Hardy v. Jefferson Cmty. Coll.,* 260 F.3d 671, 679 (6th Cir.2001). "[T]he essence of a teacher's role is to prepare students for their place in society as responsible citizens," *Hardy,* 260 F.3d at 679, and the teacher that can do that *without* covering topics of public concern is rare indeed, perhaps non-existent. Look no further than the November 2001 meeting of the school board to confirm the point. Members of the community had a lot to say about the topics discussed in Evans–Marshall's class, and they went to the school board meeting to say it. That large segments of the community disagreed with Evans–Marshall's speech—her class assignments and teaching methods—is beside the point. The question is whether the topics discussed are "of ... concern" to the community, *Connick,* 461 U.S. at 146, 103 S.Ct. 1684, not whether the community approved of the teacher's position on each topic. On this summary-judgment record, Evans–Marshall's curricular speech passes the *Connick* "matter of public concern" test, as the district court correctly determined.

Evans–Marshall also satisfies *Pickering* "balancing"—that her "interests ... as a citizen, in commenting upon matters of public concern" through her in-class speech outweighed the school board's "interest ... as an employer, in promoting the efficiency of the public services it performs." *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731. As the district court correctly concluded, a

legitimate factual dispute exists over whether Evans–Marshall's interest in teaching *Siddhartha* (and in making other curricular choices) overshadowed any interest the school board might claim in disciplining her for doing so. Although the school board has "the ability to select and require adherence to a ... stated curriculum," R.52 at 26, the court concluded, its interest in enforcing curricular standards is severely undermined if it disciplines a teacher for teaching a book the board "had purchased ... and made ... available to teachers as an optional text," *id.* at 40–41. And although the court did not find Evans–Marshall's interest in "select[ing] materials to supplement the Board-chosen textbooks ... and the methods for teaching" to be compelling, *id.* at 32, that interest outweighed the school's near-zero interest in disciplining her for teaching a book it had purchased, *id.* at 41. We agree—for many of the same reasons identified in *Evans–Marshall I*. *See* 428 F.3d at 231–32.

After addressing the *Pickering* point, however, the district court concluded that Evans–Marshall stumbled over causation. The court did not believe that Evans–Marshall could show that her exercise of free speech rights was "a motivating factor" behind the school board's conduct. *See Mt. Healthy,* 429 U.S. at 287, 97 S.Ct. 568. That is a harder point to sell. And a brief accounting of the evidence and the chronology of events shows why.

Before any parents complained about her reading assignments and classroom discussions, Evans–Marshall had never received a negative performance review. Dozens of parents flooded the school board's November 2001 meeting, and many complained about Evans–Marshall's teaching. One parent told the school board that it "should be embarrassed" about the book she was teaching. R.46 at 1:32:20. Principal Wray thereafter told Evans–Marshall that she would have to clear any potentially controversial material with him. He later told Evans–Marshall that he "intended to rei[n] ... in" her ***340** classroom discussions. R.41 at 24–25. In December 2001, Evans–Marshall complained to Superintendent Zigler about Wray's behavior. And when the semester resumed in January 2002, Wray told Evans–Marshall that he would "see what ... [he could] come up with for [her] evaluations," R.31–1 at 52–53, after which he gave her negative performance reviews for the first time. Only a short time later, the board voted not to renew her contract. To deny a causal relationship between Evans–Marshall's speech and the Board's actions does not come to grips with this sequence of events or with the imperative at this stage of the litigation that we draw all inferences in favor of the non-moving party: the teacher. Evans–Marshall satisfies *Pickering* balancing and has shown that her teaching choices caused the school board to fire her.

Evans–Marshall, however, cannot overcome *Garcetti.* When government employees speak "pursuant to their official duties," *Garcetti* teaches that they are "not speaking as citizens for First Amendment purposes." 547 U.S. at 421, 126 S.Ct. 1951. Any dispute over the board's motivations, *Pickering* balancing or the "public concerns" of her speech under *Connick* is beside the point if, as Evans–Marshall does not dispute, she made her curricular and pedagogical choices in connection with her official duties as a teacher.

In the light cast by *Garcetti,* it is clear that the First Amendment does not generally "insulate" Evans–Marshall "from employer discipline," *Garcetti,* 547 U.S. at 421, 126 S.Ct. 1951, even

discipline prompted by her curricular and pedagogical choices and even if it otherwise appears (at least on summary judgment) that the school administrators treated her shabbily. When a teacher teaches, "the school system does not 'regulate' [that] speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." *Mayer v. Monroe County Cmty. Sch. Corp.,* 474 F.3d 477, 479 (7th Cir.2007). And if it is the school board that hires that speech, it can surely "regulate the content of what is or is not expressed," *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), what is expressed in other words on its behalf. Only the school board has ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may (or may not) teach in the classroom.

It is true that teachers, like students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). But that does not transform them into the employee *and* employer when it comes to deciding what, when and how English is taught to fifteen-year-old students. Consider the difference between the speech of Evans–Marshall and Marvin Pickering, teachers both. When Pickering sent a letter to the local newspaper criticizing the school board, he said something that any citizen has a right to say, and he did it on his own time and in his own name, not on the school's time or in its name. Yet when Evans–Marshall taught 9th grade English, she did something she was hired (and paid) to do, something she could not have done but for the Board's decision to hire her as a public school teacher. As with any other individual in the community, she had no more free-speech right to dictate the school's curriculum than she had to obtain a platform—a teaching position—in the first instance for communicating her preferred list of books and teaching methods. "[N]o relevant ****341*** analogue" exists between her in-class curricular speech and speech by private citizens. *Garcetti,* 547 U.S. at 424, 126 S.Ct. 1951.

Teachers are not everyday citizens, Evans–Marshall insists, and they have a right "to select books and methods of instruction for use in the classroom without interference from public officials." R.1 ¶ 32. But that is not what Ohio law provides or the First Amendment requires. Start with Ohio law. Under it, "[t]he board of education of each city ... shall prescribe a curriculum." O.R.C. § 3313.60(A). State law gives elected officials—the school board—not teachers, not the chair of a department, not the principal, not even the superintendent, responsibility over the curriculum. This is an accountability measure, pure and simple, one that ensures the citizens of a community have a say over a matter of considerable importance to many of them—their children's education—by giving them control over membership on the board.

The First Amendment does not ban this policy choice or this accountability measure. The Constitution does not prohibit a State from creating elected school boards and from placing responsibility for the curriculum of each school district in the hands of each board. Teachers no doubt are "required ... to speak or write" and otherwise express themselves, *Garcetti,* 547 U.S. at 422, 126 S.Ct. 1951, but this does not make them "sovereign[s] unto [themselves]," *Parate v. Isibor,* 868 F.2d 821, 827 (6th Cir.1989). "The curricular choices of the schools should be

presumptively their own—the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them." *Boring v. Buncombe County Bd. of Educ.,* 136 F.3d 364, 371–72 (4th Cir.1998) (en banc) (Wilkinson, C.J., concurring).

How at any rate would a contrary approach work? If one teacher, Evans–Marshall, has a First Amendment right "to select books and methods of instruction for use in the classroom," R.1 ¶ 32, so presumably do other teachers. Evans–Marshall may wish to teach *Siddhartha* in the first unit of the school year in a certain way, but the chair of the English department may wish to use the limited time in a school year to teach *A Tale of Two Cities* at that stage of the year. Maybe the head of the upper school has something else in mind. When educators disagree over what should be assigned, as is surely bound to happen if each of them has a First Amendment right to influence the curriculum, whose free-speech rights win? Why indeed doesn't the principal, Wray, have a right to defend the discharge on the ground that he was merely exercising *his* First Amendment rights in rejecting Evans–Marshall's curricular choices and methods of teaching? Placing the First Amendment's stamp of approval on these kinds of debates not only would "demand permanent judicial intervention in the conduct of governmental operations," *Garcetti,* 547 U.S. at 423, 126 S.Ct. 1951, but it also would transform run-of-the-mine curricular disputes into constitutional stalemates.

That is not the only problem. What employer discipline arising from an employee's manner of teaching—choices of books and the methods of teaching them—does not implicate speech? Could a teacher respond to a principal's insistence that she discuss certain materials by claiming that it improperly *compels* speech? *Cf. W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Could a teacher continue to assign materials that members of the community perceive as racially insensitive even after the principal tells her not to? Could a teacher raise a controversial topic (say, the ***342** virtues of one theory of government over another or the virtues of intelligent design) after a principal has told her not to? Could a teacher introduce mature sexual themes to fifteen year olds when discussing a work of literature after a principal has told her not to? And "[d]oes a music teacher retain veto power over that most controversial of school productions—the Holiday Concert?" *Evans–Marshall I,* 428 F.3d at 237–38 (Sutton, J., concurring).

Because "one man's vulgarity is another's lyric," *Cohen v. California,* 403 U.S. 15, 25, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), or, as one school board member put the point at the November 2001 meeting, "what you might find offensive, I might not," R.46 at 1:41:40, parents long have demanded that school boards control the curriculum and the ways of teaching it to their impressionable children. Permitting federal courts to distinguish classroom vulgarities from lyrics or to pick sides on how to teach *Siddhartha* not only is a recipe for disenfranchising the 9,000 or so members of the Tipp City community but also tests judicial competence. "If even the most happily married parents cannot agree on what and how their own children should be taught, as [we] suspect is not infrequently the case, what leads anyone to think the federal judiciary can answer these questions?" *Evans–Marshall I,* 428 F.3d at 237–38 (Sutton, J., concurring).

The key insight of *Garcetti* is that the First Amendment has nothing to say about these kinds of decisions. An employee does not lose "any liberties the employee might have enjoyed as a private citizen" by signing on to work for the government, but by the same token, the government, just like a private employer, retains "control over what the employer itself has commissioned or created": the employee's job. *Garcetti,* 547 U.S. at 422, 126 S.Ct. 1951. And that insight has particular resonance in the context of public education. Every child in Ohio must attend school, *see* O.R.C. § 3321.02, providing public school teachers with a captive audience for their in-class speech, *see Mayer,* 474 F.3d at 479, and providing a compelling reason for putting curricular choices in the hands of "someone [they] can vote out of office," *id.* at 479–80, or who is otherwise democratically accountable, *see* O.R.C. § 3311.71 (elected officials and other community institutions appoint school board members in certain municipal school districts).

In concluding that the First Amendment does not protect primary and secondary school teachers' in-class curricular speech, we have considerable company. The Seventh Circuit invoked *Garcetti* in concluding that the curricular and pedagogical choices of primary and secondary school teachers exceed the reach of the First Amendment. *Mayer,* 474 F.3d at 480. The Fourth Circuit has not applied *Garcetti* to teachers' in-class speech, *see Lee v. York County Sch. Div.,* 484 F.3d 687, 694 n. 11 (4th Cir.2007), and is sometimes cited as creating a division among the circuits, *see, e.g., Gorum v. Sessoms,* 561 F.3d 179, 186 n. 6 (3d Cir.2009). But that is because the Fourth Circuit disposed of the teacher's retaliation claim based on pre- *Garcetti* precedent, namely *Connick,* holding that "speech that occurs within a compulsory classroom setting" "does not constitute speech on a matter of public concern" when it is "curricular in nature." 484 F.3d at 695, 697. The Fourth Circuit's approach changes nothing here: A teacher's curricular and pedagogical choices are categorically unprotected, whether under *Connick* or *Garcetti.*

The Third Circuit also has declined to resolve the applicability of *Garcetti* to this sort of speech, *see Borden v. Sch. Dist. of Twp. of E. Brunswick,* 523 F.3d 153, 171 n. 13 (3d Cir.2008), but that too makes no ***343** difference. Its pre- *Garcetti* cases hold that, "although [a teacher] has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom." *Edwards v. Cal. Univ. of Pa.,* 156 F.3d 488, 491 (3d Cir.1998) (Alito, J.). The Tenth Circuit has applied *Garcetti* to a school teacher's speech *about* curriculum and pedagogy, even when made outside the classroom, *see Brammer–Hoelter v. Twin Peaks Charter Acad.,* 492 F.3d 1192, 1204 (10th Cir.2007), but has not addressed *in-class* curricular speech. The Second Circuit determined, in an unpublished decision, that it need not resolve whether a teacher's in-class speech is governed by *Garcetti* or by its earlier cases applying the "reasonably related to legitimate pedagogical concerns" standard of *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). *See Panse v. Eastwood,* 303 Fed. Appx. 933, 935 (2d Cir.2008). Other courts of appeals, including this one, have applied *Garcetti* in rejecting school employees' speech claims, though not in the context of curricular and pedagogical choices. *See, e.g., Fox v. Traverse City Area Pub. Sch. Bd. of Educ.,* 605 F.3d 345, 349 (6th Cir.2010); *Williams v. Dallas Indep. Sch. Dist.,* 480 F.3d 689, 694 (5th Cir.2007); *Gilder–Lucas v. Elmore County Bd. of Educ.,* 186 Fed. Appx. 885, 887 (11th Cir.2006).

The common thread through all of these cases is that, when it comes to in-class curricular speech at the primary or secondary school level, no other court of appeals has held that such speech is protected by the First Amendment.

Our decision also respects Sixth Circuit authority. In *Cockrel* and in our initial decision in this case, we held that a school teacher's curricular and pedagogical choices (1) are "speech," (2) touch on "matters of public concern" and (3) may satisfy *Pickering* balancing depending on the circumstances developed in discovery or at trial. We do not disturb those holdings and indeed have ruled for the plaintiff on each one of these points today.

Not one of these Sixth Circuit cases, however, addressed whether in-class curricular speech survives the threshold inquiry announced in *Garcetti:* whether the speech was "pursuant to" the claimant's official duties. 547 U.S. at 421, 126 S.Ct. 1951. How could they? *Garcetti* came down *after* both decisions and established a new threshold requirement in this area. Evans–Marshall's failure to satisfy this requirement governs us here. "[A] plaintiff may not run home before she reaches first base." *Weathers v. Lafayette Parish Sch. Bd.,* 520 F.Supp.2d 827, 837 (W.D.La.2007).

Nor can Evans–Marshall sidestep this conclusion on the theory that *Garcetti* does not apply. In his dissent in *Garcetti,* as Evans–Marshall points out, Justice Souter raised concerns about the applicability of the decision to "academic freedom in public colleges and universities." 547 U.S. at 438, 126 S.Ct. 1951 (Souter, J., dissenting). The majority disclaimed any intent to resolve the point. *See id.* at 425, 126 S.Ct. 1951 (majority opinion) ("Justice Souter suggests today's decision may have important ramifications for academic freedom.... We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

Garcetti's caveat offers no refuge to Evans–Marshall. She is not a teacher at a "public college[ ]" or "universit[y]" and thus falls outside of the group the dissent wished to protect. The concept of "academic freedom," moreover, does not readily apply to in-class curricular speech at the high school level. As a cultural and a legal principle, academic freedom "was conceived***344** and implemented in the university" out of concern for "teachers who are also researchers or scholars—work not generally expected of elementary and secondary school teachers." J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment",* 99 Yale L.J. 251, 288 n. 137 (1989). "[U]niversities occupy a special niche in our constitutional tradition" and the constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools, where students generally do not choose whether or where they will attend school. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 724–25, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

Even to the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher's curricular and pedagogical choices from the school board's oversight, as opposed to the teacher's right to speak and write publicly about academic issues outside of the classroom. "[I]t is the educational institution that has a

right to academic freedom, not the individual teacher." *Borden,* 523 F.3d at 172 n. 14. Academic freedom implicates "[t]he freedom of a university to make its own judgments as to education," *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 312, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.), requiring "deference to a university's academic decisions," *Grutter v. Bollinger,* 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). *See Sweezy v. New Hampshire,* 354 U.S. 234, 263, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring). In the context of in-class curricular speech, this court has already said in the university arena that a teacher's invocation of academic freedom does not warrant judicial intrusion upon an educational institution's decisions: "The First Amendment concept of academic freedom does not require that a nontenured professor be made a sovereign unto himself." *Parate,* 868 F.2d at 827. A school "may constitutionally choose not to renew the contract of a nontenured professor" when that professor's "pedagogical attitude and teaching methods do not conform to institutional standards." *Id.* Just so here.

III.

For these reasons, we affirm the judgment of the district court.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (US Supreme Court 1969).

***504** Mr. Justice FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It upheld***505** the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F.Supp. 971 (1966). The court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it 'materially and substantially interfere(s) with the requirements of appropriate discipline in the operation of the school.' Burnside v. Byars, 363 F.2d 744, 749 (1966).[1]

> 1. In Burnside, the Fifth Circuit ordered that high school authorities be enjoined from enforcing a regulation forbidding students to wear 'freedom buttons.' It is instructive that in Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (1966), the same panel on the same day reached the opposite result on different facts. It declined to enjoin enforcement of such a regulation in another high school where the students wearing freedom buttons harassed students who did not wear them and created much

disturbance.

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed, without opinion, 383 F.2d 988 (1967). We granted certiorari. 390 U.S. 942, 88 S.Ct. 1050, 19 L.Ed.2d 1130 (1968).

*****736*** I.

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). Cf. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' ****506*** which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. Cf. Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent.[2] See also ****507*** Pierce v. Society of Sisters, etc., 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948); Wieman v. Updegraff, 344 U.S. 183, 195, 73 S.Ct. 215, 220, 97 L.Ed. 216 (1952) (concurring opinion); Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); Shelton v. Tucker, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960); Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967); Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

2. Hamilton v. Regents of University of California, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934), is sometimes cited for the broad proposition that the State may attach conditions to attendance at a state university that require individuals to violate their religious convictions. The case involved dismissal of members of a religious denomination from a land grant college for refusal to participate in military training.

> Narrowly viewed, the case turns upon the Court's conclusion that merely requiring a student to participate in school training in military 'science' could not conflict with his constitutionally protected freedom of conscience. The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees. See, e.g., West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); Dixon v. Alabama State Board of Education, 294 F.2d 150 (C.A.5th Cir. 1961); Knight v. State Board of Education, 200 F.Supp. 174 (D.C.M.D.Tenn.1961); Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (D.C.M.D.Ala.1967). See also Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960); Note, Academic Freedom, 81 Harv. L. Rev. 1045 (1968).

*****737*** In West Virginia State Board of Education v. Barnette, supra, this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

> 'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they 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.' 319 U.S., at 637, 63 S.Ct. at 1185.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See Epperson v. Arkansas, supra, 393 U.S. at 104, 89 S.Ct. at 270; Meyer v. Nebraska, supra, 262 U.S. at 402, 43 S.Ct. at 627. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing,****508*** to hairstyle, or deportment. Cf. Ferrell v. Dallas Independent School District, 392 F.2d 697 (C.A.5th Cir. 1968); Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538, 30 A.L.R. 1212 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or

of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is ***509** the basis of our national strength and of the independence and vigor of Americans ****738** who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained. Burnside v. Byars, supra, 363 F.2d at 749.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.[3]

> 3. The only suggestions of fear of disorder in the report are these: 'A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and it was felt that if any kind of a demonstration existed, it might evolve into something which would be difficult to control. ''Students at one of the high schools were heard to say they would wear arm bands of other colors if the black bands prevailed.' Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; and regulation was directed against 'the principle of the demonstration' itself. School authorities simply felt that 'the

schools are no place for demonstrations,' and if the students 'didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools.'

***510** On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.[4] It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.[5])

4. The District Court found that the school authorities, in prohibiting black armbands, were influenced by the fact that '(t)he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views.' 258 F.Supp., at 972—973.

5. After the principals' meeting, the director of secondary education and the principal of the high school informed the student that the principals were opposed to publication of his article. They reported that 'we felt that it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one.'

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing****739** of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement ***511** in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to

regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress 'expressions of feelings with which they do not wish to contend.' Burnside v. Byars, supra, 363 F.2d at 749.

In Meyer v. Nebraska, supra, 262 U.S. at 402, 43 S.Ct. at 627, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to 'foster a homogeneous people.' He said:

> 'In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a ***512** state without doing violence to both letter and spirit of the Constitution.'

This principle has been repeated by this Court of numerous occasions during the intervening years. In Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629, Mr. Justice Brennan, speaking for the Court, said:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, (364 U.S. 479), at 487 (81 S.Ct. 247, 5 L.Ed.2d 231). The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection."

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.[6] This is not only an inevitable ****740** part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on ***513** the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. Burnside v. Byars, supra, 363 F.2d at 749. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (C.A.5th Cir. 1966).

6. In Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C.S.C.1967), District

> Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. Cf. Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. Cf. Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966).

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. Cf. ***514** Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C.S.C.1967) (orderly protest meeting on state college campus); Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (D.C.M.D.Ala.1967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

*****741** We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice STEWART, concurring.

Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I ***515** cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195. I continue to hold the view I expressed in that case: '(A) State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.' Id., at 649—650, 88 S.Ct. at 1285—1286 (concurring in result.) Cf. Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645.

Mr. Justice WHITE, concurring.

While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in Burnside v. Byars, 363 F.2d 744, 748 (C.A.5th Cir. 1966), a case relied upon by the Court in the matter now before us.

Mr. Justice BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools * * *' in the United States is in ultimate effect transferred to the Supreme Court.[1] The Court brought ***516** this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way 'from kindergarten through high school.' Here the constitutional right to 'political expression' asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His

mother is an official in the Women's International League for Peace and Freedom.

> 1. The petition for certiorari here presented this single question: 'Whether the First and Fourteenth Amendments permit officials of state supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum.'

As I read the Court's opinion it relies upon the following grounds for holding *****742*** unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is 'symbolic speech' which is 'akin to 'pure speech" and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise 'symbolic speech' as long as normal school functions****517*** are not 'unreasonably' disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are 'reasonable.'

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, cf., e.g., Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949), the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—'symbolic' or 'pure'—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleased and when he pleases. This Court has already rejected such a notion. In Cox v. Louisiana, 379 U.S. 536, 554, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965), for example, the Court clearly stated that the rights of free speech and assembly 'do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.'

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with Mary Beth Tinker, who wore her armband for her 'demonstration.'****518*** Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker 'self-conscious' in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually 'disrupt' the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when

pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education.[2]

> 2. The following Associated Press article appeared in the Washington Evening Star, January 11, 1969, p. A—2, col. 1: 'BELLINGHAM, Mass. (AP)—Todd R. Hennessy, 16, has filed nominating papers to run for town park commissioner in the March election. "I can see nothing illegal in the youth's seeking the elective office,' said Lee Ambler, the town counsel. 'But I can't overlook the possibility that if he is elected any legal contract entered into by the park commissioner would be void because he is a juvenile.'' Todd is a junior in Mount St. Charles Academy, where he has a top scholastic record.'

The United States District Court refused to hold that the state school order violated the First and Fourteenth Amendments. 258 F.Supp. 971. Holding that the protest was akin to speech, *****743*** which is protected by the First ****519*** and Fourteenth Amendments, that court held that the school order was 'reasonable' and hence constitutional. There was at one time a line of cases holding 'reasonableness' as the court saw it to be the test of a 'due process' violation. Two cases upon which the Court today heavily relies for striking down this school order used this test of reasonableness, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923). The opinions in both cases were written by Mr. Justice McReynolds; Mr. Justice Holmes, who opposed this reasonableness test, dissented from the holdings as did Mr. Justice Sutherland. This constitutional test of reasonableness prevailed in this Court for a season. It was this test that brought on President Franklin Roosevelt's well-known Court fight. His proposed legislation did not pass, but the fight left the 'reasonableness' constitutional test dead on the battlefield, so much so that this Court in Ferguson v. Skrupa, 372 U.S. 726, 729, 730, 83 S.Ct. 1028, 1030—1031, 10 L.Ed.2d 93, after a thorough review of the old cases, was able to conclude in 1963:

'There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.

* * * * * *

'The doctrine that prevailed in Lochner (Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937), Coppage (Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441), Adkins (Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785), Burns (Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813), and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.'

The Ferguson case totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they 'shock

the conscience' or that they are ***520*** 'unreasonable,' 'arbitrary,' 'irrational,' 'contrary to fundamental 'decency,'' or some other flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother FORTAS, is resurrecting that old reasonableness-due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of the bench and bar. It will be a sad day for the country, I believe, when the present-day Court returns to the McReynolds due process concept. Other cases cited by the Court do not, as implied, follow the McReynolds reasonableness doctrine. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 1179, 87 L.Ed. 1628, clearly rejecting the 'reasonableness' test, held that the Fourteenth Amendment made the First applicable to the States, and that the two forbade a State to compel little schoolchildren to salute the United States flag when they had religious scruples against doing so.[3] Neither ****744*** Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117; ***521*** Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697; nor Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637, related to schoolchildren at all, and none of these cases embraced Mr. Justice McReynolds' reasonableness test; and Thornhill, Edwards, and Brown relied on the vagueness of state statutes under scrutiny to hold them unconstitutional. Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, and Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149, cited by the Court as a 'compare,' indicating, I suppose, that these two cases are no longer the law, were not rested to the slightest extent on the Meyer and Bartels 'reasonableness-due process-McReynolds' constitutional test.

> 3. In Cantwell v. Connecticut, 310 U.S. 296, 303—304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), this Court said: 'The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'

I deny, therefore, that it has been the 'unmistakable holding of this Court for almost 50 years' that 'students' and 'teachers' take with them into the 'schoolhouse gate' constitutional rights to 'freedom of speech or expression.' Even Meyer did not hold that. It makes no reference to 'symbolic speech' at all; what it did was to strike down as 'unreasonable' and therefore unconstitutional a Nebraska law barring the teaching of the German language before the children reached the eighth grade. One can well agree with Mr. Justice Holmes and Mr. Justice

Sutherland, as I do, that such a law was no more unreasonable than it would be to bar the teaching of Latin and Greek to pupils who have not reached the eighth grade. In fact, I think the majority's reason for invalidating the Nebraska law was that it did not like it or in legal jargon that it 'shocked the Court's conscience,' 'offended its sense of justice, or' was 'contrary to fundamental concepts of the English-speaking world,' as the Court has sometimes said. See, e.g. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, and Irvine v. California, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561. The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of ***522*** speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. See, e.g., Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471; Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed. 149.

In my view, teachers in state-controlled public schools are hired to teach there. Although Mr. Justice McReynolds may have intimated to the contrary in Meyer v. Nebraska, supra, certainly a teacher is not paid to go into school and teach ****745*** subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or not of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.

The true principles on this whole subject were in my judgment spoken by Mr. Justice McKenna for the Court in Waugh v. Mississippi University in 237 U.S. 589, 596—597, 35 S.Ct. 720, 723, 59 L.Ed. 1131. The State had there passed a law barring students from peaceably assembling in Greek letter fraternities and providing that students who joined them could be expelled from school. This law would appear on the surface to run afoul of the First Amendment's ***523*** freedom of assembly clause. The law was attacked as violative of due process and of the privileges and immunities clause and as a deprivation of property and of liberty, under the Fourteenth Amendment. It was argued that the fraternity made its members more moral, taught discipline, and inspired its members to study harder and to obey better the rules of discipline and order. This Court rejected all the 'fervid' pleas of the fraternities' advocates and decided unanimously against these Fourteenth Amendment arguments. The Court in its next to the last paragraph made this statement which has complete relevance for us today:

> 'It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes

> against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the state and is under the control of the state, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the state and annul its regulations upon disputable considerations of their wisdom or necessity.' (Emphasis supplied.)

It was on the foregoing argument that this Court sustained the power of Mississippi to curtail the First Amendment's right of peaceable assembly. And the same reasons are equally applicable to curtailing in the States' public schools the right to complete freedom of expression. Iowa's public schools, like Mississippi's university, are operated to give students an opportunity to learn, not to talk politics by actual speech, or by 'symbolic'***524** speech. And, as I have pointed out before, the record amply shows that public protest in the school classes against the Vietnam war 'distracted from that singleness of purpose which the state (here Iowa) desired to exist in its public educational institutions.' Here the Court should accord Iowa educational institutions the same right to determine for themselves to what extent free expression should be allowed in its schools as it accorded Mississippi with reference to freedom of assembly. But even if the record were silent as to protests against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few *****746*** other issues over have. Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily***525** refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have

already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school ***526** systems[4] in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

4. Statistical Abstract of the United States (1968), Table No. 578, p. 406.

Mr. Justice HARLAN, dissenting.

I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition ****747** that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

Wynar v. Douglas County School District 728 F.3d 1062 (Federal appeals court, 9th Circuit 2013).

With the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights. It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result. Courts have long dealt with the tension between students' First Amendment rights and "the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). But the challenge for administrators is made all the more difficult because, outside of the official school environment, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment. At the same time, school officials must take care not to overreact and to take into account the creative juices and often startling writings of the students.

In this case, Landon Wynar,[1] a student at Douglas High School, engaged in a string of increasingly violent and threatening****1065*** instant messages sent from home to his friends bragging about his weapons, threatening to shoot specific classmates, intimating that he would "take out" other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre. His friends were alarmed and notified school authorities, who temporarily expelled Landon based in large part on these instant messages. We affirm the district court's grant of summary judgment to the school district. The messages presented a real risk of significant disruption to school activities and interfered with the rights of other students. Under the circumstances, the school district did not violate Landon's rights to freedom of expression or due process.

> 1. The parties' briefs refer to Landon as "LW," but the appeal was filed in Landon's full name, and Landon's attorney confirmed at oral argument that his name was not under seal and had been made public. Landon is no longer a minor.

BACKGROUND

When the events at issue occurred, Landon was a sophomore at Douglas High School. He collected weapons and ammunition and reported owning various rifles, including a Russian semi-automatic rifle and a .22 caliber rifle.

Landon communicated regularly with friends from school by exchanging instant messages through the website MySpace. MySpace is a social networking website that allows its members to set up online "profiles" and communicate via email, instant messages, and blogs. *Layshock v. Hermitage Sch. Dist.,* 650 F.3d 205, 208 & n. 2 (3d Cir.2011) (en banc). Instant messages enable "users to engage in real-time dialogue 'by typing messages to one another that appear almost immediately on the others' computer screens.' " *United States v. Meek,* 366 F.3d 705, 709 n. 1 (9th Cir.2004) (quoting *Reno v. ACLU,* 521 U.S. 844, 851–52, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)).

Among other things, Landon wrote frequently about weapons, going shooting, and World War II (often mentioning Hitler, whom he once referred to as "our hero"). His messages also expressed social insecurity, stating, for example, "[my parents] also dont like me just like everyone at school," and "its ignore landon day everyday."[2]

2. All typographical errors in the messages quoted throughout are in the original messages.

Some months into his sophomore year, Landon's MySpace messages became increasingly violent and disturbing. They included the following statements, all centered around a school shooting to take place on April 20 (the date of Hitler's birth and the Columbine massacre and within days of the anniversary of the Virginia Tech massacre):

• "its pretty simple / i have a sweet gun / my neighbor is giving me 500 rounds / dhs is gay / ive watched these kinds of movies so i know how NOT to go wrong / i just cant decide who will be on my hit list / and thats totally deminted and it scares even my self"

• "i havent decided which 4/20 i will be doing it on / by next year, i might have a better gun to use such as an MI cabine w/ a 30 rd clip.... or 5 clips.... 10?"

• "and ill probly only kill the people i hate?who hate me / then a few random to get the record"

• [in response to a statement that he would "kill everyone"] "no, just the blacks / and mexicans / halfbreeds / athiests / french / gays / liberals / david"

• [referring to a classmate] "no im shooting her boobs off / then paul (hell take a 50rd clip) / then i reload and take out everybody else on the list / hmm paul should be last that way i can ***1066** get more people before they run away..."

• "she only reads my mesages and sometimes doesnt even do that. / shes # 1 on 4/20"

• "ya i thought about ripping someones throat out with one. / wow these r weird thoughts... / then raping some chicks dead bodies to? no. maybe. idk."

• "that stupid kid from vtech. he didnt do shit and got a record. i bet i could get 50+ people / and not one bullet would be wasted."

• "i wish then i could kill more people / but i have to make due with what i got. / 1 sks & 150 rds / 1 semi-auto shot gun w/sawed off barrle / 1 pistle"

Although Landon's friends apparently joked with him at times about school violence, the tenor of these escalating comments alarmed them, and they corresponded with each other to decide

what to do. One boy forwarded Landon's messages to a friend, who responded, “thats [f ...] crazy / landon and i have and messages like that too / he told me he was going to rape [redacted] / then kill her / then go on a school shotting / maybe we should be worried.” After seeing the messages, a third boy wrote, “Jesus Christ dude!!! / this is some really serious shit!!! / wat do we do? / i mean that is really really sico shit and this is not something to be taking lightly seriously.” The first two boys decided to speak with one of their coaches and “ask them how to deal with him / like how not to make him tick and go on a rampage.”

The boys went to a football coach whom they trusted and then, together with the coach, they talked to the school principal about their concerns. They told the principal that they had information about a possible school shooting. After two police deputies interviewed the boys and saw the MySpace printouts, they questioned Landon in the principal's office.

After the police took Landon into custody, school administrators met with him and asked if he wanted his parents to be present for their discussion. Landon said that he did not. They asked Landon about the MySpace messages, which he admitted writing but claimed were a joke. After providing a signed, written statement, Landon was suspended for 10 days.

The school board charged Landon with violating Nev. Rev. Stat. § 392.4655, among other things, and convened a formal hearing. Section 392.4655(1)(a) provides that a student will be deemed a habitual discipline problem if there is written evidence that the student threatened or extorted another pupil, teacher, or school employee. Under Nev. Rev. Stat. § 392.466(3), a student who is deemed a habitual disciplinary problem must be suspended or expelled for at least a semester. At the school board hearing, Landon was represented by an attorney. He had the opportunity to call witnesses and present evidence, which he chose not to do, and to cross-examine the school's witnesses. Landon testified at the hearing. The board held that he violated § 392.4655 and expelled him for 90 days.

Landon and his father, acting as guardian, sued the school district, school administrators, and school district officials and trustees (collectively, “Douglas County”) [3] for violations of Landon's constitutional rights under 42 U.S.C. § 1983, as well as for negligence and negligent infliction of ***1067** emotional distress.[4] The district court denied Landon's motion for summary judgment and granted Douglas County's motion for summary judgment. The material facts are not in dispute.

> 3. In the amended answer to the complaint, Douglas County raised a number of immunities as affirmative defenses. However, the district court did not address these, and Douglas County does not raise them here.
>
> 4. Landon does not appeal from the district court's grant of summary judgment on his negligence and negligent infliction of emotional distress claims.

ANALYSIS

I. FIRST AMENDMENT CLAIM

The Supreme Court has not yet addressed the applicability of its school speech cases to speech originating off campus, such as Landon's MySpace messages, which were written from home. Although the Court's prior cases are instructive, we also look to our circuit precedent and to our sister circuits for guidance. We hold that Douglas County did not violate Landon's First Amendment rights. Landon's messages, which threatened the safety of the school and its students, both interfered with the rights of other students and made it reasonable for school officials to forecast a substantial disruption of school activities.

A. FRAMEWORK FOR ANALYSIS

The Supreme Court's school speech jurisprudence echoes a common theme: although public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). The Court has decided four lead student speech cases: *Tinker; Fraser; Hazelwood Sch. Dist.,* 484 U.S. 260, 108 S.Ct. 562; and *Morse v. Frederick,* 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007). Each governs a different area of student speech: "(1) vulgar, lewd, obscene, and plainly offensive speech" is governed by *Fraser;* "(2) school-sponsored speech" is governed by *Hazelwood,* and "(3) speech that falls into neither of these categories" is governed by *Tinker. Chandler v. McMinnville Sch. Dist.,* 978 F.2d 524, 529 (9th Cir.1992). In *Morse,* the Court dealt with a fourth, and somewhat unique, category—speech promoting illegal drug use. 551 U.S. at 403, 127 S.Ct. 2618. All four cases involved speech that took place at school or at a school-sanctioned event. Beyond those contexts, the Court has noted only that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents." *Morse,* 551 U.S. at 401, 127 S.Ct. 2618.

In *LaVine v. Blaine School District,* our circuit's most analogous precedent, we held that a school did not violate the First Amendment rights of a student who was expelled on a temporary, emergency basis because of a first-person poem he wrote at home about a school shooting and suicide and later showed to his English teacher during class. 257 F.3d 981, 988 (9th Cir.2001). Because the poem was neither lewd nor school-sponsored, we applied the *Tinker* test to the school's actions. *Id.* at 989. Under *Tinker,* schools may prohibit speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities" or that collides "with the rights of other students to be secure and to be let alone." *Tinker,* 393 U.S. at 508, 514, 89 S.Ct. 733. Looking to the totality of the circumstances, *LaVine* concluded that the school could have reasonably "forecast substantial disruption of or material interference with school activities—specifically, that [the student] was intending ****1068*** to inflict injury upon himself or others." *LaVine,* 257 F.3d at 990. Against "the backdrop of actual school shootings," we considered that the student was involved in a domestic dispute, had recently broken up with his girlfriend and was reportedly stalking her, and had had disciplinary problems in the past. *Id.* at 989–90. "[M]aybe most important[ ] ... was the poem itself." *Id.* at 990. "At its extreme it can be interpreted as a portent of future violence," and "[e]ven in its most mild interpretation, the poem appears to be a 'cry for help.' " *Id.*

Although we did not explicitly address the poem's off-campus origination, courts have nevertheless cited *LaVine* as an example of a case applying the *Tinker* test to off-campus student speech. *See, e.g., Porter v. Ascension Parish Sch. Bd.,* 393 F.3d 608, 615 n. 22 (5th Cir.2004) (listing *LaVine* as one of the cases in which courts have "[r]efus[ed] to differentiate between student speech taking place on-campus and speech taking place off-campus"); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.,* 711 F.Supp.2d 1094, 1108 (C.D.Cal.2010) (stating that "under the majority rule, and the rule established by the Ninth Circuit in *LaVine,* the geographic origin of the speech is not material").

We do not view *LaVine* as taking the position staked out for it by these other courts. *LaVine* definitely did not say that the geographic origin of speech doesn't matter, nor did it say that an individual's free speech rights are diminished simply by virtue of being a student. Rather, it dealt with speech created off campus but brought to the school by the speaker. This is not a minor distinction. Our case presents another variation—off-campus communication among students involving a safety threat to the school environment and brought to the school's attention by a fellow student, not the speaker. As explained below, the location of the speech can make a difference, but that does not mean that all off-campus speech is beyond the reach of school officials.

A number of our sister circuits have wrestled with the question of *Tinker*'s reach beyond the schoolyard. The Second, Fourth, and Eighth Circuits have concluded that *Tinker* applies to certain off-campus speech. *See, e.g., Doninger v. Niehoff,* 527 F.3d 41 (2d Cir.2008) (student disqualified from running for class secretary after posting a vulgar and misleading message about the supposed cancellation of an upcoming school event on a web log ("blog") from home); *Kowalski v. Berkeley County Schs.,* 652 F.3d 565 (4th Cir.2011) (student suspended for creating and posting to a MySpace webpage that was largely dedicated to ridiculing a fellow student); *S.J.W. v. Lee's Summit R–7 Sch. Dist.,* 696 F.3d 771 (8th Cir.2012) (students suspended for creating website with offensive and racist comments discussing fights at their school and mocking black students, as well as sexually explicit and degrading comments about particular female classmates). These circuits have imposed some additional threshold test before applying *Tinker* to speech that originates off campus. For example, the Fourth Circuit requires that the speech have a sufficient "nexus" to the school, *Kowalski,* 652 F.3d at 573, while the Eighth Circuit requires that it be "reasonably foreseeable that the speech will reach the school community." *S.J.W.,* 696 F.3d at 777. The Second Circuit has not decided "whether it must be shown that it was reasonably foreseeable that [the speech] would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability." *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.,* 494 F.3d 34, 39 (2d Cir.2007). But at least where it is reasonably foreseeable that off-campus ***1069** speech meeting the *Tinker* test will wind up at school, the Second Circuit has permitted schools to impose discipline based on the speech. *Doninger,* 527 F.3d at 48.

The Third and Fifth Circuits have left open the question whether *Tinker* applies to off-campus speech. In *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.,* 650 F.3d 915, 926, 930 (3d Cir.2011) (en banc), the Third Circuit "assume[d], without deciding, that *Tinker* applie[d]" to a student's

creation of a parody MySpace profile mocking the school principal, but held that it was not reasonably foreseeable that the speech would create a substantial disruption.[5] In a separate concurrence, five judges expressed their position that *Tinker* does not apply to off-campus speech and that “the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.” *Id.* at 936 (Smith, C.J., concurring). The Fifth Circuit similarly left the question open in *Porter,* 393 F.3d at 615–16 n. 22 (noting the “difficulties posed by state regulation of student speech that takes place off-campus and is later brought on-campus”). In that case, the student's speech was not even “directed at the campus.” *Id.* at 615.

5. In another Third Circuit en banc case decided the same day as *Blue Mountain,* and also involving a principal parody profile, the school district did “not dispute the district court's finding that its punishment of [the student] was not appropriate under *Tinker*.” *Layshock v. Hermitage Sch. Dist.,* 650 F.3d 205, 216 (3d Cir.2011) (en banc). The school district relied instead on *Fraser. Id.* But the court went on to note that *Fraser* didn't allow the school “to punish [the student] for expressive conduct which occurred outside of the school context.” *Id.* at 219.

One of the difficulties with the student speech cases is an effort to divine and impose a global standard for a myriad of circumstances involving off-campus speech. A student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting, and we are reluctant to try and craft a one-size fits all approach. We do not need to consider at this time whether *Tinker* applies to all off-campus speech such as principal parody profiles or websites dedicated to disparaging or bullying fellow students. These cases present challenges of their own that we will no doubt confront down the road. Nor do we need to decide whether to incorporate or adopt the threshold tests from our sister circuits, as any of these tests could be easily satisfied in this circumstance. Given the subject and addressees of Landon's messages, it is hard to imagine how their nexus to the school could have been more direct; for the same reasons, it should have been reasonably foreseeable to Landon that his messages would reach campus. Indeed, the alarming nature of the messages prompted Landon's friends to do exactly what we would hope any responsible student would do: report to school authorities. Here we make explicit what was implicit in *LaVine:* when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker.*

As we wrote in *LaVine:* “Given the knowledge the shootings at Columbine, Thurston and Santee high schools, among others,[6] have imparted about the potential ***1070** for school violence ... we must take care when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment not to overreact in favor of either.” 257 F.3d at 983. The approach we set out strikes the appropriate balance between allowing schools to act to protect their students from credible threats of violence while recognizing and protecting freedom of expression by students.

6. In the twelve years since *LaVine* was decided, many more names have joined this

tragic list. When we decided *LaVine,* the shooting at Columbine High School, in which thirteen people died, was the deadliest school shooting to date. Since then there have been two even deadlier school shootings: at Virginia Tech and at Sandy Hook Elementary School. U.S. Dep't of Health & Human Servs., *Mass Murders: Why Us? Why the U.S.?,* Healthfinder.gov, http:// healthfinder. gov/ News/ Article.aspx?id=671871 (last visited Aug. 21, 2013).

B. APPLICATION TO LANDON'S MY SPACE MESSAGES

Confronted with messages that could be interpreted as a plan to attack the school, written by a student with confirmed access to weapons and brought to the school's attention by fellow students, Douglas County faced a dilemma every school dreads. As the Eleventh Circuit noted in a similar case, "[w]e can only imagine what would have happened if the school officials, after learning of [the] writing, did nothing about it" and Landon did in fact come to school with a gun. *Boim v. Fulton Cnty. Sch. Dist.,* 494 F.3d 978, 984 (11th Cir.2007). "School officials have a difficult task in balancing safety concerns against chilling free expression." *LaVine,* 257 F.3d at 992. Under the circumstances of this case, Douglas County did not violate Landon's First Amendment rights by expelling him for 90 days.[7]

7. If the MySpace messages constituted a "true threat," then they were not entitled to any First Amendment protection. *United States v. Cassel,* 408 F.3d 622, 627 (9th Cir.2005). In the criminal arena, for speech to be deemed a "true threat," the speaker must have "subjectively intended the speech as a threat." *Id.* at 633. Landon has contended from the beginning that the messages were written in jest. As in *LaVine,* "[b]ecause we conclude that even if [the messages were] protected speech, the school actions were justified, we need not resolve" the question whether the messages were a true threat in the civil context presented here. 257 F.3d at 989 n. 5.

Under *Tinker,* schools may restrict speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities" or that collides "with the rights of other students to be secure and to be let alone." 393 U.S. at 508, 514, 89 S.Ct. 733. Such speech is "not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513, 89 S.Ct. 733. It is an understatement that the specter of a school shooting qualifies under either prong of *Tinker.*

1. Substantial Disruption or Material Interference with School Activities

The nature of the threats here was alarming and explosive. Confronted with a challenge to the safety of its students, Douglas County did not need to wait for an actual disruption to materialize before taking action. " *Tinker* does not require school officials to wait until disruption actually occurs before they may act.... 'In fact, they have a duty to prevent the occurrence of disturbances.' " *LaVine,* 257 F.3d at 989 (quoting *Karp v. Becken,* 477 F.2d 171, 175 (9th Cir.1973)). We look to "all of the circumstances confronting the school officials that might reasonably portend disruption." *LaVine,* 257 F.3d at 989.

It was reasonable for Douglas County to interpret the messages as a real risk and to forecast a

substantial disruption. Landon argues that the circumstances in *LaVine* that made it reasonable to forecast substantial disruption—"specifically, that [the student] was intending to inflict injury upon himself or others," 257 F.3d at 990—were absent.[8] For example, the student in ***1071** *LaVine,* unlike Landon, had previous disciplinary problems, had discussed suicide with his counselor, was reportedly stalking his recent ex-girlfriend, and had been involved with a domestic dispute with his father. *See id.* at 991. That may be so, but other circumstances here made it exceedingly reasonable for the school officials to take Landon's messages seriously.

> 8. Landon's emphasis on his lack of previous disciplinary problems is misplaced. A report by the Secret Service and the Department of Education that examined 37 incidents of targeted school shootings and school attacks found that nearly two-thirds of the attackers had never been in trouble or were rarely in trouble at school. U.S. Secret Serv. & U.S. Dep't of Educ., *The Final Report and Findings of the Safe School Initiative* ii, 20 (May 2002), *available at* http:// www. secretservice. gov/ ntac/ ssi_ final_ report. pdf.

To begin, the harm described would have been catastrophic had it occurred. The messages suggest a fascination with previous school shootings. Landon explicitly invoked the deadliest school shooting ever by a single gunman and stated that he could kill even more people without wasting a single bullet. The given date for the event—April 20—implicitly invoked another horrific mass school shooting—the massacre at Columbine.

In one of the most disturbing messages, Landon explicitly named his school: "its pretty simple / i have a sweet gun / my neighbor is giving me 500 rounds / dhs [Douglas High School] is gay / ive watched these kinds of movies so i know how NOT to go wrong / i just cant decide who will be on my hit list / and thats totally deminted and it scares even my self." Landon specified a date for the attack and described how he would kill two specific, named classmates, one of whom was to be "# 1 on 4/20," while the other would be last so Landon could "get more people before they run away." Further, unlike the student in *LaVine,* 257 F.3d at 985, Landon stated that he had access to weapons and ammunition, so his friends and the school had reason to believe he had the ability to carry out a shooting. When questioned, Landon confirmed to a police officer that, as reported by his friends, he had weapons and ammunition at his house.

In contrast to the fake MySpace profile purporting to be the principal in *J.S,* which "was so outrageous that no one took its content seriously," 650 F.3d at 921, Landon's MySpace messages should have been taken seriously and apparently were. Landon's friends' MySpace messages to each other underscore their fear. The deputy sheriff who serves as a school resource officer for Douglas High School noted in his report that the friends who reported Landon's messages "were vis[i]bly shaken and believe the suspect is mentally disturbed." One female student who was mentioned in Landon's MySpace messages reported that she was afraid of Landon and that her father would not let her return to school if Landon was there.

We need not discredit Landon's insistence that he was joking; our point is that it was reasonable for Douglas County to proceed as though he was not. Faced with this scenario, the school district officials reasonably could have predicted that they would have to spend

“considerable time dealing with [parents' and students'] concerns and ensuring that appropriate safety measures were in place.” *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60,* 647 F.3d 754, 766 (8th Cir.2011).

2. Invasion of the Rights of Others

Few circuit cases address the “invasion of the rights of others” prong of *Tinker.*[9] ****1072*** 393 U.S. at 513, 89 S.Ct. 733. As then-Circuit Judge Alito wrote, “[t]he precise scope of *Tinker*'s ‘interference with the rights of others' language is unclear.” *Saxe,* 240 F.3d at 217. We agree with the Third Circuit that “it is certainly not enough that the speech is merely offensive to some listener,” *id.,* but decline to elaborate on when offensive speech crosses the line. Whatever the scope of the “rights of other students to be secure and to be let alone,” *Tinker,* 393 U.S. at 508, 89 S.Ct. 733, without doubt the threat of a school shooting impinges on those rights. Landon's messages threatened the student body as a whole and targeted specific students by name. They represent the quintessential harm to the rights of other students to be secure.

> 9. See *West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358, 1366 (10th Cir.2000), and *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 217 (3d Cir.2001), for examples of cases discussing *Tinker*'s “invasion of the rights of others” prong. We relied on this prong in *Harper v. Poway Unified Sch. Dist.,* 445 F.3d 1166 (9th Cir.2006). However, the judgment in that case was vacated and the appeal dismissed as moot after the student graduated. *Harper v. Poway Unified Sch. Dist.,* 549 U.S. 1262, 127 S.Ct. 1484, 167 L.Ed.2d 225 (2007); *Harper v. Poway Unified Sch. Dist.,* 485 F.3d 1052, 1053 (9th Cir.2007); *Harper v. Poway Unified Sch. Dist.,* 545 F.Supp.2d 1072, 1077 (S.D.Cal.2007), *aff'd in part, vacated in part,* 318 Fed. Appx. 540 (9th Cir.2009).

In holding that Douglas County's actions did not violate the First Amendment, we do not mean to imply approval of Douglas County's particular response to the perceived threat. We note that there was a more punitive character to the expulsion here than in *LaVine,* in which the school “allowed [the student] to return to class as soon as a mental health professional determined he was not a threat to himself or his classmates.” 257 F.3d at 991 n. 9. In addition, we have observed before that “[s]imply expelling a student without providing some kind of counseling or supervision might not be the best response to a school's concern for potential violence.” *Id.* at 990 n. 7. Our responsibility, however, is not to parse the wisdom of Douglas County's actions, but to determine whether they were constitutional. We conclude that they were.

II. PROCEDURAL DUE PROCESS CLAIM

Under Nevada law, Landon had a property interest in his public education and was therefore entitled to due process before he could be suspended. *See Goss v. Lopez,* 419 U.S. 565, 572–74, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); Nev. Const. art. 11, § 2. Landon received adequate due process before both his 10–day suspension and his 90–day expulsion.

A. 10–DAY SUSPENSION

The Supreme Court explained in *Goss* that “due process requires, in connection with a

suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S. at 581, 95 S.Ct. 729. Landon does not argue that Douglas County did not comply with these requirements. Instead, he complains that the county did not comply with its own regulatory procedures for suspension and that it did not notify Landon's parents before meeting with him at the juvenile detention center.

Before suspending Landon for 10 days, the school administrators who met with him at the detention center told him that they had evidence that he had made threats on MySpace and that they wanted to get his side of the story, but Landon asserts that they did not follow exactly the school district's administrative regulations ***1073** requiring that he be told of the " *specific* rules, policies, or procedures that are alleged to have been violated" (emphasis added) and that, if the evidence supported the allegations, the consequences could include suspension. As the district court noted, "defendants' purported failure to comply with their own administrative procedure does not, itself, constitute a violation of constitutional due process." *See Bilbrey by Bilbrey v. Brown,* 738 F.2d 1462, 1471 (9th Cir.1984) (holding that a due process claim arising out of an alleged violation of a school's own regulations "would not make a search unconstitutional if it were otherwise valid under the Fourth Amendment"); *Jacobs v. Clark Cnty. Sch. Dist.,* 526 F.3d 419, 441 (9th Cir.2008) ("Moreover, Plaintiffs provide no authority for their suggestion that a federal due process claim lies whenever a *local* entity deviates from its *own* procedures in enacting a *local* regulation.") (emphasis in original). The notice Landon received was constitutionally adequate.

Neither the Constitution nor the school district's policies require parental notification prior to imposing a 10–day suspension or prior to meeting with a student.

B. 90–DAY EXPULSION

Although the Constitution does not require that a school give a student "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, [and] to call his own witnesses to verify his version of the incident" before a short suspension, suspensions longer than 10 days or "expulsions for the remainder of the school term, or permanently, may require more formal process." *Goss,* 419 U.S. at 583–84, 95 S.Ct. 729. Neither the Supreme Court nor our own circuit has mandated specific procedures for a suspension of 90 days. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)) (alteration omitted). In determining whether Landon received adequate due process, we consider Landon's interest in his education at Douglas High School; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and Douglas County's interest, including the not-insignificant burdens that the additional safeguards would entail. *See Mathews,* 424 U.S. at 335, 96 S.Ct. 893. We note that "administrative proceedings need not cleave to strict state evidentiary rules." *In re Estate of Covington,* 450 F.3d 917, 923 (9th Cir.2006).

Before his expulsion, Landon received written notice of the charges and a list of possible witnesses. He was given “the right to be represented by an advocate of [his] choosing, including counsel,” to present evidence and to call and cross-examine witnesses. Landon argues his due process rights were violated because he was not provided with evidence in advance of the hearing and because no witness testified to any disruption and hence he could not cross-examine on that point.

The additional procedures conceived by Landon were not constitutionally required. To begin, Landon *had* the key evidence—he acknowledged writing the messages and he had access to them through his MySpace account. As to witnesses on disruption, this is a question of the weight of the evidence, not a due process violation. In any event, *Tinker* does not require actual disruption before a school can impose discipline.

**1074* III. DUE PROCESS NOTICE CLAIM

Landon's notice argument—that his expulsion violated due process because he could not have known that he could be expelled for writing the MySpace messages—is without legal support. “Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.” *Fraser,* 478 U.S. at 686, 106 S.Ct. 3159. Apart from common sense, the school's student handbook, which is distributed at the beginning of each year, gave adequate warning to Landon that he could face sanctions for his alarming statements about shooting classmates. *See id.* The handbook reproduced verbatim the portion of § 392.4655 that the school board found Landon to have violated. In addition, the handbook stated in a separate section that behavior that was “intimidating, harassing, threatening, or disruptive” was subject to disciplinary action.

Landon was also on notice that he could face discipline even for certain off-campus actions. Unlike the portion of § 392.4655 dealing with fights, the portion dealing with threats does not contain a geographic limitation. *Compare* § 392.4655(1)(a) (deeming a student a habitual disciplinary problem if he or she has “threatened or extorted” a classmate, teacher, or school employee, with no specification of the location of the threat or extortion) *with* § 392.4655(1)(b) (deeming a student a habitual disciplinary problem if he or she “has been suspended for initiating at least two fights on school property, at an activity sponsored by a public school, on a school bus or, if the fight occurs within 1 hour of the beginning or end of a school day, on the pupil's way to or from school”).

IV. APPLICABILITY OF § 392.4655

The district court correctly held that Douglas County did not misinterpret § 392.4655 in applying it to Landon. That section provides that “a principal of a school shall deem a pupil enrolled in the school a habitual disciplinary problem if the school has written evidence which documents that in 1 school year ... [t]he pupil has threatened or extorted, or attempted to threaten or extort, another pupil or a teacher or other personnel employed by the school.” § 392.4655(1)-(1)(a). According to Landon, he could not be “deemed a habitual disciplinary problem” under § 392.4655 because he only committed a single act.[10] Although the statute

requires multiple occurrences for certain types of conduct before a student is deemed a habitual disciplinary problem, it does not require more than one occurrence of threat or extortion. As the district court pointed out, this “shows the legislature's intent to hold a single act of threatening conduct an expellable offense.” The plain language of the statute, which includes the legislative definition of “habitual disciplinary problem” in this context, is controlling.

> 10. On appeal, Landon also argues that § 392.4655 is facially unconstitutional because it is overbroad and vague. Because he did not raise this argument before the district court, we decline to consider it here. *See Dream Palace v. Cnty. of Maricopa,* 384 F.3d 990, 1005 (9th Cir.2004).

Landon's argument that he could not be expelled because he did not intend to harm or intimidate anyone is equally unpersuasive. Douglas County's correspondence with Landon's parents and the board minutes stated that Landon was being charged with a violation of board policy and Nev. Rev. Stat. § 392.4655, an administrative statute without an intent requirement. ****1075*** Douglas County's reference to a different, criminal statute—Nev. Rev. Stat. § 392.915, with which Landon was not charged—in those same documents did not incorporate the intent element of that statute. In any event, the school was not acting in the role of a government prosecutor enforcing a criminal statute. Douglas County was not required to prove Landon's subjective intent in writing the messages before expelling him.

Santa Fe Independent School District v. Doe, 530 U.S. 290 (US Supreme Court 2000).

*****2268 *290 Syllabus****

> * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Prior to 1995, a student elected as Santa Fe High School's student council chaplain delivered a prayer over the public address system before each home varsity football game. Respondents, Mormon and Catholic students or alumni and their mothers, filed a suit challenging this practice and others under the Establishment Clause of the First Amendment. While the suit was pending, petitioner school district (District) adopted a different policy, *****2269*** which authorizes two student elections, the first to determine whether "invocations" should be delivered at games, and the second to select the spokesperson to deliver them. After the students held elections authorizing such prayers and selecting a spokesperson, the District Court entered an order modifying the policy to permit only nonsectarian, nonproselytizing prayer. The Fifth Circuit held that, even as modified by the District Court, the football prayer policy was invalid.

Held: The District's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause. Pp. 2275–2283.

(a) The Court's analysis is guided by the principles endorsed in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467. There, in concluding that a prayer delivered by a rabbi at a graduation ceremony violated the Establishment Clause, the Court held that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith, or tends to do so, *id.,* at 587, 112 S.Ct. 2649. The District argues unpersuasively that these principles are inapplicable because the policy's messages are private student speech, not public speech. The delivery of a message such as the invocation here—on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as "private" speech. Although the District relies heavily on this Court's cases addressing public forums, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700, it is clear that the District's ****291*** pregame ceremony is not the type of forum discussed in such cases. The District simply does not evince an intent to open its ceremony to indiscriminate use by the student body generally, see, *e.g., Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592, but, rather, allows only one student, the same student for the entire season, to give the invocation, which is subject to particular regulations that confine the content and topic of the student's message. The majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced. See *Board of Regents of Univ. of Wis. System v. Southworth,*

529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193. Moreover, the District has failed to divorce itself from the invocations' religious content. The policy involves both perceived and actual endorsement of religion, see *Lee,* 505 U.S., at 590, 112 S.Ct. 2649, declaring that the student elections take place because the District "has chosen to permit" student-delivered invocations, that the invocation "shall" be conducted "by the high school student council" "[u]pon advice and direction of the high school principal," and that it must be consistent with the policy's goals, which include "solemniz[ing] the event." A religious message is the most obvious method of solemnizing an event. Indeed, the only type of message expressly endorsed in the policy is an "invocation," a term which primarily describes an appeal for divine assistance and, as used in the past at Santa Fe High School, has always entailed a focused religious message. A conclusion that the message is not "private speech" is also established by factors beyond the policy's text, including the official setting in which the invocation is delivered, see, *e.g., Wallace v. Jaffree,* 472 U.S. 38, 73, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29, by the policy's sham secular purposes, see *id.,* at 75, 105 S.Ct. 2479, and by its history, which indicates that the District intended to preserve its long-sanctioned practice of prayer before football games, see *Lee,* 505 U.S., at 596, 112 S.Ct. 2649. Pp. 2275–2279.

*****2270*** (b) The Court rejects the District's argument that its policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. The first part of this argument—that there is no impermissible government coercion because the pregame messages are the product of student choices—fails for the reasons discussed above explaining why the mechanism of the dual elections and student speaker do not turn public speech into private speech. The issue resolved in the first election was whether a student would deliver prayer at varsity football games, and the controversy in this case demonstrates that the students' views are not unanimous on that issue. One of the Establishment Clause's purposes is to remove debate over this kind of issue from governmental supervision or control. See *Lee,* 505 U.S., at 589, 112 S.Ct. 2649. Although the ultimate choice of student speaker is attributable to the students, the District's decision ****292*** to hold the constitutionally problematic election is clearly a choice attributable to the State, *id.,* at 587, 112 S.Ct. 2649. The second part of the District's argument—that there is no coercion here because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary—is unpersuasive. For some students, such as cheerleaders, members of the band, and the team members themselves, attendance at football games is mandated, sometimes for class credit. The District's argument also minimizes the immense social pressure, or truly genuine desire, felt by many students to be involved in the extracurricular event that is American high school football. *Id.,* at 593, 112 S.Ct. 2649. The Constitution demands that schools not force on students the difficult choice between attending these games and avoiding personally offensive religious rituals. See *id.,* at 596, 112 S.Ct. 2649. Pp. 2279–2281.

(c) The Court also rejects the District's argument that respondents' facial challenge to the policy necessarily must fail because it is premature: No invocation has as yet been delivered under the policy. This argument assumes that the Court is concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that the Court keep in

mind the myriad, subtle ways in which Establishment Clause values can be eroded, *Lynch v. Donnelly,* 465 U.S. 668, 694, 104 S.Ct. 1355, 79 L.Ed.2d 604, and guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. See, *e.g., Bowen v. Kendrick,* 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520; *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745. As discussed above, the policy's text and the circumstances surrounding its enactment reveal that it has such a purpose. Another constitutional violation warranting the Court's attention is the District's implementation of an electoral process that subjects the issue of prayer to a majoritarian vote. Through its election scheme, the District has established a governmental mechanism that turns the school into a forum for religious debate and empowers the student body majority to subject students of minority views to constitutionally improper messages. The award of that power alone is not acceptable. Cf. *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193. For the foregoing reasons, the policy is invalid on its face. Pp. 2281–2283.

***294** Justice STEVENS delivered the opinion of the Court.

Prior to 1995, the Santa Fe High School student who occupied the school's elective office of student council chaplain delivered a prayer over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending in the District Court, the school district adopted a different policy that permits, but does not require, prayer initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing prayer. The Court of Appeals held that, even as modified by the District Court, the football prayer policy was invalid. We granted the school district's petition for certiorari to review that holding.

I

The Santa Fe Independent School District (District) is a political subdivision of the State of Texas, responsible for the education of more than 4,000 students in a small community in the southern part of the State. The District includes the Santa Fe High School, two primary schools, an intermediate school and the junior high school. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment.[1]

> 1. A decision, the Fifth Circuit Court of Appeals noted, that many District officials "apparently neither agreed with nor particularly respected." 168 F.3d 806, 809, n. 1 (C.A.5 1999). About a month after the complaint was filed, the District Court entered an order that provided, in part:
>
> "[A]ny further attempt on the part of District or school administration, officials,

counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side." App. 34–35.

295 Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, ****2272*** [2] and to deliver overtly Christian prayers over the public address system at home football games.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues.[3] With respect ***296*** to the impending graduation, the order provided that "non-denominational prayer" consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by members of the graduating class. The text of the prayer was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures "such as Mohammed, Jesus, Buddha, or the like" would be permitted "as long as the general thrust of the prayer is non-proselytizing." App. 32.

2. At the 1994 graduation ceremony the senior class president delivered this invocation:

"Please bow your heads.

"Dear heavenly Father, thank you for allowing us to gather here safely tonight. We thank you for the wonderful year you have allowed us to spend together as students of Santa Fe. We thank you for our teachers who have devoted many hours to each of us. Thank you, Lord, for our parents and may each one receive the special blessing. We pray also for a blessing and guidance as each student moves forward in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus' name we pray." *Id.,* at 19.

3. For example, it prohibited school officials from endorsing or participating in the baccalaureate ceremony sponsored by the Santa Fe Ministerial Alliance, and ordered

the District to establish policies to deal with

> "manifest First Amendment infractions of teachers, counsellors, or other District or school officials or personnel, such as ridiculing, berating or holding up for inappropriate scrutiny or examination the beliefs of any individual students. Similarly, the School District will establish or clarify existing procedures for excluding overt or covert sectarian and proselytizing religious teaching, such as the use of blatantly denominational religious terms in spelling lessons, denominational religious songs and poems in English or choir classes, denominational religious stories and parables in grammar lessons and the like, while at the same time allowing for frank and open discussion of moral, religious, and societal views and beliefs, which are non-denominational and non-judgmental." *Id.,* at 34.

In response to that portion of the order, the District adopted a series of policies over several months dealing with prayer at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided:

> " 'The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing ***297** their graduation ceremonies.' " 168 F.3d 806, 811 (C.A.5 1999) (emphasis deleted).

The parties stipulated that after this policy was adopted, "the senior class held an election to determine whether to have an invocation and benediction at the commencement [and that the] class voted, by secret ballot, to include prayer at the high school graduation." App. 52. In a second vote the class elected two seniors to deliver the invocation and benediction.[4]

> 4. The student giving the invocation thanked the Lord for keeping the class safe through 12 years of school and for gracing their lives with two special people and closed: "Lord, we ask that You keep Your hand upon us during this ceremony and to help us keep You in our hearts through the rest of our lives. In God's name we pray. Amen." *Id.,* at 53. The student benediction was similar in content and closed: "Lord, we ask for Your protection as we depart to our next destination and watch over us as we go our separate ways. Grant each of us a safe trip and keep us secure throughout the night. In Your name we pray. Amen." *Id.,* at 54.

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian ****2273** and nonproselytising," but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective.

The August policy, which was titled "Prayer at Football Games," was similar to the July policy for graduations. It also authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be "nonsectarian and nonproselytising," and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. On August 31, 1995, according to the parties' stipulation: "[T]he district's high school students voted to determine whether a student would deliver prayer at varsity football games.... The students chose to allow a ***298** student to say a prayer at football games." *Id.,* at 65. A week later, in a separate election, they selected a student "to deliver the prayer at varsity football games." *Id.,* at 66.

The final policy (October policy) is essentially the same as the August policy, though it omits the word "prayer" from its title, and refers to "messages" and "statements" as well as "invocations."[5] It is the validity of that policy that is before us.[6]

5. Despite these changes, the school did not conduct another election, under the October policy, to supersede the results of the August policy election.

6. It provides:

"STUDENT ACTIVITIES:

"PRE–GAME CEREMONIES AT FOOTBALL GAMES

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

"If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

"The board has chosen to permit students to deliver a brief invocation and/or message

to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing." *Id.,* at 104–105.

***299** The District Court did enter an order precluding enforcement of the first, open-ended policy. Relying on our decision in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), it held that the school's "action must not 'coerce anyone to support or participate in' a religious exercise." App. to Pet. for Cert. E7. Applying that test, it concluded that the graduation prayers appealed "to distinctively Christian beliefs,"[7] and that delivering a ****2274** prayer "over the school's public address system prior to each football and baseball game coerces student participation in religious events."[8] Both parties appealed, the District contending that the enjoined portion of the October policy was permissible and the Does contending that both alternatives violated the Establishment Clause. The Court of Appeals majority agreed with the Does.

7. "The graduation prayers at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs. The Court accordingly finds that use of these prayers during graduation ceremonies, considered in light of the overall manner in which they were delivered, violated the Establishment Clause." App. to Pet. for Cert. E8.

8. *Id.,* at E8–E9.

The decision of the Court of Appeals followed Fifth Circuit precedent that had announced two rules. In *Jones v. Clear Creek Independent School Dist.,* 977 F.2d 963 (C.A.5 1992), that court held that student-led prayer that was approved by a vote of the students and was nonsectarian and nonproselytizing was permissible at high school graduation ceremonies. On the other hand, in later cases the Fifth Circuit made it clear that the *Clear Creek* rule applied only to high school ***300** graduations and that school-encouraged prayer was constitutionally impermissible at school-related sporting events. Thus, in *Doe v. Duncanville Independent School Dist.,* 70 F.3d 402 (C.A.5 1995), it had described a high school graduation as "a significant, once in-a-lifetime event" to be contrasted with athletic events in "a setting that is far less solemn and extraordinary." *Id.,* at 406–407.[9]

9. Because the dissent overlooks this case, it incorrectly assumes that a "prayer-only policy" at

football games was permissible in the Fifth Circuit. See *post,* at 2286 (opinion of REHNQUIST, C.J.).

In its opinion in this case, the Court of Appeals explained:

> "The controlling feature here is the same as in *Duncanville:* The prayers are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer. The distinction to which [the District] points is simply one without difference. Regardless of whether the prayers are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers. Thus, as we indicated in *Duncanville,* our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We therefore reverse the district court's holding that [the District's] alternative Clear Creek Prayer Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions." 168 F.3d, at 823.

The dissenting judge rejected the majority's distinction between graduation ceremonies and football games. In his ***301** opinion the District's October policy created a limited public forum that had a secular purpose[10] and provided neutral accommodation of noncoerced, private, religious speech.[11]

> 10. "There are in fact several secular reasons for allowing a brief, serious message before football games—some of which [the District] has listed in its policy. At sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work, and many more goals that the majority could conceive would it only pause to do so.
>
> "Having again relinquished all editorial control, [the District] has created a limited public forum for the students to give brief statements or prayers concerning the value of those goals and the methods for achieving them." 168 F.3d, at 835.
>
> 11. "The majority fails to realize that what is at issue in this *facial challenge* to this school policy is the neutral accommodation of non-coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints. Yet the majority imposes a judicial curse upon sectarian religious speech." *Id.,* at 836.

*****2275*** We granted the District's petition for certiorari, limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." 528 U.S. 1002, 120 S.Ct. 494, 145 L.Ed.2d 381 (1999). We conclude, as did the Court of Appeals, that it does.

II

The first Clause in the First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. *Wallace v. Jaffree,* 472 U.S. 38, 49–50, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). In *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different ***302** type of school function, our analysis is properly guided by the principles that we endorsed in *Lee.*

As we held in that case:

> "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " *Id.,* at 587, 112 S.Ct. 2649 (citations omitted) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 678, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)).

In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (opinion of O'CONNOR, J.). We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Although the District relies heavily on *Rosenberger* and similar cases involving such ***303** forums,[12] it is clear that the pregame ceremony is not the type of forum discussed in those cases.[13] ****2276** The Santa Fe school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' ... by the student body generally." *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message, see *infra,*

at 2277–2278, 2278–2279. By comparison, in *Perry* we rejected a claim that the school had created a limited public forum in its school mail system despite the fact that it had allowed far more speakers to address a much broader range of topics than the policy at issue here.[14] As we concluded in *Perry,* "selective access does not transform government property into a public forum." 460 U.S., at 47, 103 S.Ct. 948.

> 12. See, *e.g.,* Brief for Petitioner 44–48, citing *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (limited public forum); *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (limited public forum); *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (traditional public forum); *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (limited public forum). Although the District relies on these public forum cases, it does not actually argue that the pregame ceremony constitutes such a forum.

> 13. A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause. See, *e.g., Pinette,* 515 U.S., at 772, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment) ("I see no necessity to carve out ... an exception to the endorsement test for the public forum context").

> 14. The school's internal mail system in *Perry* was open to various private organizations such as "[l]ocal parochial schools, church groups, YMCA's, and Cub Scout units." 460 U.S., at 39, n. 2, 103 S.Ct. 948.

***304** Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe's student election system ensures that only those messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

Recently, in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), we explained why student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic:

> "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here." *Id.,* at 235, 120 S.Ct. 1346.

Like the student referendum for funding in *Southworth,* this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority.[15] Because “fundamental rights may not be ***305** submitted to vote; they depend on the outcome of no elections,” *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the District's elections are insufficient safeguards of diverse student speech.

15. If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second election determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority rather than a random statement by a private individual.

The fact that the District's policy provides for the election of the speaker only after the majority has voted on her message identifies an obvious distinction between this case and the typical election of a “student body president, or even a newly elected prom king or queen.” *Post,* at 2285.

In *Lee,* the school district made the related argument that its policy of endorsing only “civic or nonsectarian” prayer was acceptable because it minimized the intrusion on the audience as a whole. We ****2277** rejected that claim by explaining that such a majoritarian policy “does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.” 505 U.S., at 594, 112 S.Ct. 2649. Similarly, while Santa Fe's majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.

Moreover, the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is “ ‘one of neutrality rather than endorsement’ ”[16] or by characterizing the individual student as the “circuit-breaker”[17] in the process. Contrary to the District's repeated assertions that it has adopted a “hands-off” approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee,* the “degree of school involvement” makes it clear that the pregame prayers bear “the imprint of the State and thus put school-age children who objected in an untenable position.” *Id.,* at 590, 112 S.Ct. 2649.

16. Brief for Petitioner 19 (quoting *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 248, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion)).

17. Tr. of Oral Arg. 7.

The District has attempted to disentangle itself from the religious messages by developing the

two-step student ***306*** election process. The text of the October policy, however, exposes the extent of the school's entanglement. The elections take place at all only because the school "board *has chosen to permit* students to deliver a brief invocation and/or message." App. 104 (emphasis added). The elections thus "shall" be conducted "by the high school student council" and "[u]pon advice and direction of the high school principal." *Id.,* at 104–105. The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Ibid.*

In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good sportsmanship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited.[18] Indeed, the only type of message that is expressly endorsed in the text is an "invocation"—a term that primarily describes an appeal for divine ***307*** assistance.[19] In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely ****2278*** how the students understand the policy. The results of the elections described in the parties' stipulation[20] make it clear that the students understood that the central question before them was whether prayer should be a part of the pregame ceremony.[21] We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment.

18. THE CHIEF JUSTICE's hypothetical of the student body president asked by the school to introduce a guest speaker with a biography of her accomplishments, see *post,* at 2287–2288 (dissenting opinion), obviously would pose no problems under the Establishment Clause.

19. See, *e.g.,* Webster's Third New International Dictionary 1190 (1993) (defining "invocation" as "a prayer of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship").

20. See *supra,* at 2272–2273, and n. 4.

21. Even if the plain language of the October policy were facially neutral, "the Establishment Clause forbids a State to hide behind the application of formally neutral

> criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S., at 777, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment); see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 534–535, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (making the same point in the Free Exercise Clause context).

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is ***308** clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." *Wallace,* 472 U.S., at 73, 76, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment); see also *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.

The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one." *Wallace,* 472 U.S., at 75, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment).

***309** According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment ****2279** for competition." Brief for Petitioner 14. We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further any of these purposes.

Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to “foste[r] free expression.” Furthermore, regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school. And it is unclear what type of message would be both appropriately “solemnizing” under the District's policy and yet nonreligious.

Most striking to us is the evolution of the current policy from the long-sanctioned office of “Student Chaplain” to the candidly titled “Prayer at Football Games” regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular “state-sponsored religious practice.” *Lee,* 505 U.S., at 596, 112 S.Ct. 2649.

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents “that they are outsiders, not full members of the political community, and an accompanying ****310*** message to adherents that they are insiders, favored members of the political community.” *Lynch,* 465 U.S., at 688, 104 S.Ct. 1355 (O'CONNOR, J., concurring). The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as “private” speech.

III

The District next argues that its football policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

The reasons just discussed explaining why the alleged “circuit-breaker” mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District's argument exposes anew the concerns that are created by the majoritarian election system. The parties' stipulation clearly states that the issue resolved in the first election was “whether a student would deliver prayer at varsity football games,” App. 65, and the controversy in this case demonstrates that the views of the students are not unanimous on that issue.

One of the purposes served by the Establishment Clause is to remove debate over this kind of

issue from governmental supervision or control. We explained in *Lee* that the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." 505 U.S., at 589, 112 S.Ct. 2649. The two student elections authorized ***311** by the policy, coupled with ****2280** the debates that presumably must precede each, impermissibly invade that private sphere. The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is "attributable to the students," Brief for Petitioner 40, the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State," *Lee,* 505 U.S., at 587, 112 S.Ct. 2649.

The District further argues that attendance at the commencement ceremonies at issue in *Lee* "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest to many students" and are "decidedly extracurricular," thus dissipating any coercion. Brief for Petitioner 41. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee,* "[l]aw reaches past formalism." 505 U.S., at 595, 112 S.Ct. 2649. To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." *Ibid.* We stressed in *Lee* the ***312** obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Id.,* at 593, 112 S.Ct. 2649. High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.,* at 596, 112 S.Ct. 2649.

Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For "the

government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Id.,* at 594, 112 S.Ct. 2649. As in *Lee,* "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.,* at 592, 112 S.Ct. 2649. The constitutional command will not permit the District "to exact religious conformity from a student as the *****2281*** price" of joining her classmates at a varsity football game.[22]

> 22. "We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands." *Lee,* 505 U.S., at 595–596, 112 S.Ct. 2649.

****313*** The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. See, *e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Wallace,* 472 U.S., at 59, 105 S.Ct. 2479. Indeed, the common purpose of the Religion Clauses "is to secure religious liberty." *Engel v. Vitale,* 370 U.S. 421, 430, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.

IV

Finally, the District argues repeatedly that the Does have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that any of the statements or invocations will be religious. Thus, it concludes, the October policy necessarily survives a facial challenge.

This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship ****314*** because she chooses to attend a school event. But the Constitution also requires that we keep in mind "the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch,* 465 U.S., at 694, 104 S.Ct. 1355 (O'CONNOR, J., concurring), and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District

of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote.

The District argues that the facial challenge must fail because "Santa Fe's Football Policy cannot be invalidated on the basis of some 'possibility or even likelihood' of an unconstitutional application." Brief for Petitioner 17 (quoting *Bowen v. Kendrick,* 487 U.S. 589, 613, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988)). Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose. Writing for the Court in *Bowen,* THE CHIEF JUSTICE concluded that "[a]s in previous cases involving facial challenges on Establishment Clause grounds, *e.g., Edwards v. Aguillard,* [482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987)]; *****2282** Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) ..., which guides '[t]he general nature of our inquiry in this area,' *Mueller v. Allen, supra,* at 394, 103 S.Ct. 3062." 487 U.S., at 602, 108 S.Ct. 2562. Under the *Lemon* standard, a court must invalidate a statute if it lacks "a secular legislative purpose." *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). It is therefore proper, as part of this facial challenge, for us to examine the purpose of the October policy.

As discussed, *supra,* at 2277–2278, 2278–2279, the text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker ****315*** and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message—that of Santa Fe's traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for the expression of student speech. Our examination, however, need not stop at an analysis of the text of the policy.

This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is "in large part a legal question to be answered on the basis of judicial interpretation of social facts.... Every government practice must be judged in its unique circumstances...." *Lynch,* 465 U.S., at 693–694, 104 S.Ct. 1355 (O'CONNOR, J., concurring). Our discussion in the previous sections, *supra,* at 2277–2279, demonstrates that in this case the District's direct involvement with school prayer exceeds constitutional limits.

The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe

High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to “solemnize” a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

***316** Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury. In *Wallace,* for example, we invalidated Alabama's as yet unimplemented and voluntary “moment of silence” statute based on our conclusion that it was enacted “for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day.” 472 U.S., at 60, 105 S.Ct. 2479; see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Therefore, even if no Santa Fe High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage prayer is also at issue. Government efforts to endorse religion cannot evade constitutional ****2283** reproach based solely on the remote possibility that those attempts may fail.

This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable.[23] Like the referendum in ***317** *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), the election mechanism established by the District undermines the essential protection of minority viewpoints. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred.[24] No further injury is required for the policy to fail a facial challenge.

23. THE CHIEF JUSTICE accuses us of “essentially invalidat[ing] all student elections,” see *post,* at 2285. This is obvious hyperbole. We have concluded that the resulting religious message under this policy would be attributable to the school, not just the student, see *supra,* at 2275–2279. For this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause.

24. THE CHIEF JUSTICE contends that we have “misconstrue[d] the nature ... [of] the policy as being an election on ‘prayer’ and ‘religion,’ ” *post,* at 2285. We therefore

> reiterate that the District has stipulated to the facts that the most recent election was held "to determine whether a student would deliver *prayer* at varsity football games," that the "students chose to allow a student to say a *prayer* at football games," and that a second election was then held "to determine which student would deliver the *prayer.*" App. 65–66 (emphases added). Furthermore, the policy was titled "*Prayer* at Football Games." *Id.,* at 99 (emphasis added). Although the District has since eliminated the word "prayer" from the policy, it apparently viewed that change as sufficiently minor as to make holding a new election unnecessary.

To properly examine this policy on its face, we "must be deemed aware of the history and context of the community and forum," *Pinette,* 515 U.S., at 780, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment). Our examination of those circumstances above leads to the conclusion that this policy does not provide the District with the constitutional safe harbor it sought. The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

The judgment of the Court of Appeals is, accordingly, affirmed.

It is so ordered.

***318** Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty ***2284** God." Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789–1897, p. 64 (J. Richardson ed. 1897).

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. As the Court explained in *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the fact that a policy might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." See also *Bowen v. Kendrick,* 487 U.S. 589, 612, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). While there is an exception to this principle in the First Amendment overbreadth context because of our concern that people may refrain from speech out of fear of prosecution, *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32, 38–40, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999), there is no similar justification for Establishment Clause cases. No speech will be "chilled" by the existence of a government policy that might unconstitutionally endorse religion over nonreligion. Therefore, the question

is not whether the district's policy *may be* applied in violation of the Establishment Clause, but whether it inevitably will be.

***319** The Court, venturing into the realm of prophecy, decides that it "need not wait for the inevitable" and invalidates the district's policy on its face. See *ante,* at 2282. To do so, it applies the most rigid version of the oft-criticized test of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).[1]

> 1. The Court rightly points out that in facial challenges in the Establishment Clause context, we have looked to *Lemon's* three factors to "guid[e][t]he general nature of our inquiry." *Ante,* at 2282 (internal quotation marks omitted) (citing *Bowen v. Kendrick,* 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988)). In *Bowen,* we looked to *Lemon* as such a guide and determined that a federal grant program was not invalid on its face, noting that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." 487 U.S., at 612, 108 S.Ct. 2562 (internal quotation marks omitted). But here the Court, rather than looking to *Lemon* as a guide, applies *Lemon's* factors stringently and ignores *Bowen's* admonition that mere anticipation of unconstitutional applications does not warrant striking a policy on its face.

Lemon has had a checkered career in the decisional law of this Court. See, *e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 398–399, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (SCALIA, J., concurring in judgment) (collecting opinions criticizing *Lemon*); *Wallace v. Jaffree,* 472 U.S. 38, 108–114, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting) (stating that *Lemon's* "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service" (internal quotation marks omitted)); *Committee for Public Ed. and Religious Liberty v. Regan,* 444 U.S. 646, 671, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980) (STEVENS, J., dissenting) (deriding "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon* "). We have even gone so far as to state that it has never been binding on us. *Lynch v. Donnelly,* 465 U.S. 668, 679, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area .... In two cases, the Court did not even apply the *Lemon* 'test' [citing *Marsh* ***320** *v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), and *Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)]"). Indeed, in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), an opinion upon which the Court relies heavily today, we mentioned, but did not feel compelled to apply, the *Lemon* test. See also ****2285** *Agostini v. Felton,* 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (stating that *Lemon's* entanglement test is merely "an aspect of the inquiry into a statute's effect"); *Hunt v. McNair,* 413 U.S. 734, 741, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

Even if it were appropriate to apply the *Lemon* test here, the district's student-message policy

should not be invalidated on its face. The Court applies *Lemon* and holds that the "policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." *Ante,* at 2283. The Court's reliance on each of these conclusions misses the mark.

First, the Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an election on "prayer" and "religion."[2] See *ante,* at 2281, 2283. To the contrary, the election permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be. App. 104–105. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will ***321** pray if elected. It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause or unduly suppressed minority viewpoints. But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions.[3]

> 2. The Court attempts to support its misinterpretation of the nature of the election process by noting that the district stipulated to facts about the most recent election. See *ante,* at 2283, n. 24. Of course, the most recent election was conducted under the *previous* policy—a policy that required an elected student speaker to give a pregame invocation. See App. 65–66, 99–100. There has not been an election under the policy at issue here, which expressly allows the student speaker to give a message as opposed to an invocation.
>
> 3. The Court's reliance on language regarding the student referendum in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), to support its conclusion with respect to the election process is misplaced. That case primarily concerned free speech, and, more particularly, mandated financial support of a public forum. But as stated above, if this case were in the "as applied" context and we were presented with the appropriate record, our language in *Southworth* could become more applicable. In fact, *Southworth* itself demonstrates the impropriety of making a decision with respect to the election process without a record of its operation. There we remanded in part for a determination of how the referendum functions. See *id.,* at 235–236, 120 S.Ct. 1346.

But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." *Ante,* at 2283. The Court so holds despite that any speech that may occur

as a result of the election process here would be *private,* not *government,* speech. The elected student, not the government, would choose what to say. Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections. A newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say prayers. Under the Court's view, the mere grant of power ***322** to the students to vote for such ****2286** offices, in light of the fear that those elected might publicly pray, violates the Establishment Clause.

Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." *Ante,* at 2282. But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." App. 104–105. Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent." *Wallace,* 472 U.S., at 74–75, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment); see also *Mueller v. Allen,* 463 U.S. 388, 394–395, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (stressing this Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"). The Court grants no deference to—and appears openly hostile toward—the policy's stated purposes, and wastes no time in concluding that they are a sham.

For example, the Court dismisses the secular purpose of solemnization by claiming that it "invites and encourages religious messages." *Ante,* at 2277; Cf. *Lynch,* 465 U. S, at 693, 104 S.Ct. 1355 (O'CONNOR, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions"). The Court so concludes based on its rather strange view that a "religious message is the most obvious means of solemnizing an event." *Ante,* at 2277. But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse "And this be our motto: 'In God is our trust.' " Under the Court's logic, a public school that sponsors ***323** the singing of the national anthem before football games violates the Establishment Clause. Although the Court apparently believes that solemnizing football games is an illegitimate purpose, the voters in the school district seem to disagree. Nothing in the Establishment Clause prevents them from making this choice.[4]

4. The Court also determines that the use of the term "invocation" in the policy is an express endorsement of that type of message over all others. See *ante,* at 2277–2278. A less cynical view of the policy's text is that it permits many types of messages, including invocations. That a policy tolerates religion does not mean that it improperly endorses it. Indeed, as the majority reluctantly admits, the Free Exercise Clause mandates such tolerance. See *ante,* at 2281 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); see also *Lynch v. Donnelly,* 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all

religions, and forbids hostility toward any").

The Court bases its conclusion that the true purpose of the policy is to endorse student prayer on its view of the school district's history of Establishment Clause violations and the context in which the policy was written, that is, as "the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." *Ante,* at 2278–2279, 2282. But the context—attempted compliance with a District Court order—actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The District Court ordered the school district to formulate a policy consistent with Fifth Circuit precedent, which permitted a school district to have a prayer-only policy. See *Jones v. Clear Creek Independent School Dist.,* 977 F.2d 963 (C.A.5 1992). But the school district went further than required by the District Court order and eventually settled *****2287*** on a policy that gave the student speaker a choice to deliver either an ****324*** invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose.[5]

5. *Wallace v. Jaffree,* 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), is distinguishable on these grounds. There we struck down an Alabama statute that added an express reference to prayer to an existing statute providing a moment of silence for meditation. *Id.,* at 59, 105 S.Ct. 2479. Here the school district added a secular alternative to a policy that originally provided only for prayer. More importantly, in *Wallace,* there was "unrebutted evidence" that pointed to a wholly religious purpose, *id.,* at 58, 105 S.Ct. 2479, and Alabama "conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity," *id.,* at 77–78, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment). There is no such evidence or concession here.

The Court also relies on our decision in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), to support its conclusion. In *Lee,* we concluded that the content of the speech at issue, a graduation prayer given by a rabbi, was "directed and controlled" by a school official. *Id.,* at 588, 112 S.Ct. 2649. In other words, at issue in *Lee* was *government* speech. Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be *private* speech. The "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," applies with particular force to the question of endorsement. *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion) (emphasis in original).

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria—like good public speaking skills or social popularity—and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy ****325*** would likely pass constitutional muster. See *Lee, supra,* at 630, n.

8, 112 S.Ct. 2649 (SOUTER, J., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would be harder to attribute an endorsement of religion to the State").

Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. See *ante,* at 2276–2277. This is undoubtedly a new requirement, as our Establishment Clause jurisprudence simply does not mandate "content neutrality." That concept is found in our First Amendment *speech* cases and is used as a guide for determining when we apply strict scrutiny. For example, we look to "content neutrality" in reviewing loudness restrictions imposed on speech in public forums, see *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), and regulations against picketing, see *Boos v. Barry,* 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). The Court seems to think that the fact that the policy is not content neutral somehow controls the Establishment Clause inquiry. See *ante,* at 2276–2277.

But even our speech jurisprudence would not require that all public school actions with respect to student speech be content neutral. See, *e.g., Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (allowing the imposition of sanctions against a student speaker who, in nominating a fellow student for elective office during an assembly, referred to his candidate in terms of an elaborate sexually explicit metaphor). ***2288** Schools do not violate the First Amendment every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" prayer and the policy's content limitations ***326** prohibit the student body president from giving a solemn, yet nonreligious, message like "commentary on United States foreign policy." See *ante,* at 2277.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. I would reverse the judgment of the Court of Appeals.

IV. Constitutional Anti-Discrimination Protections

Introduction

Brown v. Board of Education is likely the best-known US Supreme Court decision around the world. It is thus, appropriately, the first judicial decision included in this section. Issued in 1954 by the US Supreme Court, *Brown* remains the Court's only unanimous decision about racial discrimination in education. The immediate reaction to *Brown* was substantial—about 100 legislators across the American South signed the "Southern Manifesto" which challenged the validity of the Court's decision. Resistance in individual communities also was widespread, and often violent. About ten years after the monumental *Brown* decision, little school integration had, in fact, occurred.

Then, in 1964, the federal Civil Rights Act became law. It contained two important provisions about racial discrimination in education. The first authorized the US Attorney General (the chief lawyer for the federal government) to initiate school desegregation litigation on behalf of plaintiffs. Prior to the Civil Rights Act, individual parents had borne the burden of enforcing *Brown* by serving as the named plaintiffs in lawsuits; they were aided primarily by a small group of dedicated attorneys in the NAACP. Allowing the federal government to enforce *Brown*'s mandate on behalf of citizens was a monumental shift.

The second relevant provision of the Civil Rights Act authorized the US Department of Education to withhold funds from districts deemed to be violating the new federal statutory prohibition barring racial discrimination in education. Prior to 1965, federal funding for education had been minimal, but in 1965 the Elementary and Secondary Education Act became law, bringing with it a not insignificant amount of new federal money.

Over the years, school desegregation cases have reappeared in the US Supreme Court many times and, as a result, the jurisprudence about this issue is extensive. However, in many ways the decisions are a chronicle of a Court retreating from *Brown* and limiting the circumstances under which school districts can be found liable for unconstitutional discrimination and also limiting the remedy a court may impose even when liability exists. Because the cases are so many only the first and most recent U.S. Supreme Court decisions about school integration are included in these materials. The most recent decision, *Parents Involved v. Seattle*, was issued in 2007. Interestingly, in *Parents Involved*, the plaintiff was a white person who challenged a school district's race-conscious policies in student assignment which the school district had enacted with the goal of creating more diverse learning environments. The majority and dissenting opinions in *Parents Involved* play out two vastly different interpretations of *Brown*, with Justice Kennedy's concurrence providing the crucial fifth vote for the plurality (the majority).

Many secondary materials are available to those interested in further research about these issues; in addition to a series of first-person and scholarly essays chronicling the history of school desegregation in a book edited by Kristi Bowman, *Pursuing Racial and Ethnic Equality*, (2015), interested individuals are commended to scholarship by Derek Black, Erica Frankenburg, Jack Greenberg, Osamudia James, Michael Klarman, Goodwin Liu, Kenneth Mack, Martha

Minow, Rachel Moran, Charles Ogletree, Gary Orfield, Myron Orfield, Kimberly Jenkins Robinson, Tom Romero, James Ryan, Vanessa Siddle Walker, The Civil Rights Project at UCLA, and others.

In addition to creating a legal norm prohibiting racial discrimination, *Brown* and the 1964 Civil Rights Act have served as the framework for other civil rights movements, litigation, and statutes, including those focused on sex/ gender equality, sexual orientation, and disability. Most of the sex/ gender educational equality cases involving elementary and secondary schools have been based on claims under federal statutory law, Title IX of the Education Amendments of 1972. In 1979, the Supreme Court held in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) that Title IX contained a private right of action and thus could be enforced by individuals through the courts as well as by the federal government. Title IX is probably best known in the US for its provisions requiring sex/ gender equality in school sports opportunities and facilities. However, Title IX contains multiple provisions, and US Supreme Court decisions have established relatively robust sexual harassment protections for students under Title IX, especially through *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). Those interested in recent developments regarding all aspects of Title IX are encouraged to visit the Title IX blog at http://title-ix.blogspot.com.

Comparatively few sex/ gender education discrimination cases to reach the US Supreme Court have been based on Equal Protection Clause claims. Fortunately for our purposes, the US Supreme Court's most recent case about sex/ gender discrimination in schools explores the similarities and differences between Equal Protection Clause protections and Title IX protections. This decision, *Fitzgerald v. Barnstable*, 555 U.S. 246 (2009) is included here not only to provide a window into federal constitutional protections against sex/ gender discrimination, but also to illustrate the importance of federal statutory anti-discrimination provisions in creating educational equality. Finally, it is important to note that the US Department of Education has interpreted *Davis*, *Gebser*, and now Title IX to protect more than just "traditional" heterosexual sex/ gender discrimination:

> Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence. The fact that incidents of sexual violence may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy those instances of sexual violence.

Department of Education, *Questions and Answers on Title IX and Sexual Violence*, 5-6 (April 29, 2014).

Relatedly, as the US Supreme Court's 2015 decision in *Obergefell v. Hodges*, 576 U.S. ___ (2015) made clear, the constitution protects against discrimination based on sexual orientation, although the state action at issue receives something like intermediate scrutiny (similar to the standard of review for sex/ gender discrimination) rather than the most demanding standard of review which applies to racial and ethnic discrimination. The cases establishing these protections have not taken place in the school environment thus are not included here, but those interested in further research are recommended to read *Romer v. Evans* 517 U.S. 620 (1996), *Lawrence v. Texas* 539 U.S. 558 (2003), and *United States v. Windsor*, 570 U.S. ___ (2013).

Finally, all disability anti-discrimination law is statutory, not constitutional, and thus it is not included in these materials. Those interested in disability anti-discrimination provisions applicable to schools may want to research the Individuals with Disabilities in Education Act, originally enacted in 1975 and commonly known as "IDEA." Additionally, Section 504 of the Rehabilitation Act of 1973 also creates rights for students with disabilities; like Title VI and Title IX referred to above, it is enforced by the US Department of Education's Office of Civil Rights.

Brown v. Board of Education, 347 U.S. 483 (US Supreme Court 1954).

***486** Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

1. In the Kansas case, Brown v. Board of Education, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan.Gen.Stat.1949, § 72—1724. Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281, 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F.Supp. 797. The case is here on direct appeal under 28 U.S.C. § 1253, 28 U.S.C.A. § 1253. In the South Carolina case, Briggs v. Elliott, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C. Const. Art. XI, § 7; S.C. Code 1942, § 5377. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281, 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F.Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350, 72 S.Ct. 327, 96 L.Ed. 392. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F.Supp. 920. The case is again here on direct appeal under 28 U.S.C. § 1253, 28 U.S.C.A. § 1253. In the Virginia case, Davis v. County School Board, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const. § 140; Va. Code 1950, § 22—221. The three-judge District

Court, convened under 28 U.S.C. §§ 2281 and 2284, 28 U.S.C.A. §§ 2281, 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to 'proceed with all reasonable diligence and dispatch to remove' the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F.Supp. 337. The case is here on direct appeal under 28 U.S.C. § 1253, 28 U.S.C.A. § 1253.In the Delaware case, Gebhart v. Belton, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const. Art. X, § 2; Del. Rev. Code, 1935, § 2631, 14 Del.C. § 141. The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. Del. Ch., 87 A.2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, infra), but did not rest his decision on that ground. 87 A.2d at page 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A.2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891, 73 S.Ct. 213, 97 L.Ed. 689. The plaintiffs, who were successful below, did not submit a cross-petition.

*****688 *487*** In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, ****488*** they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was

heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

2. 344 U.S. 1, 73 S.Ct. 1, 97 L.Ed. 3, Id., 344 U.S. 141, 73 S.Ct. 124, 97 L.Ed. 152, Gebhart v. Belton, 344 U.S. 891, 73 S.Ct. 213, 97 L.Ed. 689.

3. 345 U.S. 972, 73 S.Ct. 1118, 97 L.Ed. 1388. The Attorney General of the United States participated both Terms as amicus curiae.

***489** Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it ****689** is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South, the movement toward free common schools, supported***490** by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

4. For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II: Cubberley, Public Education in the United States (1934 ed.), cc. II—XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, supra, at 269—275; Cubberley, supra, at 288—339, 408—431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the

same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, supra, at 408—423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. Id., at 427—428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112—132, 175—195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, supra, at 563—565.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of ***491** “separate but ****690** equal” did not make its appearance in this court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the ‘separate but equal’ doctrine in the field of public education. [7] In Cumming v. Board of Education of Richmond County, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262, and Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school ***492** level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208; Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247; Sweatt v. Painter, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114; McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter, supra, the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

5. In re Slaughterhouse Cases, 1873, 16 Wall. 36, 67—72, 21 L.Ed. 394; Strauder v. West Virginia, 1880, 100 U.S. 303, 307—308, 25 L.Ed. 664.'It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and

discriminations which are steps towards reducing them to the condition of a subject race.' See also State of Virginia v. Rives, 1879, 100 U.S. 313, 318, 25 L.Ed. 667; Ex parte Virginia, 1879, 100 U.S. 339, 344—345, 25 L.Ed. 676.

6. The doctrine apparently originated in Roberts v. City of Boston, 1850, 5 Cush. 198, 59 Mass. 198, 206, upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

7. See also Berea College v. Kentucky, 1908, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81.

8. In the Cumming case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the Gong Lum case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors *****691*** in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

9. In the Kansas case, the court below found substantial equality as to all such factors. 98 F.Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding 'promptly and in good faith to comply with the court's decree.' 103 F.Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already 'afoot and progressing,' 103 F.Supp. 337, 341; since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A.2d 137, 139.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout ****493*** the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments.

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

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, supra (339 U.S. 629, 70 S.Ct. 850), in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In McLaurin v. Oklahoma State Regents, supra (339 U.S. 637, 70 S.Ct. 853), the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '* * * his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' ***494** Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.' [10]

> 10. A similar finding was made in the Delaware case: 'I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.' 87 A.2d 862, 865.

****692** Whatever may have been the extent of psychological knowledge at the time of Plessy v.

Ferguson, this finding is amply supported by modern authority.[11] Any language***495** in Plessy v. Ferguson contrary to this finding is rejected.

11. K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44—48; Frazier, The Negro in the United States (1949), 674—681. And see generally Myrdal, An American Dilemma (1944).

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment. [12]

12. See Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, concerning the Due Process Clause of the Fifth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General ***496** of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

13. '4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment'(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or'(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?'5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),'(a) should this Court formulate detailed

decrees in these cases;'(b) if so, what specific issues should the decrees reach;'(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;'(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?'

14. See Rule 42, Revised Rules of this Court, effective July 1, 1954, 28 U.S.C.A.

It is so ordered.

****693*** Cases ordered restored to docket for further argument on question of appropriate decrees.

Parents Involved in Community Schools v. Seattle School District, 551 U.S. 701 (US Supreme Court 2007).

*****2740 *701*** *Syllabus* [*]

> * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent school districts voluntarily adopted student assignment plans that rely on race to determine which schools certain children may attend. The Seattle district, which has never operated legally segregated schools or been subject to court-ordered desegregation, classified children as white or nonwhite, and used *****2741*** the racial classifications as a "tiebreaker" to allocate slots in particular high schools. The Jefferson County, Ky., district was subject to a desegregation decree until 2000, when the District Court dissolved the decree after finding that the district had eliminated the vestiges of prior segregation to the greatest extent practicable. In 2001, the district adopted its plan classifying students as black or "other" in order to make certain elementary school assignments and to rule on transfer requests.

Petitioners, an organization of Seattle parents (Parents Involved) and the mother of a Jefferson County student (Joshua), whose children were or could be assigned under the foregoing plans, filed these suits contending, *inter alia,* that allocating children to different public schools based solely on their race violates the Fourteenth Amendment's equal protection guarantee. In the Seattle case, the District Court granted the school district summary judgment, finding, *inter alia,* that its plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. The Ninth Circuit affirmed. In the Jefferson County case, the District Court found that the school district had asserted a compelling interest in maintaining racially diverse schools, and that its plan was, in all relevant respects, narrowly tailored to serve that interest. The Sixth Circuit affirmed.

Held: The judgments are reversed, and the cases are remanded.

No. 05–908, 426 F.3d 1162; No. 05–915, 416 F.3d 513, reversed and remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, concluding:

****702*** 1. The Court has jurisdiction in these cases. Seattle argues that Parents Involved lacks standing because its current members' claimed injuries are not imminent and are too speculative in that, even if the district maintains its current plan and reinstitutes the racial tiebreaker, those members will only be affected if their children seek to enroll in a high school that is oversubscribed and integration positive. This argument is unavailing; the group's members have children in all levels of the district's schools, and the complaint sought declaratory and injunctive relief on behalf of members whose elementary and middle school

children may be denied admission to the high schools of their choice in the future. The fact that those children may not be denied such admission based on their race because of undersubscription or oversubscription that benefits them does not eliminate the injury claimed. The group also asserted an interest in not being forced to compete in a race-based system that might prejudice its members' children, an actionable form of injury under the Equal Protection Clause, see, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 211, 115 S.Ct. 2097, 132 L.Ed.2d 158. The fact that Seattle has ceased using the racial tiebreaker pending the outcome here is not dispositive, since the district vigorously defends its program's constitutionality, and nowhere suggests that it will not resume using race to assign students if it prevails. See *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610. Similarly, the fact that Joshua has been granted a transfer does not eliminate the Court's jurisdiction; Jefferson County's racial guidelines apply at all grade levels and he may again be subject to race-based assignment in middle school. Pp. 2750 – 2751.

2. The school districts have not carried their heavy burden of showing that the interest they seek to achieve justifies the extreme means they have chosen—*****2742*** discriminating among individual students based on race by relying upon racial classifications in making school assignments. Pp. 2751 – 2755, 2759 – 2761.

(a) Because “racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,” *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (STEVENS, J., dissenting), governmental distributions of burdens or benefits based on individual racial classifications are reviewed under strict scrutiny, *e.g., Johnson v. California,* 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949. Thus, the school districts must demonstrate that their use of such classifications is “narrowly tailored” to achieve a “compelling” government interest. *Adarand, supra,* at 227, 115 S.Ct. 2097.

Although remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test, see *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108, that interest is not involved here because the ****703*** Seattle schools were never segregated by law nor subject to court-ordered desegregation, and the desegregation decree to which the Jefferson County schools were previously subject has been dissolved. Moreover, these cases are not governed by *Grutter v. Bollinger,* 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L.Ed.2d 304, in which the Court held that, for strict scrutiny purposes, a government interest in student body diversity “in the context of higher education” is compelling. That interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity,” *id.,* at 337, 123 S.Ct. 2325, including, *e.g.,* having “overcome personal adversity and family hardship,” *id.,* at 338, 123 S.Ct. 2325. Quoting Justice Powell's articulation of diversity in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 314–315, 98 S.Ct. 2733, 57 L.Ed.2d 750, the *Grutter* Court noted that “ ‘it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,’ that can justify the use of race,” 539 U.S., at 324–325, 123 S.Ct. 2325, but “ ‘a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element,’ ” *id.,* at 325, 123 S.Ct. 2325. In the present cases, by contrast, race is not considered as part of a

broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," *id.,* at 330, 123 S.Ct. 2325; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter* ; it is *the* factor. See *Gratz v. Bollinger,* 539 U.S. 244, 275, 123 S.Ct. 2411, 156 L.Ed.2d 257. Even as to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. The *Grutter* Court expressly limited its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to the sort of classifications at issue here. Pp. 2751 – 2755.

(b) Despite the districts' assertion that they employed individual racial classifications in a way necessary to achieve their stated ends, the minimal effect these classifications have on student assignments suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Similarly, Jefferson *****2743*** County admits that its use of racial classifications has had a minimal effect, and claims only that its guidelines provide a firm definition of the goal of racially integrated schools, thereby providing administrators with authority to collaborate with principals and staff to maintain schools within the desired range. Classifying and assigning schoolchildren according to a binary conception of ****704*** race is an extreme approach in light of this Court's precedents and the Nation's history of using race in public schools, and requires more than such an amorphous end to justify it. In *Grutter,* in contrast, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school there at issue. See 539 U.S., at 320, 123 S.Ct. 2325. While the Court does not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using such classifications. The districts have also failed to show they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," *id.,* at 339, 123 S.Ct. 2325, and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Pp. 2759 – 2761.

THE CHIEF JUSTICE, joined by Justice SCALIA, Justice THOMAS, and Justice ALITO, concluded for additional reasons in Parts III–B and IV that the plans at issue are unconstitutional under this Court's precedents. Pp. 2754 – 2759, 2761 – 2768.

1. The Court need not resolve the parties' dispute over whether racial diversity in schools has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits because it is clear that the racial classifications at issue are not narrowly tailored to the asserted goal. In design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate. They are tied to each district's

specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. Whatever those demographics happen to be drives the required "diversity" number in each district. The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective districts, or rather the districts' white/nonwhite or black/"other" balance, since that is the only diversity addressed by the plans. In *Grutter,* the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body, 539 U.S., at 316, 335–336, 123 S.Ct. 2325, and the Court concluded that the law school did not count back from its applicant pool to arrive at that number, *id.,* at 335–336, 123 S.Ct. 2325. Here, in contrast, the schools worked backward to achieve a ***705** particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits. This is a fatal flaw under the Court's existing precedent. See, *e.g., Freeman,* 503 U.S., at 494, 112 S.Ct. 1430. Accepting racial balancing as a compelling state interest would justify imposing racial proportionality throughout American society, contrary to the Court's repeated admonitions****2744** that this is unconstitutional. While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition suggesting that their interest differs from racial balancing. Pp. 2754 – 2759.

2. If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. Government action dividing people by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Richmond v. J.A. Croson, Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno,* 509 U.S. 630, 657, 113 S.Ct. 2816, 125 L.Ed.2d 511, and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict," *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 603, 110 S.Ct. 2997, 111 L.Ed.2d 445 (O'Connor, J., dissenting). When it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, the Court held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because the classification and separation themselves denoted inferiority. *Id.,* at 493–494, 74 S.Ct. 686. It was not the inequality of the facilities but the fact of legally separating children based on race on which the Court relied to find a constitutional violation in that case. *Id.,* at 494, 74 S.Ct. 686. The districts here invoke the ultimate goal of those who filed *Brown* and subsequent cases to support their argument, but the argument of the plaintiff in *Brown* was that the Equal Protection Clause "prevents states from according differential treatment to American children on the basis of their color or race," and that view prevailed—this Court ruled in its remedial opinion that *Brown* required school districts "to achieve a system of determining admission to the public schools *on a nonracial basis*." *Brown v. Board of Education,* 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083 (emphasis added). Pp. 2761 – 2768.

Justice KENNEDY agreed that the Court has jurisdiction to decide these cases and that respondents' student assignment plans are not narrowly tailored to achieve the compelling goal of diversity properly defined, but concluded that some parts of the plurality opinion imply an ***706** unyielding insistence that race cannot be a factor in instances when it may be taken into account. Pp. 2788 – 2797.

(a) As part of its burden of proving that racial classifications are narrowly tailored to further compelling interests, the government must establish, in detail, how decisions based on an individual student's race are made in a challenged program. The Jefferson County Board of Education fails to meet this threshold mandate when it concedes it denied Joshua's requested kindergarten transfer on the basis of his race under its guidelines, yet also maintains that the guidelines do not apply to kindergartners. This discrepancy is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. As becomes clearer when the district's plan is further considered, Jefferson County has explained how and when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny. In its briefing it fails to make clear—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in ****2745** fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and ad hoc manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the government. In the Seattle case, the school district has gone further in describing the methods and criteria used to determine assignment decisions based on individual racial classifications, but it has nevertheless failed to explain why, in a district composed of a diversity of races, with only a minority of the students classified as "white," it has employed the crude racial categories of "white" and "non-white" as the basis for its assignment decisions. Far from being narrowly tailored, this system threatens to defeat its own ends, and the district has provided no convincing explanation for its design. Pp. 2788 – 2791.

(b) The plurality opinion is too dismissive of government's legitimate interest in ensuring that all people have equal opportunity regardless of their race. In administering public schools, it is permissible to consider the schools' racial makeup and adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. Cf. *Grutter v. Bollinger, supra*. School authorities concerned that their student bodies' racial compositions interfere with offering an equal educational opportunity to all are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion based solely on a systematic, individual typing by race. Such measures may include strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood***707** demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

Each respondent has failed to provide the necessary support for the proposition that there is no other way than individual racial classifications to avoid racial isolation in their school districts.

Cf. *Croson, supra*, at 501, 109 S.Ct. 706, 102 L.Ed.2d 854. In these cases, the fact that the number of students whose assignment depends on express racial classifications is small suggests that the schools could have achieved their stated ends through different means, including the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter,* though the criteria relevant to student placement would differ based on the students' age, the parents' needs, and the schools' role. Pp. 2791 – 2793.

Chief Justice ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, and an opinion with respect to Parts III–B and IV, in which Justice SCALIA, Justice THOMAS, and Justice ALITO join.

***709** The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine ***710** which public schools certain children may attend. The Seattle school district classifies children as white or nonwhite; the Jefferson County school district as black or "other." In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these ***711** plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection. The Courts of Appeals below upheld the plans. We granted certiorari, and now reverse.

I

Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments. Although we examine the plans under the same legal framework, the specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.

A

Seattle School District No. 1 operates 10 regular public high schools. In 1998, it adopted the plan at issue in this case for assigning students to these schools. App. in No. 05–908, pp. 90a–92a.[1] The plan ****2747** allows incoming ninth graders to choose from among any of the district's high schools, ranking however many schools they wish in order of preference.

1. The plan was in effect from 1999–2002, for three school years. This litigation was commenced in July 2000, and the record in the District Court was closed before assignments for the 2001–2002 school year were made. See Brief for Respondents in No. 05–908, p. 9, n. 9. We rely, as did the lower courts, largely on data from the 2000–

2001 school year in evaluating the plan. See 426 F.3d 1162, 1169–1171 (C.A.9 2005) (en banc) (*Parents Involved VII*).

Some schools are more popular than others. If too many students list the same school as their first choice, the district employs a series of "tiebreakers" to determine who will fill the open slots at the oversubscribed school. The first tiebreaker selects for admission students who have a sibling ***712** currently enrolled in the chosen school. The next tiebreaker depends upon the racial composition of the particular school and the race of the individual student. In the district's public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as nonwhite. *Id.,* at 38a, 103a.[2] If an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls "integration positive," and the district employs a tiebreaker that selects for assignment students whose race "will serve to bring the school into balance." *Id.,* at 38a. See *Parents Involved VII,* 426 F.3d 1162, 1169–1170 (C.A.9 2005) (en banc).[3] If it is still necessary to select students for the school after using the racial tiebreaker, the next tiebreaker is the geographic proximity of the school to the student's residence. App. in No. 05–908, at 38a.

2. The racial breakdown of this nonwhite group is approximately 23.8 percent Asian–American, 23.1 percent African–American, 10.3 percent Latino, and 2.8 percent Native–American. See 377 F.3d 949, 1005–1006 (C.A.9 2004) (*Parents Involved VI*) (Graber, J., dissenting).

3. For the 2001–2002 school year, the deviation permitted from the desired racial composition was increased from 10 to 15 percent. App. in No. 05–908, p. 38a. The bulk of the data in the record was collected using the 10 percent band, see n. 1, *supra*.

Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part. *Parents Involved VII, supra,* at 1166. Four of Seattle's high schools are located in the north—Ballard, Nathan Hale, Ingraham, and Roosevelt—and five in the south—Rainier Beach, Cleveland, West Seattle,***713** Chief Sealth, and Franklin. One school—Garfield—is more or less in the center of Seattle. App. in No. 05–908, at 38a–39a, 45a.

For the 2000–2001 school year, five of these schools were oversubscribed—Ballard, Nathan Hale, Roosevelt, Garfield, and Franklin—so much so that 82 percent of incoming ninth graders ranked one of these schools as their first choice. *Id.,* at 38a. Three of the oversubscribed schools were "integration positive" because the school's white enrollment the previous school year was greater than 51 percent—Ballard, Nathan Hale, and Roosevelt. Thus, more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and

proximity been the next tiebreaker. *Id.,* at 39a–40a. Franklin was *****2748*** "integration positive" because its nonwhite enrollment the previous school year was greater than 69 percent; 89 more white students were assigned to Franklin by operation of the racial tiebreaker in the 2000–2001 school year than otherwise would have been. *Ibid.* Garfield was the only oversubscribed school whose composition during the 1999–2000 school year was within the racial guidelines, although in previous years Garfield's enrollment had been predominantly nonwhite, and the racial tiebreaker had been used to give preference to white students. *Id.,* at 39a.

Petitioner Parents Involved in Community Schools (Parents Involved) is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race. The concerns of Parents Involved are illustrated by Jill Kurfirst, who sought to enroll her ninth-grade son, Andy Meeks, in Ballard High School's special Biotechnology Career Academy. Andy suffered from attention deficit hyperactivity disorder and dyslexia, but had made good progress with hands-on instruction, and his mother and middle school teachers thought that the smaller biotechnology program ****714*** held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment to Ballard High School. *Id.,* at 143a–146a, 152a–160a. Parents Involved commenced this suit in the Western District of Washington, alleging that Seattle's use of race in assignments violated the Equal Protection Clause of the Fourteenth Amendment,[4] Title VI of the Civil Rights Act of 1964,[5] and the Washington Civil Rights Act.[6] *Id.,* at 28a–35a.

4. "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1.

5. "No person in the United States shall, on the ground of race ... be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 78 Stat. 252, 42 U.S.C. § 2000d.

6. "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Wash. Rev. Code § 49.60.400(1) (2006).

The District Court granted summary judgment to the school district, finding that state law did not bar the district's use of the racial tiebreaker and that the plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. 137 F.Supp.2d 1224, 1240 (W.D.Wash.2001) (*Parents Involved I*). The Ninth Circuit initially reversed based on its interpretation of the Washington Civil Rights Act, 285 F.3d 1236, 1253 (2002) (*Parents Involved II*), and enjoined the district's use of the integration tiebreaker, *id.,* at 1257. Upon realizing that the litigation would not be resolved in time for assignment decisions for the 2002–2003 school year, the Ninth Circuit withdrew its opinion, 294 F.3d 1084 (2002) (*Parents Involved III*), vacated the injunction, and, pursuant to Wash. Rev. Code §

2.60.020 (2006), certified the state-law question to the Washington Supreme Court, 294 F.3d 1085, 1087 (2002) (*Parents Involved IV*).

***715** The Washington Supreme Court determined that the State Civil Rights Act bars only preferential treatment programs "where race or gender is used by government to select a less qualified applicant over a more qualified applicant," and not "[p]rograms which are racially neutral, such as the [district's] open choice plan." ****2749** *Parents Involved in Community Schools v. Seattle School Dist., No. 1,* 149 Wash.2d 660, 689–690, 663, 72 P.3d 151, 166, 153 (2003) (en banc) (*Parents Involved V*). The state court returned the case to the Ninth Circuit for further proceedings. *Id.,* at 690, 72 P.3d, at 167.

A panel of the Ninth Circuit then again reversed the District Court, this time ruling on the federal constitutional question. *Parents Involved VI,* 377 F.3d 949 (2004). The panel determined that while achieving racial diversity and avoiding racial isolation are compelling government interests, *id.,* at 964, Seattle's use of the racial tiebreaker was not narrowly tailored to achieve these interests, *id.,* at 980. The Ninth Circuit granted rehearing en banc, 395 F.3d 1168 (2005), and overruled the panel decision, affirming the District Court's determination that Seattle's plan was narrowly tailored to serve a compelling government interest, *Parents Involved VII,* 426 F.3d, at 1192–1193. We granted certiorari. 547 U.S. 1177, 126 S.Ct. 2351, 165 L.Ed.2d 277 (2006).

B

Jefferson County Public Schools operates the public school system in metropolitan Louisville, Kentucky. In 1973 a federal court found that Jefferson County had maintained a segregated school system, *Newburg Area Council, Inc. v. Board of Ed. of Jefferson Cty.,* 489 F.2d 925, 932 (CA6), vacated and remanded, 418 U.S. 918, 94 S.Ct. 3208, 3209, 41 L.Ed.2d 1160, reinstated with modifications, 510 F.2d 1358, 1359 (C.A.6 1974), and in 1975 the District Court entered a desegregation decree. See *Hampton v. Jefferson Cty. Bd. of Ed.,* 72 F.Supp.2d 753, 762–764 (W.D.Ky.1999). Jefferson County operated under this decree until 2000, when the District Court dissolved the decree after ***716** finding that the district had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its prior policy of segregation. *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 360 (2000). See *Board of Ed. of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 249–250, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991); *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 435–436, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue in this case. App. in No. 05–915, p. 77. Approximately 34 percent of the district's 97,000 students are black; most of the remaining 66 percent are white. *McFarland v. Jefferson Cty. Public Schools,* 330 F.Supp.2d 834, 839–840, and n. 6 (W.D.Ky.2004) (*McFarland I*). The plan requires all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent. App. in No. 05–915, at 81; *McFarland I, supra,* at 842.

At the elementary school level, based on his or her address, each student is designated a "resides" school to which students within a specific geographic area are assigned; elementary resides schools are "grouped into clusters in order to facilitate integration." App. in No. 05–915, at 82. The district assigns students to nonmagnet schools in one of two ways: Parents of kindergartners, first graders, and students new to the district may submit an application indicating a first and second choice among the schools within their cluster; students who do not submit such an application are assigned within the cluster by the district. "Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District's current student assignment plan." *Id.,* at 38. If a school has reached the "extremes of the *****2750*** racial guidelines," a student whose race would contribute to the school's racial imbalance will not be assigned there. *Id.,* at 38–39, 82. After assignment, students at all grade levels ****717*** are permitted to apply to transfer between nonmagnet schools in the district. Transfers may be requested for any number of reasons, and may be denied because of lack of available space or on the basis of the racial guidelines. *Id.,* at 43.[7]

> 7. Middle and high school students are designated a single resides school and assigned to that school unless it is at the extremes of the racial guidelines. Students may also apply to a magnet school or program, or, at the high school level, take advantage of an open enrollment plan that allows ninth-grade students to apply for admission to any nonmagnet high school. App. in No. 05–915, pp. 39–41, 82–83.

When petitioner Crystal Meredith moved into the school district in August 2002, she sought to enroll her son, Joshua McDonald, in kindergarten for the 2002–2003 school year. His resides school was only a mile from his new home, but it had no available space—assignments had been made in May, and the class was full. Jefferson County assigned Joshua to another elementary school in his cluster, Young Elementary. This school was 10 miles from home, and Meredith sought to transfer Joshua to a school in a different cluster, Bloom Elementary, which—like his resides school—was only a mile from home. See Tr. in *McFarland I*, pp. 1–49 through 1–54 (Dec. 8, 2003). Space was available at Bloom, and intercluster transfers are allowed, but Joshua's transfer was nonetheless denied because, in the words of Jefferson County, "[t]he transfer would have an adverse effect on desegregation compliance" of Young. App. in No. 05–915, at 97.[8]

> 8. It is not clear why the racial guidelines were even applied to Joshua's transfer application—the guidelines supposedly do not apply at the kindergarten level. *Id.,* at 43. Neither party disputes, however, that Joshua's transfer application was denied under the racial guidelines, and Meredith's objection is not that the guidelines were misapplied but rather that race was used at all.

Meredith brought suit in the Western District of Kentucky, alleging violations of the Equal Protection Clause of the Fourteenth Amendment. The District Court found that Jefferson County had asserted a compelling interest in maintaining ****718*** racially diverse schools, and that the assignment plan was (in all relevant respects) narrowly tailored to serve that compelling interest. *McFarland I, supra,* at 837.[9] The Sixth Circuit affirmed in a *per curiam* opinion relying

upon the reasoning of the District Court, concluding that a written opinion "would serve no useful purpose." *McFarland v. Jefferson Cty. Public Schools,* 416 F.3d 513, 514 (2005) (*McFarland II*). We granted certiorari. 547 U.S. 1178, 126 S.Ct. 2351, 165 L.Ed.2d 277 (2006).

9. Meredith joined a pending lawsuit filed by several other plaintiffs. See *id.,* at 7–11. The other plaintiffs all challenged assignments to certain specialized schools, and the District Court found these assignments, which are no longer at issue in this case, unconstitutional. *McFarland I,* 330 F.Supp.2d 834, 837, 864 (W.D.Ky.2004).

II

As a threshold matter, we must assure ourselves of our jurisdiction. Seattle argues that Parents Involved lacks standing because none of its current members can claim an imminent injury. Even if the district maintains the current plan and reinstitutes the racial tiebreaker, Seattle argues, Parents Involved members will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive—too speculative a *****2751*** harm to maintain standing. Brief for Respondents in No. 05–908, pp. 16–17.

This argument is unavailing. The group's members have children in the district's elementary, middle, and high schools, App. in No. 05–908, at 299a–301a; Affidavit of Kathleen Brose Pursuant to this Court's Rule 32.3 (Lodging of Petitioner Parents Involved), and the complaint sought declaratory and injunctive relief on behalf of Parents Involved members whose elementary and middle school children may be "denied admission to the high schools of their choice when they apply for those schools in the future," App. in No. 05–908, at 30a. The fact that it is possible that children of group members will not be denied admission to a school ****719*** based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed. Moreover, Parents Involved also asserted an interest in not being "forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions." *Ibid.* As we have held, one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 211, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993), an injury that the members of Parents Involved can validly claim on behalf of their children.

In challenging standing, Seattle also notes that it has ceased using the racial tiebreaker pending the outcome of this litigation. Brief for Respondents in No. 05–908, at 16–17. But the district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to assign students. Voluntary cessation does not moot a case or controversy unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145

L.Ed.2d 610 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.,* 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968); internal quotation marks omitted), a heavy burden that Seattle has clearly not met.

Jefferson County does not challenge our jurisdiction, Tr. of Oral Arg. in No. 05–915, p. 48, but we are nonetheless obliged to ensure that it exists, *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). Although apparently Joshua has now been granted a transfer to Bloom, the school to which transfer was denied under the racial guidelines, Tr. of Oral Arg. in No. 05–915, at 45, the racial guidelines apply at all grade ***720** levels. Upon Joshua's enrollment in middle school, he may again be subject to assignment based on his race. In addition, Meredith sought damages in her complaint, which is sufficient to preserve our ability to consider the question. *Los Angeles v. Lyons,* 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

III

A

It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. *Johnson v. California,* 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); ***2752** *Grutter v. Bollinger,* 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Adarand, supra,* at 224, 115 S.Ct. 2097. As the Court recently reaffirmed, " 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.' " *Gratz v. Bollinger,* 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting); brackets omitted). In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is "narrowly tailored" to achieve a "compelling" government interest. *Adarand, supra,* at 227, 115 S.Ct. 2097.

Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. See *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. In 2000, the District Court that entered that decree dissolved it, finding that Jefferson ***721** County had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved "unitary" status. *Hampton,* 102 F.Supp.2d, at 360. Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students. See Tr. of Oral Arg. in No. 05–915, at 38.

Nor could it. We have emphasized that the harm being remedied by mandatory desegregation

plans is the harm that is traceable to segregation, and that "the Constitution is not violated by racial imbalance in the schools, without more." *Milliken v. Bradley,* 433 U.S. 267, 280, n. 14, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). See also *Freeman, supra,* at 495–496, 112 S.Ct. 1430; *Dowell,* 498 U.S., at 248, 111 S.Ct. 630; *Milliken v. Bradley,* 418 U.S. 717, 746, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.[10]

> 10. The districts point to dicta in a prior opinion in which the Court suggested that, while not constitutionally mandated, it would be constitutionally permissible for a school district to seek racially balanced schools as a matter of "educational policy." See *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). The districts also quote with approval an in-chambers opinion in which then-Justice Rehnquist made a suggestion to the same effect. See *Bustop, Inc. v. Los Angeles Bd. of Ed.,* 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978). The citations do not carry the significance the districts would ascribe to them. *Swann,* evaluating a school district engaged in court-ordered desegregation, had no occasion to consider whether a district's voluntary adoption of race-based assignments in the absence of a finding of prior *de jure* segregation was constitutionally permissible, an issue that was again expressly reserved in *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 472, n. 15, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). *Bustop,* addressing in the context of an emergency injunction application a busing plan imposed by the Superior Court of Los Angeles County, is similarly unavailing. Then–Justice Rehnquist, in denying emergency relief, stressed that "equitable consideration[s]" counseled against preliminary relief. 439 U.S., at 1383, 99 S.Ct. 40. The propriety of preliminary relief and resolution of the merits are of course "significantly different" issues. *University of Texas v. Camenisch,* 451 U.S. 390, 393, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

2753 *722 The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter,* 539 U.S., at 328, 123 S.Ct. 2325. The specific interest found compelling in *Grutter* was student body diversity "in the context of higher education." *Ibid.* The diversity interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity." *Id.,* at 337, 123 S.Ct. 2325. We described the various types of diversity that the law school sought:

> "[The law school's] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields." *Id.,* at 338, 123 S.Ct. 2325 (brackets and internal quotation marks omitted).

The Court quoted the articulation of diversity from Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), noting that "it is not an

interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race." *Grutter, supra,* at 324–325, 123 S.Ct. 2325 (citing and quoting *Bakke, supra,* at 314–315, 98 S.Ct. 2733 (opinion of Powell, J.); brackets and internal quotation marks omitted). Instead, what was upheld in *Grutter* was consideration of "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." 539 U.S., at 325, 123 S.Ct. 2325 (quoting *Bakke, supra,* at 315, 98 S.Ct. 2733 (opinion of Powell, J.); internal quotation marks omitted).

The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld ***723** in *Grutter* was only as part of a "highly individualized, holistic review," 539 U.S., at 337, 123 S.Ct. 2325. As the Court explained, "[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount." *Ibid.* The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional." *Id.,* at 330, 123 S.Ct. 2325.

In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," *ibid.*; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter* ; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz,* 539 U.S., at 275, 123 S.Ct. 2411, the plans here "do not ****2754** provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way, *id.,* at 276, 280, 123 S.Ct. 2411 (O'Connor, J., concurring).

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County.[11] But see *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 610, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting) ("We are a Nation not of black and white alone, but one teeming with divergent ***724** communities knitted together by various traditions and carried forth, above all, by individuals"). The Seattle "Board Statement Reaffirming Diversity Rationale" speaks of the "inherent educational value" in "[p]roviding students the opportunity to attend schools with diverse student enrollment," App. in No. 05–908, at 128a, 129a. But under the Seattle plan, a school with 50 percent Asian–American students and 50 percent white students but no African–American, Native–American, or Latino students would qualify as balanced, while a school with 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is " 'broadly diverse,' " *Grutter, supra,* at 329, 123 S.Ct. 2325.

11. The way Seattle classifies its students bears this out. Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent identifies more than one race on the form, "[t]he application will not be accepted and, if necessary, the enrollment service person taking the application will indicate one box." App. in No. 05–908, at 303a.

Prior to *Grutter,* the courts of appeals rejected as unconstitutional attempts to implement race-based assignment plans—such as the plans at issue here—in primary and secondary schools. See, *e.g., Eisenberg v. Montgomery Cty. Public Schools,* 197 F.3d 123, 133 (C.A.4 1999); *Tuttle v. Arlington Cty. School Bd.,* 195 F.3d 698, 701 (C.A.4 1999) (*per curiam*); *Wessmann v. Gittens,* 160 F.3d 790, 809 (C.A.1 1998). See also *Ho v. San Francisco Unified School Dist.,* 147 F.3d 854, 865 (C.A.9 1998). After *Grutter,* however, the two Courts of Appeals in these cases, and one other, found that race-based assignments were permissible at the elementary and secondary level, largely in reliance on that case. See *Parents Involved VII,* 426 F.3d, at 1166; *McFarland II,* 416 F.3d, at 514; *Comfort v. Lynn School Comm.,* 418 F.3d 1, 13 (C.A.1 2005) (en banc).

In upholding the admissions plan in *Grutter,* though, this Court relied upon considerations unique to institutions of higher education, noting that in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." 539 U.S., at 329, 123 S.Ct. 2325. See also ***725** *Bakke,* 438 U.S., at 312, 313, 98 S.Ct. 2733 (opinion of Powell, J.). The Court explained that "[c]ontext matters" in applying strict scrutiny, and repeatedly noted that it was addressing the use of race "in the context of higher education." *Grutter, supra,* at 327, 328, 334, 123 S.Ct. 2325. The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

****2755*** B

Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests, distinct from the interest upheld in *Grutter,* to justify their race-based assignments. In briefing and argument before this Court, Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Brief for Respondents in No. 05–908, at 19. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students "in a racially integrated environment." App. in No. 05–915, at 22.[12] Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek ***726** is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.

12. Jefferson County also argues that it would be incongruous to hold that what was constitutionally required of it one day—race-based assignments pursuant to the

desegregation decree—can be constitutionally prohibited the next. But what was constitutionally required of the district prior to 2000 was the elimination of the vestiges of prior segregation—not racial proportionality in its own right. See *Freeman v. Pitts,* 503 U.S. 467, 494–496, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). Once those vestiges were eliminated, Jefferson County was on the same footing as any other school district, and its use of race must be justified on other grounds.

The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. In Seattle, the district seeks white enrollment of between 31 and 51 percent (within 10 percent of "the district white average" of 41 percent), and nonwhite enrollment of between 49 and 69 percent (within 10 percent of "the district minority average" of 59 percent). App. in No. 05–908, at 103a. In Jefferson County, by contrast, the district seeks black enrollment of no less than 15 or more than 50 percent, a range designed to be "equally above and below Black student enrollment systemwide," *McFarland I,* 330 F.Supp.2d, at 842, based on the objective of achieving at "all schools ... an African–American enrollment equivalent to the average district-wide African–American enrollment" of 34 percent, App. in No. 05–915, at 81. In Seattle, then, the benefits of racial diversity require enrollment of at least 31 percent white students; in Jefferson County, at least 50 percent. There must be at least 15 percent nonwhite students under Jefferson County's plan; in Seattle, more than three times that figure. This comparison makes clear that the racial demographics in each district—whatever they happen to be— ***727** drive the required "diversity" numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored, in the words of Seattle's Manager *****2756** of Enrollment Planning, Technical Support, and Demographics, to "the goal established by the school board of attaining a level of diversity within the schools that approximates the district's overall demographics." App. in No. 05–908, at 42a.

The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/"other" balance of the districts, since that is the only diversity addressed by the plans. Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district. See Brief for Respondents in No. 05–908, at 36 ("For Seattle, 'racial balance' is clearly not an end in itself but rather a measure of the extent to which the educational goals the plan was designed to foster are likely to be achieved"). When asked for "a range of percentage that would be

diverse," however, Seattle's expert said it was important to have "sufficient numbers so as to avoid students feeling any kind of specter of exceptionality." App. in No. 05–908, at 276a. The district did not attempt to defend the proposition that anything outside its range posed the "specter of exceptionality." Nor did it demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian–American, which would qualify as diverse under Seattle's plan, than at a school that is 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated.

Similarly, Jefferson County's expert referred to the importance of having "at least 20 percent" minority group representation ***728** for the group "to be visible enough to make a difference," and noted that "small isolated minority groups in a school are not likely to have a strong effect on the overall school." App. in No. 05–915, at 159, 147. The Jefferson County plan, however, is based on a goal of replicating at each school "an African–American enrollment equivalent to the average district-wide African–American enrollment." *Id.,* at 81. Joshua McDonald's requested transfer was denied because his race was listed as "other" rather than black, and allowing the transfer would have had an adverse effect on the racial guideline compliance of Young Elementary, the school he sought to leave. *Id.,* at 21. At the time, however, Young Elementary was 46.8 percent black. *Id.,* at 73. The transfer might have had an adverse effect on the effort to approach districtwide racial proportionality at Young, but it had nothing to do with preventing either the black or "other" group from becoming "small" or "isolated" at Young.

In fact, in each case the extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts. For example, at Franklin High School in Seattle, the racial tiebreaker was applied because nonwhite enrollment exceeded 69 percent, and resulted in an incoming ninth-grade class in 2000–2001 that was 30.3 percent Asian–American, 21.9 percent African–American, 6.8 percent Latino, 0.5 percent Native–American, and 40.5 percent Caucasian. Without the racial tiebreaker, the class would have been 39.6 percent Asian–American, 30.2 percent African–American, 8.3 percent Latino, 1.1 percent Native–American, and 20.8 percent Caucasian. See App. in No. 05–908, at 308a. When the actual racial breakdown is considered, enrolling students without regard to their ****2757** race yields a substantially diverse student body under any definition of diversity.[13]

> 13. Data for the Seattle schools in the several years since this litigation was commenced further demonstrate the minimal role that the racial tiebreaker in fact played. At Ballard, in 2005–2006—when no class at the school was subject to the racial tiebreaker—the student body was 14.2 percent Asian–American, 9 percent African–American, 11.7 percent Latino, 62.3 percent Caucasian, and 2.8 percent Native–American. Reply Brief for Petitioner in No. 05–908, p. 7. In 2000–2001, when the racial tiebreaker was last used, Ballard's total enrollment was 17.5 percent Asian–American, 10.8 percent African–American, 10.7 percent Latino, 56.4 percent Caucasian, and 4.6 percent Native–American. App. in No. 05–908, at 283a. Franklin in 2005–2006 was 48.9 percent Asian–American, 33.5 percent African–American, 6.6 percent Latino, 10.2

percent Caucasian, and 0.8 percent Native–American. Reply Brief for Petitioner in No. 05–908, at 7. With the racial tiebreaker in 2000–2001, total enrollment was 36.8 percent Asian–American, 32.2 percent African–American, 5.2 percent Latino, 25.1 percent Caucasian, and 0.7 percent Native–American. App. in No. 05–908, at 284a. Nathan Hale's 2005–2006 enrollment was 17.3 percent Asian–American, 10.7 percent African–American, 8 percent Latino, 61.5 percent Caucasian, and 2.5 percent Native–American. Reply Brief for Petitioner in No. 05–908, at 7. In 2000–2001, with the racial tiebreaker, it was 17.9 percent Asian–American, 13.3 percent African–American, 7 percent Latino, 58.4 percent Caucasian, and 3.4 percent Native–American. App. in No. 05–908, at 286a.

***729** In *Grutter,* the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body. 539 U.S., at 316, 335–336, 123 S.Ct. 2325. Although the matter was the subject of disagreement on the Court, see *id.,* at 346–347, 123 S.Ct. 2325 (SCALIA, J., concurring in part and dissenting in part); *id.,* at 382–383, 123 S.Ct. 2325 (Rehnquist, C. J., dissenting); *id.,* at 388–392, 123 S.Ct. 2325 (KENNEDY, J., dissenting), the majority concluded that the law school did not count back from its applicant pool to arrive at the "meaningful number" it regarded as necessary to diversify its student body. *Id.,* at 335–336, 123 S.Ct. 2325. Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts.

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that "[r]acial balance is not ***730** to be achieved for its own sake." *Freeman,* 503 U.S., at 494, 112 S.Ct. 1430. See also *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 507, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Bakke,* 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected ... as facially invalid"). *Grutter* itself reiterated that "outright racial balancing" is "patently unconstitutional." 539 U.S., at 330, 123 S.Ct. 2325.

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson,* 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (quoting *Metro Broadcasting,* 497 U.S., at 602, 110 S.Ct. 2997 (O'Connor, J., dissenting); internal quotation ****2758** marks omitted).[14] Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Croson, supra,* at 495, 109 S.Ct. 706 (plurality opinion of O'Connor, J.) (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 320, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting), in turn quoting ***731** *Fullilove,* 448

U.S., at 547, 100 S.Ct. 2758 (STEVENS, J., dissenting); brackets and citation omitted). An interest "linked to nothing other than proportional representation of various races ... would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture." *Metro Broadcasting, supra,* at 614, 110 S.Ct. 2997 (O'Connor, J., dissenting).

> 14. In contrast, Seattle's Web site formerly described "emphasizing individualism as opposed to a more collective ideology" as a form of "cultural racism," and currently states that the district has no intention " 'to hold onto unsuccessful concepts such as [a] ... colorblind mentality.' " Harrell, School Web Site Removed: Examples of Racism Sparked Controversy, Seattle Post–Intelligencer, June 2, 2006, pp. B1, B5. Compare *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law").

The validity of our concern that racial balancing has "no logical stopping point," *Croson, supra,* at 498, 109 S.Ct. 706 (quoting *Wygant, supra,* at 275, 106 S.Ct. 1842 (plurality opinion); internal quotation marks omitted); see also *Grutter, supra,* at 343, 123 S.Ct. 2325, is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics. As the districts' demographics shift, so too will their definition of racial diversity. See App. in No. 05–908, at 103a (describing application of racial tiebreaker based on " *current* white percentage" of 41 percent and " *current* minority percentage" of 59 percent (emphasis added)).

The Ninth Circuit below stated that it "share[d] in the hope" expressed in *Grutter* that in 25 years racial preferences would no longer be necessary to further the interest identified in that case. *Parents Involved VII,* 426 F.3d, at 1192. But in Seattle the plans are defended as necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action. See, *e.g., Shaw v. Hunt,* 517 U.S. 899, 909–910, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest"); *Croson, supra,* at 498–499, 109 S.Ct. 706; *Wygant,* 476 U.S., at 276, 106 S.Ct. 1842 (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"); *id.,* at 288, 106 S.Ct. 1842 (O'Connor, J., concurring in part and concurring in judgment) ("[A] governmental agency's interest in remedying 'societal' discrimination,***732** that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster").

The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to ****2759** describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance. See, *e.g.,* App. in No. 05–908, at 257a ("Q. What's your

understanding of when a school suffers from racial isolation?" "A. I don't have a definition for that"); *id.,* at 228a–229a ("I don't think we've ever sat down and said, 'Define racially concentrated school exactly on point in quantitative terms.' I don't think we've ever had that conversation"); Tr. in *McFarland I,* at 1–90 (Dec. 8, 2003) ("Q." "How does the Jefferson County School Board define diversity ... ?" "A. Well, we want to have the schools that make up the percentage of students of the population").

Jefferson County phrases its interest as "racial integration," but integration certainly does not require the sort of racial proportionality reflected in its plan. Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required, see *Milliken,* 433 U.S., at 280, n. 14, 97 S.Ct. 2749 ("[A desegregation] order contemplating the substantive constitutional right [to a] particular degree of racial balance or mixing is ... infirm as a matter of law" (internal quotation marks omitted)); *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) ("The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole"), and here Jefferson County has already been found to have eliminated the vestiges of its prior segregated school system.

***733** The en banc Ninth Circuit declared that "when a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution." *Parents Involved VII, supra,* at 1191. For the foregoing reasons, this conclusory argument cannot sustain the plans. However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled "racial diversity" or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

C

The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Approximately 307 student assignments were affected by the racial tiebreaker in 2000–2001; the district was able to track the enrollment status of 293 of these students. App. in No. 05–908, at 162a. Of these, 209 were assigned to a school that was one of their choices, 87 of whom were assigned to the same school to which they would have been assigned without the racial tiebreaker. Eighty-four students were assigned to schools that they did not list as a choice, but 29 of those students would have been assigned to their respective school without the racial tiebreaker, and 3 were able to attend one of the oversubscribed schools due to waitlist and capacity adjustments. *Id.,* at 162a–163a. In over one-third of the assignments affected by the racial tiebreaker, then, the use of race in the end made no ****2760** difference, and the district could identify ***734** only 52 students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a

preference and to which they would not otherwise have been assigned.

As the panel majority in *Parents Involved VI* concluded:

> "[T]he tiebreaker's annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools—about a dozen additional Latinos into Ballard, a dozen black students into Nathan Hale, perhaps two dozen Asians into Roosevelt, and so on. The District has not met its burden of proving these marginal changes ... outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin." 377 F.3d, at 984–985.

Similarly, Jefferson County's use of racial classifications has only a minimal effect on the assignment of students. Elementary school students are assigned to their first- or second-choice school 95 percent of the time, and transfers, which account for roughly 5 percent of assignments, are only denied 35 percent of the time—and presumably an even smaller percentage are denied on the basis of the racial guidelines, given that other factors may lead to a denial. *McFarland I,* 330 F.Supp.2d, at 844–845, nn. 16, 18. Jefferson County estimates that the racial guidelines account for only 3 percent of assignments. Brief in Opposition in No. 05–915, p. 7, n. 4; Tr. of Oral Arg. in No. 05–915, at 46. As Jefferson County explains, "the racial guidelines have minimal impact in this process, because they 'mostly influence student assignment in subtle and indirect ways.' " Brief for Respondents in No. 05–915, pp. 8–9.

While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications. In *Grutter,* the consideration of race was viewed as indispensable in more than tripling minority***735** representation at the law school—from 4 to 14.5 percent. See 539 U.S., at 320, 123 S.Ct. 2325. Here the most Jefferson County itself claims is that "because the guidelines provide a firm definition of the Board's goal of racially integrated schools, they 'provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15–50% range.' " Brief in Opposition in No. 05–915, at 7 (quoting *McFarland I, supra,* at 842). Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it.

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," *Grutter, supra,* at 339, 123 S.Ct. 2325, and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. See, *e.g.,* App. in No. 05–908, at 224a–225a, 253a–259a, 307a. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Brief for Respondents in No. 05–915, at 8–9. Cf. *Croson,* 488 U.S., at 519, 109 S.Ct. 706 (KENNEDY, J.,

concurring in part and ***2761** concurring in judgment) (racial classifications permitted only "as a last resort").

IV

Justice BREYER's dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications,***736** and greatly exaggerates the consequences of today's decision.

To begin with, Justice BREYER seeks to justify the plans at issue under our precedents recognizing the compelling interest in remedying past intentional discrimination. See *post,* at 2809 – 2813. Not even the school districts go this far, and for good reason. The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. See, *e.g., Milliken,* 433 U.S., at 280, n. 14, 97 S.Ct. 2749; *Freeman,* 503 U.S., at 495–496, 112 S.Ct. 1430 ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications"). The dissent elides this distinction between *de jure* and *de facto* segregation, casually intimates that Seattle's school attendance patterns reflect illegal segregation, *post,* at 2802, 2809 – 2810, 2812,[15] and fails to credit the judicial determination—under the most rigorous standard—that Jefferson County had eliminated the vestiges of prior segregation. The dissent thus alters in fundamental ways not only the facts presented here but the established law.

> 15. Justice BREYER makes much of the fact that in 1978 Seattle "settled" an NAACP complaint alleging illegal segregation with the federal Office for Civil Rights (OCR). See *post,* at 2802, 2804, 2809 – 2810, 2812. The memorandum of agreement between Seattle and OCR, of course, contains no admission by Seattle that such segregation ever existed or was ongoing at the time of the agreement, and simply reflects a "desire to avoid the incovenience [*sic*] and expense of a formal OCR investigation," which OCR was obligated under law to initiate upon the filing of such a complaint. Memorandum of Agreement between Seattle School District No. 1 of King County, Washington, and the OCR, U.S. Dept. of Health, Education, and Welfare 2 (June 9, 1978); see also 45 CFR § 80.7(c) (2006).

Justice BREYER's reliance on *McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), *post,* at 2812 – 2813, 2815 – 2816, highlights how far removed the discussion in the dissent is from the question actually presented in these cases. *McDaniel* concerned a Georgia school system that had been segregated by law. There was no doubt that the county had operated a "dual school ***737** system," 402 U.S., at 41, 91 S.Ct. 1287, and no one questions that the obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect. See *supra,* at 2806. The present cases are before us, however, because the Seattle school district was never segregated by law, and the Jefferson County district has been found to be unitary, having eliminated the vestiges of its prior dual status. The justification for race-conscious remedies in *McDaniel* is

therefore not applicable here. The dissent's persistent refusal to accept this distinction—its insistence on viewing the racial classifications here as if they were just like the ones in *McDaniel,* "devised to overcome a history of segregated public schools," *post,* at 2825 – 2826—explains its inability to understand why the remedial justification for racial classifications cannot decide these cases.

*****2762*** Justice BREYER's dissent next relies heavily on dicta from *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S., at 16, 91 S.Ct. 1267—far more heavily than the school districts themselves. Compare *post,* at 2801, 2811 – 2815, with Brief for Respondents in No. 05–908, at 19–20; Brief for Respondents in No. 05–915, at 31. The dissent acknowledges that the two-sentence discussion in *Swann* was pure dicta, *post,* at 2811 – 2812, but nonetheless asserts that it demonstrates a "basic principle of constitutional law" that provides "authoritative legal guidance," *post,* at 2811 – 2812, 2816. Initially, as the Court explained just last Term, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Community College v. Katz,* 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). That is particularly true given that, when *Swann* was decided, this Court had not yet confirmed that strict scrutiny applies to racial classifications like those before us. See n. 16, *infra*. There is nothing "technical" or "theoretical," *post,* at 2816, about our approach to such dicta. See, *e.g., Cohens v. Virginia,* 6 Wheat. 264, 399–400, 5 L.Ed. 257 (1821) (Marshall, C.J.) (explaining why dicta is not binding).

****738*** Justice BREYER would not only put such extraordinary weight on admitted dicta, but relies on the statement for something it does not remotely say. *Swann* addresses only a possible state objective; it says nothing of the permissible *means*—race conscious or otherwise—that a school district might employ to achieve that objective. The reason for this omission is clear enough, since the case did not involve any voluntary means adopted by a school district. The dissent's characterization of *Swann* as recognizing that "the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals" is—at best—a dubious inference. *Post,* at 2811–2812. Even if the dicta from *Swann* were entitled to the weight the dissent would give it, and no dicta is, it not only did not address the question presented in *Swann,* it also does not address the question presented in these cases—whether the school districts' use of racial classifications to achieve their stated goals is permissible.

Further, for all the lower court cases Justice BREYER cites as evidence of the "prevailing legal assumption," *post*, at 2813, embodied by *Swann,* very few are pertinent. Most are not. For example, the dissent features *Tometz v. Board of Ed., Waukegan City School Dist. No. 61,* 39 Ill.2d 593, 597–598, 237 N.E.2d 498, 501 (1968), as evidence that "state and federal courts had considered the matter settled and uncontroversial." *Post,* at 2813. But *Tometz* addressed a challenge to a statute requiring race-consciousness in drawing school attendance boundaries—an issue well beyond the scope of the question presented in these cases. Importantly, it considered that issue only under rational-basis review, 39 Ill.2d, at 600, 237 N.E.2d, at 502 ("The test of any legislative classification essentially is one of reasonableness"), which even the dissent grudgingly recognizes is an improper standard for evaluating express racial classifications. Other cases cited are similarly inapplicable. See, *e.g.,* ****739*** *Citizens for Better Ed.*

v. Goose Creek Consol. Independent School Dist., 719 S.W.2d 350, 352–353 (Tex.App.1986) (upholding rezoning plan under rational-basis review).[16]

> 16. In fact, all the cases Justice BREYER's dissent cites as evidence of the "prevailing legal assumption," see *post,* at 2813 – 2815, were decided before this Court definitively determined that "all racial classifications ... must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Many proceeded under the now-rejected view that classifications seeking to benefit a disadvantaged racial group should be held to a lesser standard of review. See, *e.g., Springfield School Comm. v. Barksdale,* 348 F.2d 261, 266 (C.A.1 1965). Even if this purported distinction, which Justice STEVENS would adopt, *post,* at 2798, n. 3 (dissenting opinion), had not been already rejected by this Court, the distinction has no relevance to these cases, in which students of all races are excluded from the schools they wish to attend based solely on the racial classifications. See, *e.g.,* App. in No. 05–908, at 202a (noting that 89 nonwhite students were denied assignment to a particular school by operation of Seattle's racial tiebreaker).

Justice STEVENS's reliance on *School Comm. of Boston v. Board of Ed.,* 352 Mass. 693, 227 N.E.2d 729 (1967), appeal dism'd, 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778 (1968) (*per curiam*), *post,* at 2798 – 2800, is inapposite for the same reason that many of the cases cited by Justice BREYER are inapposite; the case involved a Massachusetts law that required school districts to avoid racial imbalance in schools but did not specify how to achieve this goal—and certainly did not require express racial classifications as the means to do so. The law was upheld under rational-basis review, with the state court explicitly rejecting the suggestion—which is now plainly the law—that "racial group classifications bear a far heavier burden of justification." 352 Mass., at 700, 227 N.E.2d, at 734 (internal quotation marks omitted). The passage Justice STEVENS quotes proves our point; all the quoted language says is that the school committee "shall prepare a plan to eliminate imbalance." *Id.,* at 695, 227 N.E.2d, at 731; see *post,* at 2799, n. 5. Nothing in the opinion approves use of racial classifications as the means to address the imbalance. The suggestion that our decision today is somehow inconsistent with our disposition of that appeal is belied by the fact that neither the lower courts, the respondent school districts, nor any of their 51 *amici* saw fit even to cite the case. We raise this fact not to argue that the dismissal should be afforded any different *stare decisis* effect, but rather simply to suggest that perhaps—for the reasons noted above—the dismissal does not mean what Justice STEVENS believes it does.

*****2763*** Justice BREYER's dissent next looks for authority to a footnote in ****740*** *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 472, n. 15, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), *post,* at 2830 – 2831, but there this Court expressly noted that it was *not* passing on the propriety of race-conscious student assignments in the absence of a finding of *de jure* segregation. Similarly, the citation of *Crawford v. Board of Ed. of Los Angeles,* 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), *post,* at 2813, in which a state referendum prohibiting a race-based assignment plan was challenged, is inapposite—in *Crawford* the Court again expressly reserved the question presented by these cases. 458 U.S., at 535, n. 11, 102 S.Ct. 3211. Such reservations

and preliminary analyses of course did not decide the merits of this question—as evidenced by the disagreement among the lower courts on this issue. Compare *Eisenberg,* 197 F.3d, at 133, with *Comfort,* 418 F.3d, at 13.

Justice BREYER's dissent also asserts that these cases are controlled by *Grutter,* claiming that the existence of a compelling interest in these cases "follows *a fortiori* " from *Grutter, post,* at 2822, 2834 – 2836, and accusing us of tacitly overruling that case, see *post,* at 2834 – 2836. The dissent overreads *Grutter,* however, in suggesting that it renders pure racial balancing a constitutionally compelling interest; *Grutter* itself recognized that using race simply to achieve racial balance would be "patently unconstitutional," 539 U.S., at 330, 123 S.Ct. 2325. The Court was exceedingly careful in describing the interest furthered in *Grutter* as "not an interest in simple ethnic diversity" but rather a "far broader array of qualifications and characteristics" in which race was but a single element. *Id.*, at 324–325, 123 S.Ct. 2325 (internal *****2764*** quotation marks omitted). We take the *Grutter* Court at its word. We simply do not understand how Justice BREYER can maintain that classifying every schoolchild as black or white, and using that classification as a determinative factor in assigning children to achieve pure racial balance, can be regarded as "less burdensome, and hence more narrowly tailored" than the consideration of race in *Grutter, post,* at 2825 – 2826, when the Court in *Grutter* stated that "[t]he importance of ... individualized consideration" in the program was "paramount," and consideration****741*** of race was one factor in a "highly individualized, holistic review," 539 U.S., at 337, 123 S.Ct. 2325. Certainly if the constitutionality of the stark use of race in these cases were as established as the dissent would have it, there would have been no need for the extensive analysis undertaken in *Grutter*. In light of the foregoing, Justice BREYER's appeal to *stare decisis* rings particularly hollow. See *post,* at 2835 – 2836.

At the same time it relies on inapplicable desegregation cases, misstatements of admitted dicta, and other noncontrolling pronouncements, Justice BREYER's dissent candidly dismisses the significance of this Court's repeated *holdings* that all racial classifications must be reviewed under strict scrutiny, see *post,* at 2816 – 2817, 2818 – 2820, arguing that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes, see *post,* at 2816 – 2820.

This Court has recently reiterated, however, that " ' *all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.' " *Johnson,* 543 U.S., at 505, 125 S.Ct. 1141 (quoting *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097; emphasis added by *Johnson* Court). See also *Grutter, supra,* at 326, 123 S.Ct. 2325 ("[G]overnmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry" (internal quotation marks and emphasis omitted)). Justice BREYER nonetheless relies on the good intentions and motives of the school districts, stating that he has found "no case that ... repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races." *Post,* at 2815 – 2816 (emphasis in original). We have found many. Our cases clearly reject the argument that motives affect the strict scrutiny analysis. See *Johnson, supra,* at 505, 125 S.Ct. 1141 ("We have insisted on strict scrutiny in every context,

even for so-called 'benign' racial classifications"); *Adarand, supra*, at 227, 115 S.Ct. 2097 (rejecting idea that " 'benign' " racial classifications may ***742** be held to "different standards"); *Croson,* 488 U.S., at 500, 109 S.Ct. 706 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice").

This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, see, *e.g., Gratz,* 539 U.S., at 282, 123 S.Ct. 2411 (BREYER, J., concurring in judgment); *id.,* at 301, 123 S.Ct. 2411 (GINSBURG, J., dissenting); *Adarand, supra,* at 243, 115 S.Ct. 2097 (STEVENS, J., dissenting); *Wygant,* 476 U.S., at 316–317, 106 S.Ct. 1842 (STEVENS, J., dissenting), and has been repeatedly rejected. See also *Bakke,* 438 U.S., at 289–291, 98 S.Ct. 2733 (opinion of Powell, J.) (rejecting argument that strict scrutiny should be applied only to classifications that disadvantage minorities, stating "[r]acial and ethnic distinctions of any sort are inherently****2765** suspect and thus call for the most exacting judicial examination").

The reasons for rejecting a motives test for racial classifications are clear enough. "The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility .... '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broadcasting,* 497 U.S., at 609–610, 110 S.Ct. 2997 (O'Connor, J., dissenting). See also *Adarand, supra,* at 226, 115 S.Ct. 2097 (" '[I]t may not always be clear that a so-called preference is in fact benign' " (quoting *Bakke, supra,* at 298, 98 S.Ct. 2733 (opinion of Powell, J.))). Accepting Justice BREYER's approach would "do no more than move us from 'separate but equal' to 'unequal but benign.' " *Metro Broadcasting, supra,* at 638, 110 S.Ct. 2997 (KENNEDY, J., dissenting).

Justice BREYER speaks of bringing "the races" together (putting aside the purely black-and-white nature of the plans) as the justification for excluding individuals on the basis of their race.) See *post,* at 2815 – 2816. Again, this approach***743** to racial classifications is fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause "protect [s] *persons,* not *groups,*" *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097 (emphasis in original). See *ibid.* ("[A]ll governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' *Hirabayashi* [*v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)]—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed" (emphasis in original)); *Metro Broadcasting, supra,* at 636, 110 S.Ct. 2997 (KENNEDY, J., dissenting) ("[O]ur Constitution protects each citizen as an individual, not as a member of a group"); *Bakke, supra,* at 289, 98 S.Ct. 2733 (opinion of Powell, J.) (The Fourteenth Amendment creates rights " 'guaranteed to the individual. The rights established are personal rights' "). This fundamental principle goes back, in this context, to *Brown* itself. See *Brown v. Board of Education,* 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*) ("At stake is the *personal* interest of the plaintiffs in admission to public schools ... on a nondiscriminatory basis" (emphasis added)). For the dissent, in contrast, " 'individualized scrutiny' is simply beside

the point.” *Post,* at 2829 – 2830.

Justice BREYER's position comes down to a familiar claim: The end justifies the means. He admits that “there is a cost in applying ‘a state-mandated racial label,’ ” *post,* at 2836, but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on “detailed examination, both as to ends *and* as to means.” *Adarand, supra,* at 236, 115 S.Ct. 2097 (emphasis added). Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

Despite his argument that these cases should be evaluated under a “standard of review that is not ‘strict’ in the traditional sense of that word,” *post,* at 2819 – 2820, Justice BREYER still purports ***744** to apply strict scrutiny to these cases. See *ibid.* It is evident, however, that Justice BREYER's brand of narrow tailoring is quite unlike anything found in our precedents. ****2766** Without any detailed discussion of the operation of the plans, the students who are affected, or the districts' failure to consider race-neutral alternatives, the dissent concludes that the districts have shown that these racial classifications are necessary to achieve the districts' stated goals. This conclusion is divorced from any evaluation of the actual impact of the plans at issue in these cases—other than to note that the plans “often have no effect.” *Post,* at 2824 – 2825.[17] Instead, the dissent suggests that some combination of the development of these plans over time, the difficulty of the endeavor, and the good faith of the districts suffices to demonstrate that these stark and controlling racial classifications are constitutional. The Constitution and our precedents require more.

> 17. Justice BREYER also tries to downplay the impact of the racial assignments by stating that in Seattle “students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria).” *Post,* at 2824 – 2825. This presumably refers to the district's decision to cease, for 2001–2002 school year assignments, applying the racial tiebreaker to students seeking to transfer to a different school after ninth grade. See App. in No. 05–908, at 137a–139a. There are obvious disincentives for students to transfer to a different school after a full quarter of their high school experience has passed, and the record sheds no light on how transfers to the oversubscribed high schools are handled.

In keeping with his view that strict scrutiny should not apply, Justice BREYER repeatedly urges deference to local school boards on these issues. See, *e.g., post,* at 2811, 2826 – 2827, 2835 – 2836. Such deference “is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.” *Johnson,* 543 U.S., at 506, n. 1, 125 S.Ct. 1141. See *Croson, supra*, at 501, 109 S.Ct. 706 (“The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in ***745** equal protection analysis”); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (“The Fourteenth Amendment ... protects the citizen against the State itself and all of its creatures—Boards of Education not excepted”).

Justice BREYER's dissent ends on an unjustified note of alarm. It predicts that today's decision "threaten[s]" the validity of "[h]undreds of state and federal statutes and regulations." *Post,* at 2833; see also *post,* at 2814 – 2815. But the examples the dissent mentions—for example, a provision of the No Child Left Behind Act of 2001 that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups, 20 U.S.C. § 6311(b)(2)(C)(v) (2000 ed., Supp. IV)—have nothing to do with the pertinent issues in these cases.

Justice BREYER also suggests that other means for achieving greater racial diversity in schools are necessarily unconstitutional if the racial classifications at issue in these cases cannot survive strict scrutiny. *Post,* at 2831 – 2834. These other means— *e.g.,* where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta. Rather, we employ the familiar and well-established analytic approach of strict scrutiny to evaluate the plans at issue today, an approach that in no way warrants the dissent's cataclysmic concerns. Under *****2767*** that approach, the school districts have not carried their burden of showing that the ends they seek justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis.

* * *

If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. "[D]istinctions between citizens ****746*** solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand,* 515 U.S., at 214, 115 S.Ct. 2097 (internal quotation marks omitted). Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Croson,* 488 U.S., at 493, 109 S.Ct. 706 (plurality opinion), "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno,* 509 U.S. 630, 657, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broadcasting,* 497 U.S., at 603, 110 S.Ct. 2997 (O'Connor, J., dissenting). As the Court explained in *Rice v. Cayetano,* 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000), "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether

school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. *Id.,* at 493–494, 74 S.Ct. 686. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. See *id.,* at 494, 74 S.Ct. 686 (" 'The impact [of segregation] is greater when it has the sanction of the law' "). The next Term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of ***747** determining admission to the public schools *on a nonracial basis*." *Brown II,* 349 U.S., at 300–301, 75 S.Ct. 753 (emphasis added).

The parties and their *amici* debate which side is more faithful to the heritage of *Brown,* but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown I,* O.T.1953, p. 15 (Summary of Argument). What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in ****2768** affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I,* O.T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis,*" and what was required was "determining admission to the public schools *on a nonracial basis*." *Brown II, supra,* at 300–301, 75 S.Ct. 753 (emphasis added). What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown,* schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as ***748** Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," *Brown II, supra*, at 300–301, 75 S.Ct. 753, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings.

It is so ordered.

Justice THOMAS, concurring.

Today, the Court holds that state entities may not experiment with race-based means to achieve ends they deem socially desirable. I wholly concur in THE CHIEF JUSTICE's opinion. I write separately to address several of the contentions in Justice BREYER's dissent (hereinafter dissent). Contrary to the dissent's arguments, resegregation is not occurring in Seattle or Louisville; these school boards have no present interest in remedying past segregation; and these race-based student-assignment programs do not serve any compelling state interest. Accordingly, the plans are unconstitutional. Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). This approach is just as wrong today as it was a half century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.

I

The dissent repeatedly claims that the school districts are threatened with resegregation and that they will succumb to that threat if these plans are declared unconstitutional. It also argues that these plans can be justified as part of the school boards' attempts to "eradicat[e] earlier school segregation."***749** See, *e.g., post,* at 2801 – 2802. Contrary to the dissent's rhetoric, neither of these school districts is threatened with resegregation, and neither is constitutionally compelled or permitted to undertake race-based remediation. Racial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.

A

Because this Court has authorized and required race-based remedial measures to ****2769** address *de jure* segregation, it is important to define segregation clearly and to distinguish it from racial imbalance. In the context of public schooling, segregation is the deliberate operation of a school system to "carry out a governmental policy to separate pupils in schools solely on the basis of race." *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 6, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); see also *Monroe v. Board of Comm'rs of Jackson,* 391 U.S. 450, 452, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968). In *Brown,* this Court declared that segregation was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Swann, supra,* at 6, 91 S.Ct. 1267; see also *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 435, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) ("[T]he State, acting through the local school board and school officials, organized and operated a dual system, part 'white' and part 'Negro.' It was such dual systems that 14 years ago *Brown* [, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873,] held unconstitutional and a year later *Brown* [*v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955),] held must be abolished") .[1]

1. In this Court's paradigmatic segregation cases, there was a local ordinance, state statute, or state constitutional provision requiring racial separation. See, *e.g.,* Brief for Petitioners in *Bolling v. Sharpe,* O.T.1952, No. 413, pp. 28–30 (cataloging state laws requiring separation of the races); *id.,* at App. A (listing "Statutory and Constitutional Provisions in the States Where Segregation in Education is Institutionalized").

Racial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large. Cf. ***750** *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 460, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). Racial imbalance is not segregation.[2] Although presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices. See *Swann, supra,* at 25–26, 91 S.Ct. 1267; *Missouri v. Jenkins,* 515 U.S. 70, 116, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring). Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself. *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 413, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *Dayton Bd. of Ed. v. Brinkman,* 443 U.S. 526, 531, n. 5, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) ("Racial imbalance ... is not *per se* a constitutional violation"); *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992); see also *Swann, supra,* at 31–32, 91 S.Ct. 1267; cf. *Milliken v. Bradley,* 418 U.S. 717, 740–741, and n. 19, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974).

> 2. The dissent refers repeatedly and reverently to " 'integration.' " However, outside of the context of remediation for past *de jure* segregation, "integration" is simply racial balancing. See *post,* at 2820. Therefore, the school districts' attempts to further "integrate" are properly thought of as little more than attempts to achieve a particular racial balance.

Although there is arguably a danger of racial imbalance in schools in Seattle and Louisville, there is no danger of resegregation. No one contends that Seattle has established or that Louisville has reestablished a dual school system that separates students on the basis of race. The statistics cited in Appendix A to the dissent are not to the contrary. See *post,* at 2837 – 2839. At most, those statistics show a national trend toward classroom racial imbalance. However, racial imbalance without intentional state action to separate the races does not amount to segregation. To raise the specter of resegregation to defend*****2770*** these programs is to ignore the meaning of the word and the nature of the cases before us.[3]

> 3. The dissent's assertion that these plans are necessary for the school districts to maintain their "hard-won gains" reveals its conflation of segregation and racial imbalance. *Post,* at 2820 – 2821. For the dissent's purposes, the relevant hard-won gains are the present racial compositions in the individual schools in Seattle and Louisville. However, the actual hard-won gain in these cases is the elimination of the vestiges of the system of state-enforced racial separation that once existed in Louisville. To equate the achievement of a certain statistical mix in several schools with the elimination of the system of systematic *de jure* segregation trivializes the latter accomplishment. Nothing but an interest in classroom aesthetics and a hypersensitivity to elite sensibilities justifies the school districts' racial balancing programs. See Part II–B, *infra*. But "the principle of inherent equality that underlies and infuses our Constitution" required the disestablishment of *de jure* segregation. See *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (THOMAS, J., concurring in part and

concurring in judgment). Assessed in any objective manner, there is no comparison between the two.

***751** B

Just as the school districts lack an interest in preventing resegregation, they also have no present interest in remedying past segregation. The Constitution generally prohibits government race-based decisionmaking, but this Court has authorized the use of race-based measures for remedial purposes in two narrowly defined circumstances. First, in schools that were formerly segregated by law, race-based measures are sometimes constitutionally compelled to remedy prior school segregation. Second, in *Croson,* the Court appeared willing to authorize a government unit to remedy past discrimination for which it was responsible. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 504, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Without explicitly resting on either of these strands of doctrine, the dissent repeatedly invokes the school districts' supposed interests in remedying past segregation. Properly analyzed, though, these plans do not fall within either existing category of permissible race-based remediation.

1

The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives. *Grutter v. Bollinger,* 539 U.S. 306, 371, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) ***752** THOMAS, J., concurring in part and dissenting in part) (citing *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 239, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (SCALIA, J., concurring in part and concurring in judgment)). Rather, race-based government decisionmaking is categorically prohibited unless narrowly tailored to serve a compelling interest. *Grutter, supra,* at 326, 123 S.Ct. 2325; see also Part II–A, *infra*. This exacting scrutiny "has proven automatically fatal" in most cases. *Jenkins, supra,* at 121, 115 S.Ct. 2038 (THOMAS, J., concurring); cf. *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943) ("[R]acial discriminations are in most circumstances irrelevant and therefore prohibited"). And appropriately so. "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter, supra,* at 353, 123 S.Ct. 2325 (opinion of THOMAS, J.). Therefore, as a general rule, all race-based government ****2771** decisionmaking—regardless of context—is unconstitutional.

2

This Court has carved out a narrow exception to that general rule for cases in which a school district has a "history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." [4] *Swann,* 402 U.S., at 5–6, 91 S.Ct. 1267. In such cases, race-based remedial ***753** measures are sometimes required.[5] *Green,* 391 U.S., at 437–438, 88 S.Ct. 1689; cf. *United States v. Fordice,* 505 U.S. 717, 745, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992) (THOMAS, J., concurring).[6] But without a history of state-enforced racial separation, a school district has no affirmative legal obligation to take race-based remedial measures to eliminate segregation and its vestiges.

4. The dissent makes much of the supposed difficulty of determining whether prior segregation was *de jure* or *de facto*. See, *e.g., post,* at 2810 – 2811. That determination typically will not be nearly as difficult as the dissent makes it seem. In most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races. See, *e.g.,* n. 1, *supra*. And even if the determination is difficult, it is one the dissent acknowledges must be made to determine what remedies school districts are required to adopt. *Post,* at 2823.

5. This Court's opinion in *McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), fits comfortably within this framework. There, a Georgia school board voluntarily adopted a desegregation plan. At the time of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), Georgia's Constitution required that "[s]eparate schools shall be provided for the white and colored races." Ga. Const., Art. VIII, § 2–6401 (1945). Given that state law had previously required the school board to maintain a dual school system, the county was obligated to take measures to remedy its prior *de jure* segregation. This Court recognized as much in its opinion, which stated that the school board had an "affirmative duty to disestablish the dual school system." *McDaniel, supra,* at 41, 91 S.Ct. 1287.

6. As I have explained elsewhere, the remedies this Court authorized lower courts to compel in early desegregation cases like *Green* and *Swann* were exceptional. See *Missouri v. Jenkins,* 515 U.S. 70, 124–125, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (concurring opinion). Sustained resistance to *Brown* prompted the Court to authorize extraordinary race-conscious remedial measures (like compelled racial mixing) to turn the Constitution's dictate to desegregate into reality. 515 U.S., at 125, 115 S.Ct. 2038 (THOMAS, J., concurring). Even if these measures were appropriate as remedies in the face of widespread resistance to *Brown*'s mandate, they are not forever insulated from constitutional scrutiny. Rather, "such powers should have been temporary and used only to overcome the widespread resistance to the dictates of the Constitution." 515 U.S., at 125, 115 S.Ct. 2038 (THOMAS, J., concurring).

Neither of the programs before us today is compelled as a remedial measure, and no one makes such a claim. Seattle has no history of *de jure* segregation; therefore, the Constitution did not require Seattle's plan.[7] Although Louisville ***754** once operated****2772** a segregated school system and was subject to a Federal District Court's desegregation decree, see *ante,* at 2803; *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 376–377 (W.D.Ky.2000), that decree was dissolved in 2000, *id.,* at 360. Since then, no race-based remedial measures have been required in Louisville. Thus, the race-based student-assignment plan at issue here, which was instituted the year after the dissolution of the desegregation decree, was not even arguably required by the Constitution.

7. Though the dissent cites every manner of complaint, record material, and scholarly

article relating to Seattle's race-based student-assignment efforts, *post,* at 2839 – 2841, it cites no law or official policy that required separation of the races in Seattle's schools. Nevertheless, the dissent tries to cast doubt on the historical fact that the Seattle schools were never segregated by law by citing allegations that the National Association for the Advancement of Colored People and other organizations made in court filings to the effect that Seattle's schools were once segregated by law. See *post,* at 2803 – 2805, 2812. These allegations were never proved and were not even made in this case. Indeed, the record before us suggests the contrary. See App. in No. 05–908, pp. 214a, 225a, 257a. Past allegations in another case provide no basis for resolving these cases.

3

Aside from constitutionally compelled remediation in schools, this Court has permitted government units to remedy prior racial discrimination only in narrow circumstances. See *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). Regardless of the constitutional validity of such remediation, see *Croson,* 488 U.S., at 524–525, 109 S.Ct. 706 (SCALIA, J., concurring in judgment), it does not apply here. Again, neither school board asserts that its race-based actions were taken to remedy prior discrimination. Seattle provides three forward-looking—as opposed to remedial—justifications for its race-based assignment plan. Brief for Respondents in No. 05–908, pp. 24–34. Louisville asserts several similar forward-looking interests, Brief for Respondents in No. 05–915, pp. 24–29, and at oral argument, counsel for Louisville disavowed any claim that Louisville's argument "depend[ed] in any way on the prior de jure segregation," Tr. of Oral Arg. in No. 05–915, p. 38.

Furthermore, for a government unit to remedy past discrimination for which it was responsible, the Court has required it to demonstrate "a 'strong basis in evidence for its conclusion that remedial action was necessary.' " ***755** *Croson, supra*, at 500, 109 S.Ct. 706 (quoting *Wygant, supra,* at 277, 106 S.Ct. 1842 (plurality opinion)). Establishing a "strong basis in evidence" requires proper findings regarding the extent of the government unit's past racial discrimination. *Croson,* 488 U.S., at 504, 109 S.Ct. 706. The findings should "define the scope of any injury [and] the necessary remedy," *id.,* at 505, 109 S.Ct. 706, and must be more than "inherently unmeasurable claims of past wrongs," *id.,* at 506, 109 S.Ct. 706. Assertions of general societal discrimination are plainly insufficient. *Id.,* at 499, 504, 109 S.Ct. 706; *Wygant, supra,* at 274, 106 S.Ct. 1842 (plurality opinion); cf. *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 310, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). Neither school district has made any such specific findings. For Seattle, the dissent attempts to make up for this failing by adverting to allegations made in past complaints filed against the Seattle school district. However, allegations in complaints cannot substitute for specific findings of prior discrimination—even when those allegations lead to settlements with complaining parties. Cf. *Croson, supra,* at 505, 109 S.Ct. 706; *Wygant, supra,* at 279, n. 5, 106 S.Ct. 1842 (plurality opinion). As for Louisville, its slate was cleared by the District Court's 2000 dissolution decree, which effectively declared that there were no longer any effects of *de jure* discrimination in need of remediation.[8]

8. Contrary to the dissent's argument, *post,* at 2823 – 2824, the Louisville school

> district's interest in remedying its past *de jure* segregation did vanish the day the District Court found that Louisville had eliminated the vestiges of its historic *de jure* segregation. See *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 360 (W.D.Ky.2000). If there were further remediation to be done, the District Court could not logically have reached the conclusion that Louisville "ha [d] eliminated the vestiges associated with the former policy of segregation and its pernicious effects." *Ibid.* Because Louisville could use race-based measures only as a remedy for past *de jure* segregation, it is not "incoherent," *post,* at 2830, to say that race-based decisionmaking was allowed to Louisville one day—while it was still remedying—and forbidden to it the next—when remediation was finished. That seemingly odd turnaround is merely a result of the fact that the remediation of *de jure* segregation is a jealously guarded exception to the Equal Protection Clause's general rule against government race-based decisionmaking.

*****2773 *756*** Despite the dissent's repeated intimation of a remedial purpose, neither of the programs in question qualifies as a permissible race-based remedial measure. Thus, the programs are subject to the general rule that government race-based decisionmaking is unconstitutional.

C

As the foregoing demonstrates, racial balancing is sometimes a constitutionally permissible remedy for the discrete legal wrong of *de jure* segregation, and when directed to that end, racial balancing is an exception to the general rule that government race-based decisionmaking is unconstitutional. Perhaps for this reason, the dissent conflates the concepts of segregation and racial imbalance: If racial imbalance equates to segregation, then it must also be constitutionally acceptable to use racial balancing to remedy racial imbalance.

For at least two reasons, however, it is wrong to place the remediation of segregation on the same plane as the remediation of racial imbalance. First, as demonstrated above, the two concepts are distinct. Although racial imbalance can result from *de jure* segregation, it does not necessarily, and the further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation. See *Freeman,* 503 U.S., at 496, 112 S.Ct. 1430; *Jenkins,* 515 U.S., at 118, 115 S.Ct. 2038 (THOMAS, J., concurring).

Second, a school cannot "remedy" racial imbalance in the same way that it can remedy segregation. Remediation of past *de jure* segregation is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied, and the school district will be declared unitary. See *Swann,* 402 U.S., at 31, 91 S.Ct. 1267. Unlike *de jure* segregation, there is no ultimate remedy for racial imbalance. Individual schools will fall in and out of balance in the natural course, and the appropriate balance itself will shift with a school district's changing****757*** demographics. Thus, racial balancing will have to take place on an indefinite basis—a continuous process with no identifiable culpable party and no discernable end point. In part for those reasons, the Court has never permitted outright racial balancing solely for the purpose of achieving a particular

racial balance.

II

Lacking a cognizable interest in remediation, neither of these plans can survive strict scrutiny because neither plan serves a genuinely compelling state interest. The dissent avoids reaching that conclusion by unquestioningly accepting the assertions of selected social scientists while completely ignoring the fact that those assertions are the subject of fervent debate. Ultimately, the dissent's entire analysis is corrupted by the considerations that lead it initially to question whether strict scrutiny should apply at all. What emerges is a version of "strict scrutiny" that combines hollow assurances of harmlessness with reflexive acceptance of conventional wisdom. When it *****2774*** comes to government race-based decisionmaking, the Constitution demands more.

A

The dissent claims that "the law requires application here of a standard of review that is not 'strict' in the traditional sense of that word." *Post,* at 2819 – 2820. This view is informed by dissents in our previous cases and the concurrences of two Court of Appeals judges. *Post,* at 34–36 (citing 426 F.3d 1162, 1193–1194 (C.A.9 2005) (Kozinski, J., concurring); *Comfort v. Lynn School Comm.,* 418 F.3d 1, 28–29 (C.A.1 2005) (Boudin, C. J., concurring)). Those lower court judges reasoned that programs like these are not "aimed at oppressing blacks" and do not "seek to give one racial group an edge over another." *Id.,* at 27; 426 F.3d, at 1193 (Kozinski, J., concurring). They were further persuaded that these plans differed from other race-based programs this Court has considered because they are "certainly more benign than laws ****758*** that favor or disfavor one race, segregate by race, or create quotas for or against a racial group," *Comfort,* 418 F.3d, at 28 (Boudin, C. J., concurring), and they are "far from the original evils at which the Fourteenth Amendment was addressed," *id.,* at 29; 426 F.3d, at 1195 (Kozinski, J., concurring). Instead of strict scrutiny, Judge Kozinski would have analyzed the plans under "robust and realistic rational basis review." *Id.,* at 1194.

These arguments are inimical to the Constitution and to this Court's precedents.[9] We have made it unusually clear that strict scrutiny applies to *every* racial classification. *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097; *Grutter,* 539 U.S., at 326, 123 S.Ct. 2325; *Johnson v. California,* 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications").[10] There are good reasons not to apply a lesser standard to these cases. The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking. *Adarand,* 515 U.S., at 228–229, 115 S.Ct. 2097. Purportedly benign race-based decisionmaking suffers the same constitutional infirmity as invidious race-based decisionmaking. ****759*** *Id.,* at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment) ("As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged").

9. The dissent's appeal to *stare decisis, post,* at 2835, is particularly ironic in light of its apparent willingness to depart from these precedents, *post,* at 2819 – 2820.

10. The idea that government racial classifications must be subjected to strict scrutiny did not originate in *Adarand*. As early as *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), this Court made clear that government action that "rest[s] solely upon distinctions drawn according to race" had to be "subjected to the 'most rigid scrutiny.' " *Id.,* at 11, 87 S.Ct. 1817 (quoting *Korematsu v. United States,* 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944)); see also *McLaughlin v. Florida,* 379 U.S. 184, 196, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (requiring a statute drawing a racial classification to be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy"); *id.,* at 197, 85 S.Ct. 283 (Harlan, J., concurring) ("The necessity test ... should be equally applicable in a case involving state racial discrimination").

*****2775*** Even supposing it mattered to the constitutional analysis, the race-based student-assignment programs before us are not as benign as the dissent believes. See *post,* at 2818 – 2819. "[R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." *Adarand, supra,* at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). As these programs demonstrate, every time the government uses racial criteria to "bring the races together," *post,* at 2815 – 2816, someone gets excluded, and the person excluded suffers an injury solely because of his or her race. The petitioner in the Louisville case received a letter from the school board informing her that her *kindergartner* would not be allowed to attend the school of petitioner's choosing because of the child's race. App. in No. 05–915, p. 97. Doubtless, hundreds of letters like this went out from both school boards every year these race-based assignment plans were in operation. This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and "provoke[s] resentment among those who believe that they have been wronged by the government's use of race." *Adarand, supra,* at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). Accordingly, these plans are simply one more variation on the government race-based decisionmaking we have consistently held must be subjected to strict scrutiny. *Grutter, supra,* at 326, 123 S.Ct. 2325.

B

Though the dissent admits to discomfort in applying strict scrutiny to these plans, it claims to have nonetheless applied that exacting standard. But in its search for a compelling ****760*** interest, the dissent casually accepts even the most tenuous interests asserted on behalf of the plans, grouping them all under the term " 'integration.' " See *post,* at 2820. " '[I]ntegration,' " we are told, has "three essential elements." *Ibid.* None of these elements is compelling. And the combination of the three unsubstantiated elements does not produce an interest any more compelling than that represented by each element independently.

1

According to the dissent, integration involves "an interest in setting right the consequences of prior conditions of segregation." *Ibid*. For the reasons explained above, the records in these

cases do not demonstrate that either school board's plan is supported by an interest in remedying past discrimination. Part I–B, *supra*.

Moreover, the school boards have no interest in remedying the sundry consequences of prior segregation unrelated to schooling, such as "housing patterns, employment practices, economic conditions, and social attitudes." *Post,* at 2820 – 2821. General claims that past school segregation affected such varied societal trends are "too amorphous a basis for imposing a racially classified remedy," *Wygant,* 476 U.S., at 276, 106 S.Ct. 1842 (plurality opinion), because "[i]t is sheer speculation" how decades-past segregation in the school system might have affected these trends, see *Croson,* 488 U.S., at 499, 109 S.Ct. 706. Consequently, school boards seeking to remedy those societal problems with race-based measures in schools today would have no way to gauge the proper scope of the remedy. *Id.,* at 498, 109 S.Ct. 706. Indeed, remedial measures geared toward such broad and unrelated societal ills have " 'no logical stopping point,' " *ibid.,* and threaten to become "ageless in their reach into the past, and timeless in their ability to affect the future," ***2776** *Wygant, supra,* at 276, 106 S.Ct. 1842 (plurality opinion). See *Grutter, supra*, at 342, 123 S.Ct. 2325 (stating the "requirement that all governmental use of race must have a logical end point").

***761** Because the school boards lack any further interest in remedying segregation, this element offers no support for the purported interest in "integration."

2

Next, the dissent argues that the interest in integration has an educational element. The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites certain social science research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.

Scholars have differing opinions as to whether educational benefits arise from racial balancing. Some have concluded that black students receive genuine educational benefits. See, *e.g.,* Crain & Mahard, Desegregation and Black Achievement: A Review of the Research, 42 Law & Contemp. Prob. 17, 48 (Summer 1978). Others have been more circumspect. See, *e.g.,* Henderson, Greenberg, Schneider, Uribe, & Verdugo, High–Quality Schooling for African American Students, in Beyond Desegregation 162, 166 (M. Shujaa ed. 1996) ("Perhaps desegregation does not have a single effect, positive or negative, on the academic achievement of African American students, but rather some strategies help, some hurt, and still others make no difference whatsoever. It is clear to us that focusing simply on demographic issues detracts from focusing on improving schools"). And some have concluded that there are no demonstrable educational benefits. See, *e.g.,* Armor & Rossell, Desegregation and Resegregation in the Public Schools, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 239, 251 (A. Thernstrom & S. Thernstrom eds.2002).

The *amicus* briefs in the cases before us mirror this divergence of opinion. Supporting the

school boards, one *amicus* ***762** has assured us that “both early desegregation research and recent statistical and econometric analyses ... indicate that there are positive effects on minority student achievement scores arising from diverse school settings.” Brief for American Educational Research Association 10. Another brief claims that “school desegregation has a modest positive impact on the achievement of African–American students.” App. to Brief for 553 Social Scientists as *Amici Curiae* 13–14 (footnote omitted). Yet neither of those briefs contains specific details like the magnitude of the claimed positive effects or the precise demographic mix at which those positive effects begin to be realized. Indeed, the social scientists' brief rather cautiously claims the existence of any benefit at all, describing the “positive impact” as “modest,” *id.,* at 13, acknowledging that “there appears to be little or no effect on math scores,” *id.,* at 14, and admitting that the “underlying reasons for these gains in achievement are not entirely clear,” *id.,* at 15.[11]

> 11. At least one of the academic articles the dissent cites to support this proposition fails to establish a causal connection between the supposed educational gains realized by black students and racial mixing. See Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L.J. 733 (1998). In the pages following the ones the dissent cites, the author of that article remarks that “the main reason white and minority students perform better academically in majority white schools is likely that these schools provide greater opportunities to learn. In other words, it is not desegregation per se that improves achievement, but rather the learning advantages some desegregated schools provide.” *Id.,* at 744. Evidence that race is a good proxy for other factors that might be correlated with educational benefits does not support a compelling interest in the use of race to achieve academic results.

****2777** Other *amici* dispute these findings. One *amicus* reports that “[i]n study after study, racial composition of a student body, when isolated, proves to be an insignificant determinant of student achievement.” Brief for Dr. John Murphy et al. in No. 05–908, p. 8; see also *id.,* at 9 (“[T]here is no evidence that diversity in the K–12 classroom positively affects***763** student achievement”). Another *amicus* surveys several social science studies and concludes that “a fair and comprehensive analysis of the research shows that there is no clear and consistent evidence of [educational] benefits.” Brief for David J. Armor et al. 29.

Add to the inconclusive social science the fact of black achievement in “racially isolated” environments. See T. Sowell, Education: Assumptions Versus History 7–38 (1986). Before *Brown,* the most prominent example of an exemplary black school was Dunbar High School. Sowell, Education: Assumptions Versus History, at 29 (“[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan”). Dunbar is by no means an isolated example. See *id.,* at 10–32 (discussing other successful black schools); Walker, Can Institutions Care? Evidence from the Segregated Schooling of African American Children, in Beyond Desegregation, *supra*, at 209–226; see also T. Sowell, Affirmative Action Around the World: An Empirical Study 141–165 (2004). Even after *Brown,* some schools with predominantly black enrollments have achieved outstanding educational results. See, *e.g.,* S. Carter, No Excuses: Lessons from 21 High–

Performing, High–Poverty Schools 49–50, 53–56, 71–73, 81–84, 87–88 (2001); A. Thernstrom & S. Thernstrom, No Excuses: Closing the Racial Gap in Learning 43–64 (2003); see also L. Izumi, They Have Overcome: High–Poverty, High–Performing Schools in California (2002) (chronicling exemplary achievement in predominantly Hispanic schools in California). There is also evidence that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges. *Grutter,* 539 U.S., at 364–365, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part) (citing sources); see also *Fordice,* 505 U.S., at 748–749, 112 S.Ct. 2727 (THOMAS, J., concurring).

***764** The Seattle School Board itself must believe that racial mixing is not necessary to black achievement. Seattle operates a K–8 "African–American Academy," which has a "nonwhite" enrollment of 99%. See App. in No. 05–908, p. 227a; Reply Brief for Petitioner in No. 05–908, p. 13, n. 13. That school was founded in 1990 as part of the school board's effort to "increase academic achievement." [12] See African American Academy History, online at http:// www. seattle schools. org/ schools/ aaa/ history. htm (all Internet materials as visited June 26, 2007, and available in Clerk of Court's case file). According to the school's most recent annual report, "[a]cademic excellence" is its "primary goal." See African American Academy 2006 Annual Report, p. ****2778** 2, online at http://www.seattleschools.org/area/siso/reports/anrep/ altern/938.pdf. This racially imbalanced environment has reportedly produced test scores "higher across all grade levels in reading, writing and math." *Ibid.* Contrary to what the dissent would have predicted, see *post,* at 2820 – 2821, the children in Seattle's African American Academy have shown gains when placed in a "highly segregated" environment.

> 12. Of course, if the Seattle School Board were truly committed to the notion that diversity leads directly to educational benefits, operating a school with such a high "nonwhite" enrollment would be a shocking dereliction of its duty to educate the students enrolled in that school.

Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling.[13] See ***765** *Jenkins,* 515 U.S., at 121–122, 115 S.Ct. 2038 (THOMAS, J., concurring) ("[T]here is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment").

> 13. In fact, the available data from the Seattle school district appear to undercut the dissent's view. A comparison of the test results of the schools in the last year the racial balancing program operated to the results in the 2004–to–2005 school year (in which student assignments were race neutral) does not indicate the decline in black achievement one would expect to find if black achievement were contingent upon a particular racial mix. See Washington State Report Card, online at http:// reportcard. ospi. k 12. wa. us/ summary. aspx? school Id= 1099 & OrgType= 4& re portLevel= School; http:// reportcard. ospi. k 12. wa. us/ summary. aspx? schoolId= 1104& reportLevel= School &orgLinkId= 1104& yrs=; http: // reportcard. ospi. k12. wa. us/

summary. aspx? schoolId= 1061& report Level= School& orgLinkId= 1061& yrs =; http:// reportcard. ospi. k 12. wa. us/ sum mary. aspx? schoolId= 1043& reportLevel = School& orgLinkId= 1043& yrs= (showing that reading scores went up, not down, when Seattle's race-based assignment program ended at Sealth High School, Ingraham High School, Garfield High School, and Franklin High School—some of the schools most affected by the plan).

Perhaps recognizing as much, the dissent argues that the social science evidence is "strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one." *Post,* at 2820 – 2821. This assertion is inexplicable. It is not up to the school boards—the very government entities whose race-based practices we must strictly scrutinize—to determine what interests qualify as compelling under the Fourteenth Amendment to the United States Constitution. Rather, this Court must assess independently the nature of the interest asserted and the evidence to support it in order to determine whether it qualifies as compelling under our precedents. In making such a determination, we have deferred to state authorities only once, see *Grutter,* 539 U.S., at 328–330, 123 S.Ct. 2325, and that deference was prompted by factors uniquely relevant to higher education. *Id.,* at 328, 123 S.Ct. 2325 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions"). The dissent's proposed test—whether sufficient social science evidence supports a government unit's conclusion that the interest it asserts is compelling—calls to mind the rational-basis standard of review the dissent purports not to apply, *post,* at 2819 – 2820. See *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955) ("It is enough that there is an evil at hand for correction,***766** and that it might be thought that the particular legislative measure was a rational way to correct it"). Furthermore, it would leave our equal protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists. To adopt the dissent's deferential approach *****2779*** would be to abdicate our constitutional responsibilities.[14]

14. The dissent accuses me of "feel[ing] confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria" and chastises me for not deferring to democratically elected majorities. See *post,* at 2833 – 2834. Regardless of what Justice BREYER's goals might be, this Court does not sit to "create a society that includes all Americans" or to solve the problems of "troubled inner–city schooling." *Ibid.* We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.

It should escape no one that behind Justice BREYER's veil of judicial modesty hides an inflated role for the Federal Judiciary. The dissent's approach confers on judges the power to say what sorts of discrimination are benign and which are invidious. Having made that determination (based on no objective measure that I can detect), a judge following the dissent's approach will set the level of scrutiny to achieve the desired result. Only then must the judge defer to a

democratic majority. In my view, to defer to one's preferred result is not to defer at all.

3

Finally, the dissent asserts a "democratic element" to the integration interest. It defines the "democratic element" as "an interest in producing an educational environment that reflects the 'pluralistic society' in which our children will live." *Post,* at 2821.[15] Environmental reflection, though, is ***767** just another way to say racial balancing. And "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Bakke,* 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.). "This the Constitution forbids." *Ibid.; Grutter, supra,* at 329–330, 123 S.Ct. 2325; *Freeman,* 503 U.S., at 494, 112 S.Ct. 1430.

> 15. The notion that a "democratic" interest qualifies as a compelling interest (or constitutes a part of a compelling interest) is proposed for the first time in today's dissent and has little basis in the Constitution or our precedent, which has narrowly restricted the interests that qualify as compelling. See *Grutter v. Bollinger,* 539 U.S. 306, 351–354, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (THOMAS, J., concurring in part and dissenting in part). The Fourteenth Amendment does not enact the dissent's newly minted understanding of liberty. See *Lochner v. New York,* 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics").

Navigating around that inconvenient authority, the dissent argues that the racial balancing in these plans is not an end in itself but is instead intended to "teac[h] children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation." *Post,* at 2821 – 2822. These "generic lessons in socialization and good citizenship" are too sweeping to qualify as compelling interests. *Grutter,* 539 U.S., at 348, 123 S.Ct. 2325 (SCALIA, J., concurring in part and dissenting in part). And they are not "uniquely relevant" to schools or "uniquely 'teachable' in a formal educational setting." *Id.,* at 347, 123 S.Ct. 2325. Therefore, if governments may constitutionally use racial balancing to achieve these aspirational ends in schools, they may use racial balancing to achieve similar goals at every level—from state-sponsored 4–H clubs, see *Bazemore v. Friday,* 478 U.S. 385, 388–390, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (Brennan, J., concurring in part), to the state civil service, see *Grutter,* 539 U.S., at 347–348, 123 S.Ct. 2325 (opinion of SCALIA, J.).

Moreover, the democratic interest has no durational limit, contrary to *Grutter*'s command. See *id.,* at 342, 123 S.Ct. 2325 (opinion of the Court); see also ****2780** *Croson,* 488 U.S., at 498, 109 S.Ct. 706; *Wygant,* 476 U.S., at 275, 106 S.Ct. 1842 (plurality opinion). In other words, it will always be important for students to learn cooperation among the races. If this interest justifies race-conscious measures today, then logically it will justify race-conscious measures forever. Thus, the democratic interest, limitless in scope ***768** and "timeless in [its] ability to affect the future," *id.,* at 276, 106 S.Ct. 1842, cannot justify government race-based decisionmaking.[16]

> 16. The dissent does not explain how its recognition of an interest in teaching racial understanding and cooperation here is consistent with the Court's rejection of a similar

> interest in *Wygant*. In *Wygant,* a school district justified its race-based teacher-layoff program in part on the theory that "minority teachers provided 'role models' for minority students and that a racially 'diverse' faculty would improve the education of all students." *Grutter, supra,* at 352, 123 S.Ct. 2325 (opinion of THOMAS, J.) (citing Brief for Respondents, O.T.1985, No. 84–1340, pp. 27–28; *Wygant*, 476 U.S., at 315, 106 S.Ct. 1842 (STEVENS, J., dissenting)). The Court rejected the interests asserted to justify the layoff program as insufficiently compelling. *Id.*, at 275–276, 106 S.Ct. 1842 (plurality opinion); *id.,* at 295, 106 S.Ct. 1842 (White, J., concurring in judgment). If a school district has an interest in teaching racial understanding and cooperation, there is no logical reason why that interest should not extend to the composition of the teaching staff as well as the composition of the student body. The dissent's reliance on this interest is, therefore, inconsistent with *Wygant*.

In addition to these defects, the democratic element of the integration interest fails on the dissent's own terms. The dissent again relies upon social science research to support the proposition that state-compelled racial mixing teaches children to accept cooperation and improves racial attitudes and race relations. Here again, though, the dissent overstates the data that supposedly support the interest.

The dissent points to data that indicate that "black and white students in desegregated schools are less racially prejudiced than those in segregated schools." *Post,* at 2821 – 2822 (internal quotation marks omitted). By the dissent's account, improvements in racial attitudes depend upon the increased contact between black and white students thought to occur in more racially balanced schools. There is no guarantee, however, that students of different races in the same school will actually spend time with one another. Schools frequently group students by academic ability as an aid to efficient instruction, but such groupings often result in classrooms with high concentrations of one race or another. See, ****769*** *e.g.,* Yonezawa, Wells, & Serna, Choosing Tracks: "Freedom of Choice" in Detracking Schools, 39 Am. Ed. Research J. 37, 38 (2002); Mickelson, Subverting Swann: First- and Second–Generation Segregation in the Charlotte–Mecklenburg Schools, 38 Am. Ed. Research J. 215, 233–234 (2001) (describing this effect in schools in Charlotte, North Carolina). In addition to classroom separation, students of different races within the same school may separate themselves socially. See Hallinan & Williams, Interracial Friendship Choices in Secondary Schools, 54 Am. Sociological Rev. 67, 72–76 (1989); see also Clotfelter, Interracial Contact in High School Extracurricular Activities, 34 Urban Rev. 25, 41–43 (2002). Therefore, even supposing interracial contact leads directly to improvements in racial attitudes and race relations, a program that assigns students of different races to the same schools might not capture those benefits. Simply putting students together under the same roof does not necessarily mean that the students will learn together or even interact.

Furthermore, it is unclear whether increased interracial contact improves racial *****2781*** attitudes and relations.[17] One researcher has stated that "the reviews of desegregation and intergroup relations were unable to come to any conclusion about what the probable effects of desegregation were ... [;] ****770*** virtually all of the reviewers determined that few, if any, firm

conclusions about the impact of desegregation on intergroup relations could be drawn." Schofield, School Desegregation and Intergroup Relations: A Review of the Literature, in 17 Review of Research in Education 335, 356 (G. Grant ed.1991). Some studies have even found that a deterioration in racial attitudes seems to result from racial mixing in schools. See N. St. John, School Desegregation Outcomes for Children 67–68 (1975) ("A glance at [the data] shows that for either race positive findings are less common than negative findings"); Stephan, The Effects of School Desegregation: An Evaluation 30 Years After *Brown*, in 3 Advances in Applied Social Psychology 181, 183–186 (M. Saks & L. Saxe eds.1986). Therefore, it is not nearly as apparent as the dissent suggests that increased interracial exposure automatically leads to improved racial attitudes or race relations.

> 17. Outside the school context, this Court's cases reflect the fact that racial mixing does not always lead to harmony and understanding. In *Johnson v. California,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), this Court considered a California prison policy that separated inmates racially. *Id.,* at 525–528, 125 S.Ct. 1141 (THOMAS, J., dissenting). That policy was necessary because of "numerous incidents of racial violence." *Id.,* at 502, 125 S.Ct. 1141 (opinion of the Court); *id*., at 532–534, 125 S.Ct. 1141 (THOMAS, J., dissenting). As a result of this Court's insistence on strict scrutiny of that policy, but see *id.,* at 538–547, 125 S.Ct. 1141, inmates in the California prisons were killed. See *Beard v. Banks,* 548 U.S. 521, 536 – 537, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006) (THOMAS, J., concurring in judgment) (noting that two were killed and hundreds were injured in race rioting subsequent to this Court's decision in *Johnson*).

Given our case law and the paucity of evidence supporting the dissent's belief that these plans improve race relations, no democratic element can support the integration interest.[18]

> 18. After discussing the "democratic element," the dissent repeats its assertion that the social science evidence supporting that interest is "sufficiently strong to permit a school board to determine ... that this interest is compelling." *Post,* at 2821 – 2822. Again, though, the school boards have no say in deciding whether an interest is compelling. Strict scrutiny of race-based government decisionmaking is more searching than *Chevron*-style administrative review for reasonableness. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

4

The dissent attempts to buttress the integration interest by claiming that it follows *a fortiori* from the interest this Court recognized as compelling in *Grutter*. *Post,* at 2822. Regardless of the merit of *Grutter,* the compelling interest recognized in that case cannot support these plans. *Grutter* recognized a compelling interest in a law school's attainment of a diverse student body. ***771** 539 U.S., at 328, 123 S.Ct. 2325. This interest was critically dependent upon features unique to higher education: "the expansive freedoms of speech and thought associated with the university environment," the "special niche in our constitutional tradition" occupied by universities, and "[t]he freedom of a university to make its own judgments as to education[,]

includ[ing] the selection of its student body." *Id.,* at 329, 123 S.Ct. 2325 (internal quotation marks omitted). None of these features is present in elementary and secondary schools. Those schools do not select their own students, and education in the elementary and secondary environment generally does not involve ***2782** the free interchange of ideas thought to be an integral part of higher education. See 426 F.3d, at 1208 (Bea, J., dissenting). Extending *Grutter* to this context would require us to cut that holding loose from its theoretical moorings. Thus, only by ignoring *Grutter*'s reasoning can the dissent claim that recognizing a compelling interest in these cases is an *a fortiori* application of *Grutter*.

C

Stripped of the baseless and novel interests the dissent asserts on their behalf, the school boards cannot plausibly maintain that their plans further a compelling interest. As I explained in *Grutter,* only "those measures the State must take to provide a bulwark against anarchy ... or to prevent violence" and "a government's effort to remedy past discrimination for which it is responsible" constitute compelling interests. 539 U.S., at 353, 351–352, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). Neither of the parties has argued—nor could they—that race-based student assignment is necessary to provide a bulwark against anarchy or to prevent violence. And as I explained above, the school districts have no remedial interest in pursuing these programs. See Part I–B, *supra*. Accordingly, the school boards cannot satisfy strict scrutiny. These plans are unconstitutional.

***772** III

Most of the dissent's criticisms of today's result can be traced to its rejection of the colorblind Constitution. See *post,* at 2815 – 2816. The dissent attempts to marginalize the notion of a colorblind Constitution by consigning it to me and Members of today's plurality.[19] See *ibid.;* see also *post,* at 2832 – 2833. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy:* "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (dissenting opinion). And my view was the rallying cry for the lawyers who litigated *Brown*. See, *e.g.,* Brief for Appellants in Nos. 1, 2, and 4, and for Respondents in No. 10 on Reargument in *Brown v. Board of Education,* O.T.1953, p. 65 ("That the Constitution is color blind is our dedicated belief"); Brief for Appellants in *Brown v. Board of Education,* O.T.1952, No. 8, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"); [20] ***773** see also ***2783** In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, p. X (1993) (remarks of Judge Motley) ("Marshall had a 'Bible' to which he turned during his most depressed moments. The 'Bible' would be known in the legal community as the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson,* 163 U.S. 537, 552, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). I do not know of any opinion which buoyed Marshall more in his pre- *Brown* days ...").

19. The dissent halfheartedly attacks the historical underpinnings of the colorblind Constitution. *Post,* at 2815 – 2816. I have no quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full

members. *Post,* at 2815 (citing *Slaughter–House Cases,* 16 Wall. 36, 71–72, 21 L.Ed. 394 (1873)). What the dissent fails to understand, however, is that the colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. See, *e.g.,* Part I–B, *supra.* Race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were therefore not inconsistent with the colorblind Constitution.

20. See also Juris. Statement in *Davis v. County School Board,* O.T.1952, No. 191, p. 8 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action"); Tr. of Oral Arg. in *Brown v. Board of Education,* O.T.1952, No. 8, p. 7 ("We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens"); Tr. of Oral Arg. in *Briggs v. Elliott* et al., O.T.1953, No. 2 etc., p. 50 ("[T]he state is deprived of any power to make any racial classifications in any governmental field").

The dissent appears to pin its interpretation of the Equal Protection Clause to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts. Such a view was ascendant in this Court's jurisprudence for several decades. It first appeared in *Plessy,* where the Court asked whether a state law providing for segregated railway cars was "a reasonable regulation." 163 U.S., at 550, 16 S.Ct. 1138. The Court deferred to local authorities in making its determination, noting that in inquiring into reasonableness "there must necessarily be a large discretion on the part of the legislature." *Ibid.* The Court likewise paid heed to societal practices, local expectations, and practical consequences by looking to "the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Ibid.* Guided by these principles, the Court concluded: "[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia." *Id.,* at 550–551, 16 S.Ct. 1138.

The segregationists in *Brown* embraced the arguments the Court endorsed in *Plessy*. Though *Brown* decisively rejected ***774** those arguments, today's dissent replicates them to a distressing extent. Thus, the dissent argues that "[e]ach plan embodies the results of local experience and community consultation." *Post,* at 2825 – 2826. Similarly, the segregationists made repeated appeals to societal practice and expectation. See, *e.g.,* Brief for Appellees on Reargument in *Briggs v. Elliott,* O.T.1953, No. 2, p. 76 ("[A] State has power to establish a school system which is capable of efficient administration, taking into account local problems and conditions"). [21] The dissent argues that "weight [must be ****2784** given] to a local school board's knowledge, expertise, and concerns," *post,* at 2826, and with equal vigor, the segregationists argued for

deference ***775** to local authorities. See, *e.g.,* Brief for Kansas on Reargument in *Brown v. Board of Education,* O.T.1953, No. 1, p. 14 ("We advocate only a concept of constitutional law that permits determinations of state and local policy to be made on state and local levels. We defend only the validity of the statute that enables the Topeka Board of Education to determine its own course"). [22] The dissent argues that today's decision "threatens to substitute for present calm a disruptive round of race-related litigation," *post,* at 2800 – 2801, and claims that today's decision "risks serious harm to the law and for the Nation," *post,* at 2835. The segregationists also relied upon the likely practical consequences of ending the state-imposed system of racial separation. See, *e.g.,* Brief ***776** for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, p. 37 ("Yet a holding that school segregation by race violates the Constitution will result in upheaval in all of those places not now subject to Federal judicial scrutiny. This Court has made many decisions of widespread effect; none would affect more people more directly in more fundamental interests and, in fact, cause more chaos in local government than a reversal of the decision in this case").[23] ****2785** And foreshadowing today's dissent, the segregationists most heavily relied upon judicial precedent. See, *e.g.,* Brief for Appellees on Reargument in *Briggs v. Elliott,* O.T.1953, No. 2, at 59 ("[I]t would be difficult indeed to find a case so favored by precedent as is the case for South Carolina here").[24]

21. See also Brief for Appellees in *Davis v. County School Board,* O.T.1952, No. 191, p. 1 ("[T]he Court is asked ... to outlaw the fixed policies of the several States which are based on local social conditions well known to the respective legislatures"); *id.,* at 9 ("For this purpose, Virginia history and present Virginia conditions are important"); Tr. of Oral Arg. in *Davis v. County School Board,* O.T.1952, No. 191, p. 57 ("[T]he historical background that exists, certainly in this Virginia situation, with all the strife and the history that we have shown in this record, shows a basis, a real basis, for the classification that has been made"); *id.,* at 69 (describing the potential abolition of segregation as "contrary to the customs, the traditions and the mores of what we might claim to be a great people, established through generations, who themselves are fiercely and irrevocably dedicated to the preservation of the white and colored races"). Accord, *post,* at 2836 – 2837 ("Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced"); *post,* at 2811 (emphasizing the importance of "local circumstances" and encouraging different localities to "try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs" (internal quotation marks omitted)); post, *at 2826 (emphasizing the school districts' "40–year history" during which both school districts have tried numerous approaches "to achieve more integrated schools");* post, *at 2834 ("[T]he histories of Louisville and Seattle reveal complex circumstances and a long tradition of conscientious efforts by local school boards"*).

22. See also Brief for Appellees in *Brown v. Board of Education,* O.T.1952, No. 8, p. 29 ("'It is universally held, therefore, that each state shall determine for itself, subject to the

observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power .... And in no field is this right of the several states more clearly recognized than in that of public education' " (quoting *Briggs v. Elliott,* 98 F.Supp. 529, 532 (E.D.S.C.1951))); Brief for Appellees in *Briggs v. Elliott,* O.T.1952, No. 101, p. 7 ("Local self-government in local affairs is essential to the peace and happiness of each locality and to the strength and stability of our whole federal system. Nowhere is this more profoundly true than in the field of education"); Tr. of Oral Arg. in *Briggs v. Elliott,* O.T.1952, No. 101, pp. 54–55 ("What is the great national and federal policy on this matter? Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not of all the activities of government the one which most nearly approaches the hearts and minds of people, the question of the education of their young? Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be ascertained before their children are forced into what may be an unwelcome contact?"). Accord, *post,* at 2826 ("[L]ocal school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils"); *post,* at 2835 – 2836 ("[W]hat of respect for democratic local decisionmaking by States and school boards?"); *ibid.* (explaining "that the Constitution grants local school districts a significant degree of leeway").

23. See also Brief for Appellees in Reply to Supp. Brief for the United States on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, p. 17 ("The Court is ... dealing with thousands of local school districts and schools. Is each to be the subject of litigation in the District Courts?"); Brief for Kansas on Reargument in *Brown v. Board of Education,* O.T.1953, No. 1, p. 51 ("The delicate nature of the problem of segregation and the paramount interest of the State of Kansas in preserving the internal peace and tranquility of its people indicates that this is a question which can best be solved on the local level, at least until Congress declares otherwise"). Accord, *post,* at 2833 ("At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes .... In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm"); *post,* at 2835 ("Indeed, the consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not"); *post,* at 2835 – 2836 (predicting "further litigation, aggravating race-related conflict").

24. See also Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm in *Davis v. County School Board,* O.T.1952, No. 191, p. 5 ("[I]t would be difficult to find from any field of law a legal principle more repeatedly and conclusively decided than the one sought to be raised by appellants"); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, pp. 46–47 ("If this case were to be decided solely on the basis of precedent, this brief could have been much more limited.

There is ample precedent in the decisions of this Court to uphold school segregation"); Brief for Petitioners in *Gebhart v. Belton,* O.T.1952, No. 448, p. 27 ("Respondents ask this Court to upset a long established and well settled principle recognized by numerous state Legislatures, and Courts, both state and federal, over a long period of years"); Tr. of Oral Arg. in *Briggs v. Elliott,* et al., O.T.1953, No. 2 etc., at 79 ("But be that doctrine what it may, somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance .... We relied on the fact that this Court had not once but seven times, I think it is, pronounced in favor of the separate but equal doctrine. We relied on the fact that the courts of last appeal of some sixteen or eighteen States have passed upon the validity of the separate but equal doctrine vis-a-vis the Fourteenth Amendment. We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia"); App. D. Brief for Appellees in *Briggs v. Elliott,* O.T.1952, No. 101 (collecting citations of state and federal cases "[w]hich [e]nunciate the [p]rinciple that [s]tate [l]aws [p]roviding for [r]acial [s]egregation in the [p]ublic [s]chools do not [c]onflict with the Fourteenth Amendment"). Accord, *post,* at 2811 – 2812 ("[T]he Court set forth in *Swann* a basic principle of constitutional law—a principle of law that has found wide acceptance in the legal culture" (internal quotation marks omitted)); *post,* at 2813 ("Lower state and federal courts had considered the matter settled and uncontroversial even before this Court decided *Swann* "); *post,* at 2813 – 2814 ("Numerous state and federal courts explicitly relied upon *Swann*'s guidance for decades to follow"); *post,* at 2814 – 2815 (stating "how lower courts understood and followed *Swann*'s enunciation of the relevant legal principle"); *post,* at 2816 ("The constitutional principle enunciated in *Swann,* reiterated in subsequent cases, and relied upon over many years, provides, and has widely been thought to provide, authoritative legal guidance"); *post,* at 2833 ("[T]oday's opinion will require setting aside the laws of several States and many local communities"); *post,* at 2835 – 2836 ("And what has happened to *Swann?* To *McDaniel?* To *Crawford?* To *Harris?* To *School Committee of Boston?* To *Seattle School Dist. No. 1?* After decades of vibrant life, they would all, under the plurality's logic, be written out of the law").

777 The similarities between the dissent's arguments and the segregationists' arguments do not stop there. Like the dissent, the segregationists repeatedly cautioned the Court to consider practicalities and not to embrace too theoretical a view of the Fourteenth Amendment.[25] And just as ***2786*** the dissent***778*** argues that the need for these programs will lessen over time, the segregationists claimed that reliance on segregation was lessening and might eventually end.[26]

25. Compare Brief for Appellees in *Davis v. County School Board,* O.T.1952, No. 191, at 16–17 (" 'It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered' " (quoting *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 110, 69 S.Ct. 463, 93 L.Ed. 533 (1949))); Brief for Appellees on Reargument in *Davis v. County School Board,*

O.T.1953, No. 4, at 76 ("The question is a practical one for them to solve; it is not subject to solution in the theoretical realm of abstract principles"); Tr. of Oral Arg. in *Briggs v. Elliot* et al., O.T.1953, No. 2 etc., at 86 ("[Y]ou cannot talk about this problem just in a vacuum in the manner of a law school discussion"), with *post,* at 2830 – 2831 ("The Founders meant the Constitution as a practical document").

26. Compare Brief for Kansas on Reargument in *Brown v. Board of Education,* O.T.1953, No. 1, at 57 ("[T]he people of Kansas ... are abandoning the policy of segregation whenever local conditions and local attitudes make it feasible"); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, at 76 ("As time passes, it may well be that segregation will end"), with *post,* at 2810 ("[T]hey use race-conscious criteria in limited and gradually diminishing ways"); *post,* at 2826 ("[E]ach plan's use of race-conscious elements is *diminished* compared to the use of race in preceding integration plans"); *post,* at 2829 – 2830 (describing the "historically diminishing use of race" in the school districts).

What was wrong in 1954 cannot be right today.[27] Whatever else the Court's rejection of the segregationists' arguments***779** in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. The fact that racial discrimination was preferable to the relevant communities was irrelevant to the *Brown* Court. And the fact that the state and local governments had relied on statements in this Court's opinions was irrelevant to the *Brown* Court. The same principles guide today's decision. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards' race-based plans because no contextual detail—or collection of contextual details, *post,* at 2800 – 2812—can "provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race." *Adarand,* 515 U.S., at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment).[28]

27. It is no answer to say that these cases can be distinguished from *Brown* because *Brown* involved invidious racial classifications whereas the racial classifications here are benign. See *post,* at 2833–2834. How does one tell when a racial classification is invidious? The segregationists in *Brown* argued that their racial classifications were benign, not invidious. See Tr. of Oral Arg. in *Briggs v. Elliott,* et al., O.T.1953, No. 2 etc., at 83 ("It [South Carolina] is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools"); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, at 82–83 ("Our many hours of research and investigation have led only to confirmation of our view that segregation by race in Virginia's public schools at this time not only does not offend the Constitution of the United States but serves to provide a better education for living for the children of both races"); Tr. of Oral Arg. in *Davis v. County School Board,* O.T.1952, No. 191, at 71 ("[T]o make such a transition, would undo what

we have been doing, and which we propose to continue to do for the uplift and advancement of the education of both races. It would stop this march of progress, this onward sweep”). It is the height of arrogance for Members of this Court to assert blindly that their motives are better than others.

28. See also *id.,* at 8–9 (“It has been urged that [these state laws and policies] derive validity as a consequence of a long duration supported and made possible by a long line of judicial decisions, including expressions in some of the decisions of this Court. At the same time, it is urged that these laws are valid as a matter of constitutionally permissible social experimentation by the States. On the matter of stare decisis, I submit that the duration of the challenged practice, while it is persuasive, is not controlling .... As a matter of social experimentation, the laws in question must satisfy the requirements of the Constitution. While this Court has permitted the States to legislate or otherwise officially act experimentally in the social and economic fields, it has always recognized and held that this power is subject to the limitations of the Constitution, and that the tests of the Constitution must be met”); Reply Brief for Appellants on Reargument in *Briggs v. Elliott* et al., O.T.1953, No. 2 etc., pp. 18–19 (“The truth of the matter is that this is an attempt to place local mores and customs above the high equalitarian principles of our Government as set forth in our Constitution and particularly the Fourteenth Amendment. This entire contention is tantamount to saying that the vindication and enjoyment of constitutional rights recognized by this Court as present and personal can be postponed whenever such postponement is claimed to be socially desirable”).

*****2787 *780*** In place of the colorblind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart.[29] See *post,* at 2815 – 2818. Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable. Even if current social theories favor classroom racial engineering as necessary to “solve the problems at hand,” *post,* at 2811, the Constitution enshrines principles independent of social theories. See *Plessy,* 163 U.S., at 559, 16 S.Ct. 1138 (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time .... But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. ... Our Constitution is color-blind, and neither knows nor tolerates classes among citizens”). Indeed, if our history has taught us anything, it has taught ****781*** us to beware of elites bearing racial theories.[30] See, *e.g.,* *****2788*** *Dred Scott v. Sandford,* 19 How. 393, 406, 407, 15 L.Ed. 691 (1857) (“[T]hey [members of the “negro African race”] had no rights which the white man was bound to respect”). Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be ****782*** nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow.

29. The dissent does not face the complicated questions attending its proposed

standard. For example, where does the dissent's principle stop? Can the government force racial mixing against the will of those being mixed? Can the government force black families to relocate to white neighborhoods in the name of bringing the races together? What about historically black colleges, which have "established traditions and programs that might disproportionately appeal to one race or another"? *United States v. Fordice,* 505 U.S. 717, 749, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992) (THOMAS, J., concurring). The dissent does not and cannot answer these questions because the contours of the distinction it propounds rest entirely in the eye of the beholder.

30. Justice BREYER's good intentions, which I do not doubt, have the shelf life of Justice BREYER's tenure. Unlike the dissenters, I am unwilling to delegate my constitutional responsibilities to local school boards and allow them to experiment with race-based decisionmaking on the assumption that their intentions will forever remain as good as Justice BREYER's. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) ("If men were angels, no government would be necessary"). Indeed, the racial theories endorsed by the Seattle School Board should cause the dissenters to question whether local school boards should be entrusted with the power to make decisions on the basis of race. The Seattle school district's Website formerly contained the following definition of "cultural racism": " 'Those aspects of society that overtly and covertly attribute value and normality to white people and whiteness, and devalue, stereotype, and label people of color as "other," different, less than, or render them invisible. Examples of these norms include defining white skin tones as nude or flesh colored, having a future time orientation, emphasizing individualism as opposed to a more collective ideology, defining one form of English as standard....' " See Harrell, School Web Site Removed: Examples of Racism Sparked Controversy, Seattle Post–Intelligencer, June 2, 2006, pp. B1, B5. After the site was removed, the district offered the comforting clarification that the site was not intended " 'to hold onto unsuccessful concepts such as melting pot or colorblind mentality.' " *Ibid.;* see also *ante,* at 2761, n. 14 (plurality opinion).

More recently, the school district sent a delegation of high school students to a "White Privilege Conference." See Equity and Race Relations White Privilege Conference, http:// www. seattle schools. org/ area/ equity and race/ white privilege conference. xml. One conference participant described "white privilege" as "an invisible package of unearned assets which I can count on cashing in each day, but about which I was meant to remain oblivious. White Privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks." See White Privilege Conference, Questions and Answers, http:// www. uccs. edu/ wpc/ faqs.htm; see generally Westneat, District's Obsessed with Race, Seattle Times, Apr. 1, 2007, p. B1 (describing racial issues in Seattle schools).

* * *

The plans before us base school assignment decisions on students' race. Because "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," such race-based decisionmaking is unconstitutional. *Plessy, supra,* at 559, 16 S.Ct. 1138 (Harlan, J., dissenting). I concur in THE CHIEF JUSTICE's opinion so holding.

Justice KENNEDY, concurring in part and concurring in the judgment.

The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled. But the solutions mandated by these school districts must themselves be lawful. To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome. In my view the state-mandated racial classifications at issue, official labels proclaiming the race of all persons in a broad class of citizens—elementary school students in one case, high school students in another—are unconstitutional as the cases now come to us.

I agree with THE CHIEF JUSTICE that we have jurisdiction to decide the cases before us and join Parts I and II of the Court's opinion. I also join Parts III–A and III–C for reasons provided below. My views do not allow me to join the balance of the opinion by THE CHIEF JUSTICE, which seems to me to be inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection ***783** Clause. Justice BREYER's dissenting opinion, on the other hand, rests on what in my respectful submission is a misuse and mistaken interpretation of our precedents. This leads it to advance propositions that, in my view, are both erroneous and in fundamental conflict with basic equal protection principles. As a consequence, this separate opinion is necessary to set forth my conclusions in the two cases before the Court.

I

The opinion of the Court and Justice BREYER's dissenting opinion (hereinafter ****2789** dissent) describe in detail the history of integration efforts in Louisville and Seattle. These plans classify individuals by race and allocate benefits and burdens on that basis; and as a result, they are to be subjected to strict scrutiny. See *Johnson v. California,* 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); *ante,* at 2751 – 2752. The dissent finds that the school districts have identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation. See *post,* at 2820 – 2824. The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here. See *ante,* at 2755 – 2759. For this reason, among others, I do not join Parts III–B and IV. Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.

It is well established that when a governmental policy is subjected to strict scrutiny, "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.' " *Johnson, supra,* at 505, 125 S.Ct. 1141 (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or

simple racial politics." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). And the inquiry ***784** into less restrictive alternatives demanded by the narrow tailoring analysis requires in many cases a thorough understanding of how a plan works. The government bears the burden of justifying its use of individual racial classifications. As part of that burden it must establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program. The Jefferson County Board of Education fails to meet this threshold mandate.

Petitioner Crystal Meredith challenges the district's decision to deny her son Joshua McDonald a requested transfer for his kindergarten enrollment. The district concedes it denied his request "under the guidelines," which is to say, on the basis of Joshua's race. Brief for Respondents in No. 05–915, p. 10; see also App. in No. 05–915, p. 97. Yet the district also maintains that the guidelines do not apply to "kindergartens," Brief for Respondents in No. 05–915, at 4, and it fails to explain the discrepancy. Resort to the record, including the parties' stipulation of facts, further confuses the matter. See App. in No. 05–915, at 43 ("Transfer applications can be denied because of lack of available space or, for students in grades other than Primary 1 (kindergarten), the racial guidelines in the District's current student assignment plan"); *id*., at 29 ("The student assignment plan does not apply to ... students in Primary 1"); see also Stipulation of Facts in No. 3:02–CV–00620–JGH; Doc. 32, Exh. 44, p. 6 (2003–04 Jefferson County Public Schools Elementary Student Assignment Application, Section B) ("Assignment is made to a school for Primary 1 (Kindergarten) through Grade Five as long as racial guidelines are maintained. If the Primary 1 (Kindergarten) placement does not enhance racial balance, a new application must be completed for Primary 2 (Grade One)").

The discrepancy identified is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. To the contrary, Jefferson County in its briefing has explained how and ***785** when it employs these classifications ****2790** only in terms so broad and imprecise that they cannot withstand strict scrutiny. See, *e.g*., Brief for Respondents in No. 05–915, at 4–10. While it acknowledges that racial classifications are used to make certain assignment decisions, it fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision. See *ibid*. *;* see also App. in No. 05–915, at 38, 42 (indicating that decisions are "based on ... the racial guidelines" without further explanation); *id*., at 81 (setting forth the blanket mandate that "[s]chools shall work cooperatively with each other and with central office to ensure that enrollment at all schools [in question] is within the racial guidelines annually and to encourage that the enrollment at all schools progresses toward the midpoint of the guidelines"); *id*., at 43, 76–77, 81–83; *McFarland v. Jefferson Cty. Public Schools,* 330 F.Supp.2d 834, 837–845, 855–862 (W.D.Ky.2004).

When litigation, as here, involves a "complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools," Brief for Respondents in No. 05–915, at 4, these ambiguities become all the more problematic in light of the contradictions and

confusions that result. Compare, *e.g*., App. in No. 05–915, at 37 (“Each [Jefferson County] school ... has a designated geographic attendance area, which is called the ‘resides area’ of the school[, and each] such school is the ‘resides school’ for those students whose parent's or guardian's residence address is within the school's geographic attendance area”); *id*., at 82 (“All elementary students ... shall be assigned to the school which serves the area in which they reside”); and Brief for Respondents in No. 05–915, at 5 (“There are no selection criteria for admission to [an elementary school student's] resides school, except attainment of the appropriate age and completion of ***786** the previous grade”), with App. in No. 05–915, at 38 (“Decisions to assign students to schools within each cluster are based on available space within the [elementary] schools and the racial guidelines in the District's current student assignment plan”); *id*., at 82 (acknowledging that a student may not be assigned to his or her resides school if it “has reached ... the extremes of the racial guidelines”).

One can attempt to identify a construction of Jefferson County's student assignment plan that, at least as a logical matter, complies with these competing propositions; but this does not remedy the underlying problem. Jefferson County fails to make clear to this Court—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and ad hoc manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.

As for the Seattle case, the school district has gone further in describing the methods and criteria used to determine assignment decisions on the basis of individual racial classifications. See, *e.g*., Brief for Respondents in No. 05–908, pp. 5–11. The district, nevertheless, has failed to make an adequate showing in at least one respect. It has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as “white,” it has employed the crude racial categories of “white” and ****2791** “non-white” as the basis for its assignment decisions. See, *e.g., id*., at 1–11.

The district has identified its purposes as follows: “(1) to promote the educational benefits of diverse school enrollments; (2) to reduce the potentially harmful effects of racial isolation by allowing students the opportunity to opt out of racially isolated schools; and (3) to make sure that racially segregated housing patterns did not prevent non-white ***787** students from having equitable access to the most popular over-subscribed schools.” *Id*., at 19. Yet the school district does not explain how, in the context of its diverse student population, a blunt distinction between “white” and “non-white” furthers these goals. As the Court explains, “a school with 50 percent Asian–American students and 50 percent white students but no African–American, Native–American, or Latino students would qualify as balanced, while a school with 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white students would not.” *Ante,* at 2754 – 2755; see also Brief for United States as *Amicus Curiae* in No. 05–908, pp. 13–14. Far from being narrowly tailored to its purposes, this system threatens to defeat its own ends, and the school district has provided no convincing explanation for its design. Other problems are evident in Seattle's system, but there is no need to address them

now. As the district fails to account for the classification system it has chosen, despite what appears to be its ill fit, Seattle has not shown its plan to be narrowly tailored to achieve its own ends; and thus it fails to pass strict scrutiny.

II

Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

This is by way of preface to my respectful submission that parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government***788** has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *ante,* at 2767 – 2768, is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

The statement by Justice Harlan that "[o]ur Constitution is color-blind" was most certainly justified in the context of his dissent in ***2792** *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The Court's decision in that case was a grievous error it took far too long to overrule. *Plessy,* of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. Cf. *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *id.,* at 387–388, 123 S.Ct. 2325 (KENNEDY, J., dissenting). If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a ***789** general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. See *Bush v. Vera,* 517 U.S. 952, 958, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race .... Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race' " (quoting *Adarand,* 515 U.S., at 213, 115 S.Ct. 2097)). Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, as explained, each has failed to provide the support necessary for that proposition. Cf. *Croson,* 488 U.S., at 501, 109 S.Ct. 706 ***790** "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). And individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest. See *id.,* at 519, 109 S.Ct. 706 (KENNEDY, J., concurring in part and concurring in judgment).

In the cases before us it is noteworthy that the number of students whose assignment depends on express racial classifications is limited. I join Part III–C of the Court's opinion because I agree that in the ****2793** context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means. These include the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter,* though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.

III

The dissent rests on the assumptions that these sweeping race-based classifications of persons are permitted by existing precedents; that its confident endorsement of race categories for each child in a large segment of the community presents no danger to individual freedom in

other, prospective realms of governmental regulation; and that the racial classifications used here cause no hurt or anger of the type the Constitution prevents. Each of these premises is, in my respectful view, incorrect.

A

The dissent's reliance on this Court's precedents to justify the explicit, sweeping, classwide racial classifications at issue ***791** here is a misreading of our authorities that, it appears to me, tends to undermine well-accepted principles needed to guard our freedom. And in his critique of that analysis, I am in many respects in agreement with THE CHIEF JUSTICE. The conclusions he has set forth in Part III–A of the Court's opinion are correct, in my view, because the compelling interests implicated in the cases before us are distinct from the interests the Court has recognized in remedying the effects of past intentional discrimination and in increasing diversity in higher education. See *ante,* at 2752 – 2753. As the Court notes, we recognized the compelling nature of the interest in remedying past intentional discrimination in *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992), and of the interest in diversity in higher education in *Grutter*. At the same time, these compelling interests, in my view, do help inform the present inquiry. And to the extent the plurality opinion can be interpreted to foreclose consideration of these interests, I disagree with that reasoning.

As to the dissent, the general conclusions upon which it relies have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling. The dissent's permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review) could invite widespread governmental deployment of racial classifications. There is every reason to think that, if the dissent's rationale were accepted, Congress, assuming an otherwise proper exercise of its spending authority or commerce power, could mandate either the Seattle or the Jefferson County plans nationwide. There seems to be no principled rule, moreover, to limit the dissent's rationale to the context of public schools. The dissent emphasizes local control, see *post,* at 2826 – 2827, the unique history of school desegregation, see *post,* at 2800 – 2801, and the fact that these plans make less use of race than prior plans, see *post,* at 2830 – 2831, but these factors seem more rhetorical than integral to the analytical structure of the opinion.

***792** This brings us to the dissent's reliance on the Court's opinions in *Gratz v. Bollinger,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), and *Grutter,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304. If ****2794** today's dissent said it was adhering to the views expressed in the separate opinions in *Gratz* and *Grutter,* see *Gratz,* 539 U.S., at 281, 123 S.Ct. 2411 (BREYER, J., concurring in judgment); *id.,* at 282, 123 S.Ct. 2411 (STEVENS, J., dissenting); *id.,* at 291, 123 S.Ct. 2411 (SOUTER, J., dissenting); *id.,* at 298, 123 S.Ct. 2411 (GINSBURG, J., dissenting); *Grutter, supra,* at 344, 123 S.Ct. 2325 (GINSBURG, J., concurring), that would be understandable, and likely within the tradition—to be invoked, in my view, in rare instances—that permits us to maintain our own positions in the face of *stare decisis* when fundamental points of doctrine are at stake. See, *e.g., Federal Maritime Comm'n v. South Carolina Ports Authority,* 535 U.S. 743, 770, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002) (STEVENS, J., dissenting). To say, however, that we must ratify the racial classifications here at issue based on the

majority opinions in *Gratz* and *Grutter* is, with all respect, simply baffling.

Gratz involved a system where race was not the entire classification. The procedures in *Gratz* placed much less reliance on race than do the plans at issue here. The issue in *Gratz* arose, moreover, in the context of college admissions where students had other choices and precedent supported the proposition that First Amendment interests give universities particular latitude in defining diversity. See *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 312–314, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). Even so the race factor was found to be invalid. *Gratz, supra,* at 251, 123 S.Ct. 2411. If *Gratz* is to be the measure, the racial classification systems here are *a fortiori* invalid. If the dissent were to say that college cases are simply not applicable to public school systems in kindergarten through high school, this would seem to me wrong, but at least an arguable distinction. Under no fair reading, though, can the majority opinion in *Gratz* be cited as authority to sustain the racial classifications under consideration here.

***793** The same must be said for the controlling opinion in *Grutter*. There the Court sustained a system that, it found, was flexible enough to take into account "all pertinent elements of diversity," 539 U.S., at 341, 123 S.Ct. 2325 (internal quotation marks omitted), and considered race as only one factor among many, *id*., at 340, 123 S.Ct. 2325. Seattle's plan, by contrast, relies upon a mechanical formula that has denied hundreds of students their preferred schools on the basis of three rigid criteria: placement of siblings, distance from schools, and race. If those students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application. That, though, is not the case. The only support today's dissent can draw from *Grutter* must be found in its various separate opinions, not in the opinion filed for the Court.

B

To uphold these programs the Court is asked to brush aside two concepts of central importance for determining the validity of laws and decrees designed to alleviate the hurt and adverse consequences resulting from race discrimination. The first is the difference between *de jure* and *de facto* segregation; the second, the presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals.

In the immediate aftermath of *Brown* the Court addressed other instances where laws and practices enforced *de jure* segregation. See, *e.g., Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (marriage); ***2795** *New Orleans City Park Improvement Assn. v. Detiege,* 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) *(per curiam)* (public parks); *Gayle v. Browder,* 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) *(per curiam)* (buses); *Holmes v. Atlanta,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) *(per curiam)* (golf courses); *Mayor and City Council of Baltimore v. Dawson,* 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) *(per curiam)* (beaches). But with reference to schools, the effect of the legal wrong proved most difficult to correct. To remedy the wrong, school districts that had been segregated by law had no choice, whether ***794** under court supervision or pursuant to voluntary desegregation efforts, but to resort to extraordinary measures including individual student and teacher assignment to schools based

on race. See, *e.g., Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 8–10, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); see also *Croson,* 488 U.S., at 519, 109 S.Ct. 706 (KENNEDY, J., concurring in part and concurring in judgment) (noting that racial classifications "may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause"). So it was, as the dissent observes, see *post,* at 2806 – 2807, that Louisville classified children by race in its school assignment and busing plan in the 1970's.

Our cases recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. School districts that had engaged in *de jure* segregation had an affirmative constitutional duty to desegregate; those that were *de facto* segregated did not. Compare *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 437–438, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), with *Milliken v. Bradley,* 418 U.S. 717, 745, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). The distinctions between *de jure* and *de facto* segregation extended to the remedies available to governmental units in addition to the courts. For example, in *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 274, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the plurality noted: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." The Court's decision in *Croson, supra,* reinforced the difference between the remedies available to redress *de facto* and *de jure* discrimination:

> "To accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream ***795** of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Id.,* at 505–506, 109 S.Ct. 706.

From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.

Yet, like so many other legal categories that can overlap in some instances, the constitutional distinction between *de jure* and *de facto* segregation has been thought ****2796** to be an important one. It must be conceded its primary function in school cases was to delimit the powers of the Judiciary in the fashioning of remedies. See, *e.g., Milliken, supra,* at 746, 94 S.Ct. 3112. The distinction ought not to be altogether disregarded, however, when we come to that most sensitive of all racial issues, an attempt by the government to treat whole classes of persons differently based on the government's systematic classification of each individual by race. There, too, the distinction serves as a limit on the exercise of a power that reaches to the

very verge of constitutional authority. Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake. The allocation of governmental burdens and benefits, contentious under any circumstances, is even more divisive when allocations are made on the basis of individual racial classifications. See, *e.g., Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750; *Adarand,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158.

Notwithstanding these concerns, allocation of benefits and burdens through individual racial classifications was found ***796** sometimes permissible in the context of remedies for *de jure* wrong. Where there has been *de jure* segregation, there is a cognizable legal wrong, and the courts and legislatures have broad power to remedy it. The remedy, though, was limited in time and limited to the wrong. The Court has allowed school districts to remedy their prior *de jure* segregation by classifying individual students based on their race. See *North Carolina Bd. of Ed. v. Swann,* 402 U.S. 43, 45–46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971). The limitation of this power to instances where there has been *de jure* segregation serves to confine the nature, extent, and duration of governmental reliance on individual racial classifications.

The cases here were argued upon the assumption, and come to us on the premise, that the discrimination in question did not result from *de jure* actions. And when *de facto* discrimination is at issue our tradition has been that the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here.

C

The dissent refers to an opinion filed by Judge Kozinski in one of the cases now before us, and that opinion relied upon an opinion filed by Chief Judge Boudin in a case presenting an issue similar to the one here. See *post,* at 2818 – 2819 (citing 426 F.3d 1162, 1193–1196 (C.A.9 2005) (concurring opinion), in turn citing *Comfort v. Lynn School Comm.,* 418 F.3d 1, 27, 29 (C.A.1 2005) (Boudin, C. J., concurring)). Though this may oversimplify the matter a bit, one of the main concerns underlying those opinions was this: If it is legitimate for school authorities to work to avoid racial isolation in their schools, must they do so only by indirection and general policies? Does the Constitution mandate this inefficient result? Why may the authorities not recognize the problem in candid fashion and solve it altogether through resort to direct assignments based on student racial classifications? So, the argument***797** proceeds, if race is the problem, then perhaps race is the solution.

The argument ignores the dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means. When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly****2797** is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but

instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.

The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it. Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.

* * *

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a ***798** compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.

That statement, to be sure, invites this response: A sense of stigma may already become the fate of those separated out by circumstances beyond their immediate control. But to this the replication must be: Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted.

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.

With this explanation I concur in the judgment of the Court.

Justice STEVENS, dissenting.

While I join Justice BREYER's eloquent and unanswerable dissent in its entirety, it is appropriate to add these words.

There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in ***799** *Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 1955). The first sentence in the concluding paragraph of his opinion states: "Before ****2798** *Brown,* schoolchildren were told where they could and could not go to school based on the color of their skin." *Ante,* at 2767 – 2768. This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], ... forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." [1] THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.[2] In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions. Compare *ante,* at 2767 ("history will be heard"), with *Brewer v. Quarterman,* 550 U.S. 286, 275, 127 S.Ct. 1706, 1720, 167 L.Ed.2d 622 (2007) (ROBERTS, C. J., dissenting) ("It is a familiar adage that history is written by the victors").

> 1. Le Lys Rouge (The Red Lily) 95 (W. Stephens transl. 6th ed.1922).
> 2. See, *e.g.,* J. Wilkinson, From *Brown* to *Bakke* 11 (1979) ("Everyone understands that *Brown v. Board of Education* helped deliver the Negro from over three centuries of legal bondage"); Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424–425 (1960) ("History, too, tells us that segregation was imposed on one race by the other race; consent was not invited or required. Segregation in the South grew up and is kept going because and only because the white race has wanted it that way—an incontrovertible fact which in itself hardly consorts with equality").

THE CHIEF JUSTICE rejects the conclusion that the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude.[3] The only justification for ***800** refusing to acknowledge the obvious importance of that difference is the citation of a few recent opinions—none of which even approached unanimity—grandly proclaiming that all racial classifications must be analyzed under "strict scrutiny." See, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Even today, two of our wisest federal judges have rejected such a wooden reading of the Equal Protection Clause in the context of school integration. See 426 F.3d 1162, 1193–1196 (C.A.9 2005) (Kozinski, J., concurring); *Comfort v. Lynn School Comm.,* 418 F.3d 1, 27–29 (C.A.1 2005) (Boudin, C. J., concurring). The Court's misuse of the three-tiered approach to equal protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution. See *Craig v. Boren,* 429 U.S. 190, 211, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (concurring opinion).[4]

> 3. I have long adhered to the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason. See, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 243, 248, n. 6, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (STEVENS, J., dissenting); *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 316, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (same). This distinction is critically important in the context of education. While the focus of our opinions is often on the benefits that minority schoolchildren receive from an integrated education, see, *e.g., ante,* at 2753 – 2754 (THOMAS, J., concurring), children of *all* races

benefit from integrated classrooms and playgrounds, see *Wygant,* 476 U.S., at 316, 106 S.Ct. 1842, 90 L.Ed.2d 260 ("[T]he fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it").

4. THE CHIEF JUSTICE twice cites my dissent in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). See *ante,* at 2752, 2758. In that case, I stressed the importance of confining a remedy for *past* wrongdoing to the members of the injured class. See 448 U.S., at 539, 100 S.Ct. 2758. The present cases, unlike *Fullilove* but like our decision in *Wygant,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, require us to "ask whether the Board[s'] action [s] advanc[e] the public interest in educating children for the *future,*" *id.*, at 313, 106 S.Ct. 1842 (STEVENS, J., dissenting) (emphasis added). See *ibid*. ("In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future"). See also *Adarand,* 515 U.S., at 261–262, 115 S.Ct. 2097 (STEVENS, J., dissenting) ("This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors").

*****2799*** If we look at cases decided during the interim between *Brown* and *Adarand,* we can see how a rigid adherence to ****801*** tiers of scrutiny obscures *Brown*'s clear message. Perhaps the best example is provided by our approval of the decision of the Supreme Judicial Court of Massachusetts in 1967 upholding a state statute mandating racial integration in that State's school system. See *School Comm. of Boston v. Board of Education,* 352 Mass. 693, 227 N.E.2d 729.[5] Rejecting arguments comparable to those that the plurality accepts today,[6] that court noted: "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based ****802*** on race, founder on unsuspected shoals in the Fourteenth Amendment." *Id.,* at 698, 227 N.E.2d, at 733 (footnote omitted).

5. THE CHIEF JUSTICE states that the Massachusetts racial imbalance Act did not require express classifications. See *ante,* at 2762 – 2763, n. 16. This is incorrect. The Massachusetts Supreme Judicial Court expressly stated:

> "The racial imbalance act requires the school committee of every municipality annually to submit statistics showing the percentage of nonwhite pupils in all public schools and in each school. Whenever the board finds that racial imbalance exists in a public school, it shall give written notice to the appropriate school committee, which shall prepare a plan to eliminate imbalance and file a copy with the board. 'The term "racial imbalance" refers to a ratio between nonwhite and other students in public schools which is sharply out of balance with the racial composition of the society in which nonwhite children study,

serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of nonwhite students in any public school is in excess of fifty per cent of the total number of students in such school.' " 352 Mass., at 695, 227 N.E.2d, at 731.

6. Compare *ante,* at 2767 ("It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954"), with Juris. Statement in *School Comm. of Boston v. Board of Education,* O.T.1967, No. 759, p. 11 ("It is implicit in *Brown v. Board of Education*[,] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873[(1954)], that color or race is a constitutionally impermissible standard for the assignment of school children to public schools. We construe *Brown* as endorsing Mr. Justice Harlan's classical statement in *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 [(1896) (dissenting opinion)]: 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens' ").

Invoking our mandatory appellate jurisdiction,[7] the Boston plaintiffs prosecuted an appeal in this Court. Our ruling on the merits simply stated that the appeal was "dismissed for want of a substantial federal question." *School Comm. of Boston v. Board of Education,* 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778 (1968) *(per curiam).* That decision not only expressed our appraisal of the merits of the appeal, but it constitutes a precedent that the Court *****2800*** overrules today. The subsequent statements by the unanimous Court in *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), by then-Justice Rehnquist in chambers in *Bustop, Inc. v. Los Angeles Bd. of Ed.,* 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978), and by the host of state–court decisions cited by Justice BREYER, see *post,* at 2813 – 2815,[8] were ****803*** fully consistent with that disposition. Unlike today's decision, they were also entirely loyal to *Brown.*

7. In 1968 our mandatory jurisdiction was defined by the provision of the 1948 Judicial Code then codified at 28 U.S.C. § 1257, see 62 Stat. 929; that provision was repealed in 1988, see 102 Stat. 662.

8. For example, prior to our decision in *School Comm. of Boston,* the Illinois Supreme Court had issued an unpublished opinion holding unconstitutional a similar statute aimed at eliminating racial imbalance in public schools. See Juris. Statement in *School Comm. of Boston v. Board of Education,* O.T.1967, No. 759, at 9 ("Unlike the Massachusetts Court, the Illinois Supreme Court has recently held its law to eliminate racial imbalance unconstitutional on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment"); *ibid.,* n. 1. However, shortly after we dismissed the Massachusetts suit for want of a substantial federal question, the Illinois Supreme Court reversed course and upheld its statute in the published decision that Justice BREYER extensively quotes in his dissent. See *Tometz v. Board of Ed., Waukegan City School Dist. No. 61,* 39 Ill.2d 593, 237 N.E.2d 498 (1968). In so doing, the Illinois Supreme Court acted in explicit reliance on our decision in *School Comm. of Boston.* See 39 Ill.2d,

> at 599–600, 237 N.E.2d, at 502 (“Too, the United States Supreme Court on January 15, 1968, dismissed an appeal in *School Committee of Boston v. Board of Education,* (Mass.1967) 352 Mass. 693, 227 N.E.2d 729, which challenged the statute providing for elimination of racial imbalance in public schools ‘for want of a substantial federal question.’ 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778”).

The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interests at stake in such cases are “compelling.” We have approved of “narrowly tailored” plans that are no less race conscious than the plans before us. And we have understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought ***804** to make a ****2801** reality. This cannot be justified in the name of the Equal Protection Clause.

I

Facts

The historical and factual context in which these cases arise is critical. In *Brown,* this Court held that the government's segregation of schoolchildren by race violates the Constitution's promise of equal protection. The Court emphasized that “education is perhaps the most important function of state and local governments.” 347 U.S., at 493, 74 S.Ct. 686. And it thereby set the Nation on a path toward public school integration.

In dozens of subsequent cases, this Court told school districts previously segregated by law what they must do at a minimum to comply with *Brown*'s constitutional holding. The measures

required by those cases often included race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers. See, *e.g., Columbus Bd. of Ed. v. Penick,* 443 U.S. 449, 455, n. 3, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); *Davis v. Board of School Comm'rs of Mobile Cty.,* 402 U.S. 33, 37–38, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 441–442, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

Beyond those minimum requirements, the Court left much of the determination of how to achieve integration to the judgment of local communities. Thus, in respect to race-conscious desegregation measures that the Constitution *permitted,* but did not *require* (measures similar to those at issue here), this Court unanimously stated:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within ***805** the broad discretionary powers of school authorities*." *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (emphasis added).

As a result, different districts—some acting under court decree, some acting in order to avoid threatened lawsuits, some seeking to comply with federal administrative orders, some acting purely voluntarily, some acting after federal courts had dissolved earlier orders—adopted, modified, and experimented with hosts of different kinds of plans, including race-conscious plans, all with a similar objective: greater racial integration of public schools. See F. Welch & A. Light, New Evidence on School Desegregation, p. v (1987) (hereinafter Welch) (prepared for the Commission on Civil Rights) (reviewing a sample of 125 school districts, constituting 20% of national public school enrollment, that had experimented with nearly 300 different plans over 18 years). The techniques that different districts have employed range "from voluntary transfer programs to mandatory reassignment." *Id.,* at 21. And the design of particular plans has been "dictated by both the law and the specific needs of the district." *Ibid*.

Overall these efforts brought about considerable racial integration. More recently, however, progress has stalled. Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the Nation (from 57% *****2802*** to 69% in the South). Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the Nation (from 78% to 23% in the South), but that too reversed direction, rising by the year 2000 from 33% to 37% in the Nation (from 23% to 31% in the South). As of 2002, almost 2.4 million students, or over 5% of all public school enrollment, attended schools with a white population of less than 1%. Of these, ****806*** 2.3 million were black and Latino students, and only 72,000 were white. Today, more than one in six black children attend a school that is 99%–100% minority. See Appendix A, *infra.* In light of the evident risk of a return to school systems that are in fact (though not in law) resegregated, many school

districts have felt a need to maintain or to extend their integration efforts.

The upshot is that myriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about integration, or preventing retrogression. Seattle and Louisville are two such districts, and the histories of their present plans set forth typical school integration stories.

I describe those histories at length in order to highlight three important features of these cases. First, the school districts' plans serve "compelling interests" and are "narrowly tailored" on any reasonable definition of those terms. Second, the distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, *e.g.,* by housing patterns or generalized societal discrimination) is meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction. Third, real-world efforts to substitute racially diverse for racially segregated schools (however caused) are complex, to the point where the Constitution cannot plausibly be interpreted to rule out categorically all local efforts to use means that are "conscious" of the race of individuals.

In both Seattle and Louisville, the local school districts began with schools that were highly segregated in fact. In both cities, plaintiffs filed lawsuits claiming unconstitutional segregation. In Louisville, a Federal District Court found that school segregation reflected pre- *Brown* state laws separating the races. In Seattle, the plaintiffs alleged that school segregation unconstitutionally reflected not only generalized societal discrimination and residential housing patterns,***807** but also *school board policies and actions* that had helped to create, maintain, and aggravate racial segregation. In Louisville, a federal court entered a remedial decree. In Seattle, the parties settled after the school district pledged to undertake a desegregation plan. In both cities, the school boards adopted plans designed to achieve integration by bringing about more racially diverse schools. In each city, the school board modified its plan several times in light of, for example, hostility to busing, the threat of resegregation, and the desirability of introducing greater student choice. And in each city, the school boards' plans have evolved over time in ways that progressively *diminish* the plans' use of explicit race-conscious criteria.

The histories that follow set forth these basic facts. They are based upon numerous sources, which for ease of exposition I have cataloged, along with their corresponding citations, at Appendix B, *infra.*

A

Seattle

1. Segregation, 1945 to 1956. During and just after World War II, significant ****2803** numbers of black Americans began to make Seattle their home. Few black residents lived outside the central section of the city. Most worked at unskilled jobs. Although black students made up about 3% of the total Seattle population in the mid–1950's, nearly all black children attended schools where a majority of the population was minority. Elementary schools in central Seattle

were between 60% and 80% black; Garfield, the central district high school, was more than 50% minority; schools outside the central and southeastern sections of Seattle were virtually all white.

2. Preliminary Challenges, 1956 to 1969. In 1956, a memo for the Seattle School Board reported that school segregation reflected not only segregated housing patterns but also school board policies that permitted white students to ***808*** transfer out of black schools while restricting the transfer of black students into white schools. In 1958, black parents whose children attended Harrison Elementary School (with a black student population of over 75%) wrote the Seattle board, complaining that the " 'boundaries for the Harrison Elementary School were not set in accordance with the long-established standards of the School District ... but were arbitrarily set with an end to excluding colored children from McGilvra School, which is adjacent to the Harrison school district.' "

In 1963, at the insistence of the National Association for the Advancement of Colored People (NAACP) and other community groups, the school board adopted a new race-based transfer policy. The new policy added an explicitly racial criterion: If a place exists in a school, then, irrespective of other transfer criteria, a white student may transfer to a predominantly black school, and a black student may transfer to a predominantly white school.

At that time, one high school, Garfield, was about two-thirds minority; eight high schools were virtually all white. In 1963, the transfer program's first year, 239 black students and 8 white students transferred. In 1969, about 2,200 (of 10,383 total) of the district's black students and about 400 of the district's white students took advantage of the plan. For the next decade, annual program transfers remained at approximately this level.

3. The NAACP's First Legal Challenge and Seattle's Response, 1966 to 1977. In 1966, the NAACP filed a federal lawsuit against the school board, claiming that the board had "unlawfully and unconstitutionally" "establish[ed]" and "maintain [ed]" a system of "racially segregated public schools." The complaint said that 77% of black public elementary school students in Seattle attended 9 of the city's 86 elementary schools and that 23 of the remaining schools had no black students at all. Similarly, of the 1,461 black students***809*** enrolled in the 12 senior high schools in Seattle, 1,151 (or 78.8%) attended 3 senior high schools, and 900 (61.6%) attended a single school, Garfield.

The complaint charged that the school board had brought about this segregated system in part by "mak[ing] and enforc[ing]" certain "rules and regulations," in part by "drawing ... boundary lines" and "executing school attendance policies" that would create and maintain "predominantly Negro or non-white schools," and in part by building schools "in such a manner as to restrict the Negro plaintiffs and the class they represent to predominantly Negro or non-white schools." The complaint also charged that the board discriminated in assigning teachers.

The board responded to the lawsuit by introducing a plan that required race-based transfers and mandatory busing. The plan created three new middle schools ****2804*** at three school

buildings in the predominantly white north end. It then created a “mixed” student body by assigning to those schools students who would otherwise attend predominantly white, or predominantly black, schools elsewhere. It used explicitly racial criteria in making these assignments (*i.e.,* it deliberately assigned to the new middle schools black students, not white students, from the black schools and white students, not black students, from the white schools). And it used busing to transport the students to their new assignments. The plan provoked considerable local opposition. Opponents brought a lawsuit. But eventually a state court found that the mandatory busing was lawful.

In 1976–1977, the plan involved the busing of about 500 middle school students (300 black students and 200 white students). Another 1,200 black students and 400 white students participated in the previously adopted voluntary transfer program. Thus about 2,000 students out of a total district population of about 60,000 students were involved in one or the other transfer program. At that time, about ***810** 20% or 12,000 of the district's students were black. And the board continued to describe 26 of its 112 schools as “segregated.”

4. The NAACP's Second Legal Challenge, 1977. In 1977, the NAACP filed another legal complaint, this time with the federal Department of Health, Education, and Welfare's Office for Civil Rights (OCR). The complaint alleged that the Seattle School Board had created or perpetuated unlawful racial segregation through, *e.g.,* certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts.

The OCR and the school board entered into a formal settlement agreement. The agreement required the board to implement what became known as the “Seattle Plan.”

5. The Seattle Plan: Mandatory Busing, 1978 to 1988. The board began to implement the Seattle Plan in 1978. This plan labeled “racially imbalanced” any school at which the percentage of black students exceeded by more than 20% the minority population of the school district as a whole. It applied that label to 26 schools, including 4 high schools—Cleveland (72.8% minority), Franklin (76.6% minority), Garfield (78.4% minority), and Rainier Beach (58.9% minority). The plan paired (or “triaded”) “imbalanced” black schools with “imbalanced” white schools. It then placed some grades (say, third and fourth grades) at one school building and other grades (say, fifth and sixth grades) at the other school building. And it thereby required, for example, all fourth grade students from the previously black and previously white schools first to attend together what would now be a “mixed” fourth grade at one of the school buildings and then the next year to attend what would now be a “mixed” fifth grade at the other school building.

***811** At the same time, the plan provided that a previous “black” school would remain about 50% black, while a previous “white” school would remain about two-thirds white. It was consequently necessary to decide with some care *which* students would attend the new “mixed” grade. For this purpose, administrators cataloged the racial makeup of each

neighborhood housing block. The school district met its percentage goals by assigning to the new *****2805*** "mixed" school an appropriate number of "black" housing blocks and "white" housing blocks. At the same time, transport from house to school involved extensive busing, with about half of all students attending a school other than the one closest to their home.

The Seattle Plan achieved the school integration that it sought. Just prior to the plan's implementation, for example, 4 of Seattle's 11 high schools were "imbalanced," *i.e.,* almost exclusively "black" or almost exclusively "white." By 1979, only two were out of "balance." By 1980, only Cleveland remained out of "balance" (as the board defined it) and that by a mere two students.

Nonetheless, the Seattle Plan, due to its busing, provoked serious opposition within the State. See generally *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 461–466, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). Thus, Washington state voters enacted an initiative that amended state law to require students to be assigned to the schools closest to their homes. *Id.,* at 462, 102 S.Ct. 3187. The Seattle School Board challenged the constitutionality of the initiative. *Id.,* at 464, 102 S.Ct. 3187. This Court then held that the initiative—which would have prevented the Seattle Plan from taking effect—violated the Fourteenth Amendment. *Id.,* at 470, 102 S.Ct. 3187.

6. Student Choice, 1988 to 1998. By 1988, many white families had left the school district, and many Asian families had moved in. The public school population had fallen from about 100,000 to less than 50,000. The racial makeup of the school population amounted to 43% white, 24% black, and 23% Asian or Pacific Islander, with Hispanics and Native ****812*** Americans making up the rest. The cost of busing, the harm that members of all racial communities feared that the Seattle Plan caused, the desire to attract white families back to the public schools, and the interest in providing greater school choice led the board to abandon busing and to substitute a new student assignment policy that resembles the plan now before us.

The new plan permitted each student to choose the school he or she wished to attend, subject to race-based constraints. In respect to high schools, for example, a student was given a list of a subset of schools, carefully selected by the board to balance racial distribution in the district by including neighborhood schools and schools in racially different neighborhoods elsewhere in the city. The student could then choose among those schools, indicating a first choice, and other choices the student found acceptable. In making an assignment to a particular high school, the district would give first preference to a student with a sibling already at the school. It gave second preference to a student whose race differed from a race that was "over-represented" at the school (*i.e.,* a race that accounted for a higher percentage of the school population than of the total district population). It gave third preference to students residing in the neighborhood. It gave fourth preference to students who received child care in the neighborhood. In a typical year, say, 1995, about 20,000 potential high school students participated. About 68% received their first choice. Another 16% received an "acceptable" choice. A further 16% were assigned to a school they had not listed.

7. The Current Plan, 1999 to the Present. In 1996, the school board adopted the present plan, which began in 1999. In doing so, it sought to deemphasize the use of racial criteria and to increase the likelihood that a student would receive an assignment at his first or second choice high school. The district retained a racial tiebreaker*****2806*** for oversubscribed schools, which takes effect only if the school's minority or ****813*** majority enrollment falls outside of a 30% range centered on the minority/majority population ratio within the district. At the same time, all students were free subsequently to transfer from the school at which they were initially placed to a different school of their choice without regard to race. Thus, at worst, a student would have to spend one year at a high school he did not pick as a first or second choice.

The new plan worked roughly as expected for the two school years during which it was in effect (1999–2000 and 2000–2001). In the 2000–2001 school year, for example, with the racial tiebreaker, the entering ninth grade class at Franklin High School had a 60% minority population; without the racial tiebreaker that same class at Franklin would have had an almost 80% minority population. (We consider only the ninth grade since only students entering that class were subject to the tiebreaker, and because the plan was not in place long enough to change the composition of an entire school.) In the year 2005–2006, by which time the racial tiebreaker had not been used for several years, Franklin's overall minority enrollment had risen to 90%. During the period the tiebreaker applied, it typically affected about 300 students per year. Between 80% and 90% of all students received their first choice assignment; between 89% and 97% received their first or second choice assignment.

Petitioner Parents Involved in Community Schools objected to Seattle's most recent plan under the State and Federal Constitutions. In due course, the Washington Supreme Court, the Federal District Court, and the Court of Appeals for the Ninth Circuit (sitting en banc) rejected the challenge and found Seattle's plan lawful.

B

Louisville

1. Before the Lawsuit, 1954 to 1972. In 1956, two years after *Brown* made clear that Kentucky could no longer require racial segregation by law, the Louisville Board of Education****814*** created a geography-based student assignment plan designed to help achieve school integration. At the same time, it adopted an open transfer policy under which approximately 3,000 of Louisville's 46,000 students applied for transfer. By 1972, however, the Louisville School District remained highly segregated. Approximately half the district's public school enrollment was black; about half was white. Fourteen of the district's nineteen nonvocational middle and high schools were close to totally black or totally white. Nineteen of the district's forty-six elementary schools were between 80% and 100% black. Twenty-one elementary schools were between roughly 90% and 100% white.

2. Court–Imposed Guidelines and Busing, 1972 to 1991. In 1972, civil rights groups and parents, claiming unconstitutional segregation, sued the Louisville Board of Education in federal court. The original litigation eventually became a lawsuit against the Jefferson County School System, which in April 1975 absorbed Louisville's schools and combined them with those of the

surrounding suburbs. (For ease of exposition, I shall still use “Louisville” to refer to what is now the combined districts.) After preliminary rulings and an eventual victory for the plaintiffs in the Court of Appeals for the Sixth Circuit, the District Court in July 1975 entered an order requiring desegregation.

The order's requirements reflected a (newly enlarged) school district student population of about 135,000, approximately ***2807** 20% of whom were black. The order required the school board to create and to maintain schools with student populations that ranged, for elementary schools, between 12% and 40% black, and for secondary schools (with one exception), between 12.5% and 35% black.

The District Court also adopted a complex desegregation plan designed to achieve the order's targets. The plan required redrawing school attendance zones, closing 12 schools, and busing groups of students, selected by race and the first letter of their last names, to schools outside their immediate ***815*** neighborhoods. The plan's initial busing requirements were extensive, involving the busing of 23,000 students and a transportation fleet that had to “operate from early in the morning until late in the evening.” For typical students, the plan meant busing for several years (several more years for typical black students than for typical white students). The following notice, published in a Louisville newspaper in 1976, gives a sense of how the district's race-based busing plan operated in practice:

[image omitted]

Louisville Courier–Journal, June 18, 1976 (reproduced in J. Wilkinson, From *Brown* to *Bakke:* The Supreme Court and School Integration 1954–1978, p. 176 (1979)).

The District Court monitored implementation of the plan. In 1978, it found that the plan had brought all of Louisville's schools within its “ ‘guidelines' for racial composition” for “at least a substantial portion of the [previous] three years.” It removed the case from its active docket while stating that it expected the board “to continue to implement those portions of the desegregation order which are by their nature of a continuing effect.”

816 By 1984, after several schools had fallen out of compliance with the order's racial percentages due to shifting demographics in the community, the school board revised its desegregation plan. In doing so, the board created a new racial “guideline,” namely a “floating range of 10% above and 10% below the countywide average for the different grade levels.” The board simultaneously redrew district boundaries so that middle school students could attend the same school for three years and high school students for four years. It added “magnet” programs at two high schools. And it adjusted its alphabet-based system for grouping and busing students. The board estimated ***2808** that its new plan would lead to annual reassignment (with busing) of about 8,500 black students and about 8,000 white students.

3. Student Choice and Project Renaissance, 1991 to 1996. By 1991, the board had concluded that assigning elementary school students to two or more schools during their elementary

school years had proved educationally unsound and, if continued, would undermine Kentucky's newly adopted Education Reform Act. It consequently conducted a nearly year-long review of its plan. In doing so, it consulted widely with parents and other members of the local community, using public presentations, public meetings, and various other methods to obtain the public's input. At the conclusion of this review, the board adopted a new plan, called “Project Renaissance,” that emphasized student choice.

Project Renaissance again revised the board's racial guidelines. It provided that each elementary school would have a black student population of between 15% and 50%; each middle and high school would have a black population and a white population that fell within a range, the boundaries of which were set at 15% above and 15% below the general student population percentages in the county at that grade level. The plan then drew new geographical school assignment zones designed to satisfy these guidelines; the district could reassign students if particular schools failed to meet ***817** the guidelines and was required to do so if a school repeatedly missed these targets.

In respect to elementary schools, the plan first drew a neighborhood line around each elementary school, and it then drew a second line around groups of elementary schools (called “clusters”). It initially assigned each student to his or her neighborhood school, but it permitted each student freely to transfer between elementary schools within each cluster *provided that* the transferring student (1) was black if transferring from a predominantly black school to a predominantly white school, or (2) was white if transferring from a predominantly white school to a predominantly black school. Students could also apply to attend magnet elementary schools or programs.

The plan required each middle school student to be assigned to his or her neighborhood school unless the student applied for, and was accepted by, a magnet middle school. The plan provided for “open” high school enrollment. Every 9th or 10th grader could apply to any high school in the system, and the high school would accept applicants according to set criteria—one of which consisted of the need to attain or remain in compliance with the plan's racial guidelines. Finally, the plan created two new magnet schools, one each at the elementary and middle school levels.

4. The Current Plan: Project Renaissance Modified, 1996 to 2003. In 1995 and 1996, the Louisville School Board, with the help of a special “Planning Team,” community meetings, and other official and unofficial study groups, monitored the effects of Project Renaissance and considered proposals for improvement. Consequently, in 1996, the board modified Project Renaissance, thereby creating the present plan.

At the time, the district's public school population was approximately 30% black. The plan consequently redrew the racial “guidelines,” setting the boundaries at 15% to 50% black for *all* schools. It again redrew school assignment boundaries. And it expanded the transfer opportunities ***818** available to elementary and middle school pupils. The plan forbade transfers, however, if the transfer would lead to a school population outside the guidelines

range, *i.e.,* if it would create a school ****2809*** where fewer than 15% or more than 50% of the students were black.

The plan also established "Parent Assistance Centers" to help parents and students navigate the school selection and assignment process. It pledged the use of other resources in order to "encourage all schools to achieve an African–American enrollment equivalent to the average district-wide African–American enrollment at the school's respective elementary, middle or high school level." And the plan continued use of magnet schools.

In 1999, several parents brought a lawsuit in federal court attacking the plan's use of racial guidelines at one of the district's magnet schools. They asked the court to dissolve the desegregation order and to hold the use of *magnet* school racial guidelines unconstitutional. The board opposed dissolution, arguing that "the old dual system" had left a "demographic imbalance" that "prevent[ed] dissolution." In 2000, after reviewing the present plan, the District Court dissolved the 1975 order. It wrote that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes." It added that the Louisville School Board had "treated the ideal of an integrated system as much more than a legal obligation—they consider it a positive, desirable policy and an essential element of any well-rounded public school education."

The court also found that the magnet programs available at the high school in question were "not available at other high schools" in the school district. It consequently held unconstitutional the use of race-based "targets" to govern admission to *magnet schools*. And it ordered the board not to control access to those scarce programs through the use of racial targets.

****819*** *5. The Current Lawsuit, 2003 to the Present.* Subsequent to the District Court's dissolution of the desegregation order (in 2000) the board simply continued to implement its 1996 plan as modified to reflect the court's magnet school determination. In 2003, the petitioner now before us, Crystal Meredith, brought this lawsuit challenging the plan's unmodified portions, *i.e.,* those portions that dealt with *ordinary,* not magnet, schools. Both the District Court and the Court of Appeals for the Sixth Circuit rejected Meredith's challenge and held the unmodified aspects of the plan constitutional.

C

The histories I have set forth describe the extensive and ongoing efforts of two school districts to bring about greater racial integration of their public schools. In both cases the efforts were in part remedial. Louisville began its integration efforts in earnest when a federal court in 1975 entered a school desegregation order. Seattle undertook its integration efforts in response to the filing of a federal lawsuit and as a result of its settlement of a segregation complaint filed with the federal OCR.

The plans in both Louisville and Seattle grow out of these earlier remedial efforts. Both districts faced problems that reflected initial periods of severe racial segregation, followed by such remedial efforts as busing, followed by evidence of resegregation, followed by a need to end

busing and encourage the return of, *e.g.,* suburban students through increased student choice. When formulating the plans under review, both districts drew upon their considerable experience with earlier plans, having revised their policies periodically in light of that experience. Both districts rethought their methods over time and explored a wide range of other means, including non-race-conscious policies. Both districts also ****2810*** considered elaborate studies and consulted widely within their communities.

****820*** Both districts sought greater racial integration for educational and democratic, as well as for remedial, reasons. Both sought to achieve these objectives while preserving their commitment to other educational goals, *e.g.,* district wide commitment to high quality public schools, increased pupil assignment to neighborhood schools, diminished use of busing, greater student choice, reduced risk of white flight, and so forth. Consequently, the present plans expand student choice; they limit the burdens (including busing) that earlier plans had imposed upon students and their families; and they use race-conscious criteria in limited and gradually diminishing ways. In particular, they use race-conscious criteria only to mark the outer bounds of broad population-related ranges.

The histories also make clear the futility of looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of "race-conscious" criteria. Justice THOMAS suggests that it will be easy to identify *de jure* segregation because "[i]n most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races." *Ante,* at 2771, n. 4 (concurring opinion). But our precedent has recognized that *de jure* discrimination can be present even in the absence of racially explicit laws. See *Yick Wo v. Hopkins,* 118 U.S. 356, 373–374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

No one here disputes that Louisville's segregation was *de jure*. But what about Seattle's? Was it *de facto? De jure?* A mixture? Opinions differed. Or is it that a prior federal court had not adjudicated the matter? Does that make a difference? Is Seattle free on remand to say that its schools were *de jure* segregated, just as in 1956 a memo for the school board admitted? The plurality does not seem confident as to the answer. Compare *ante,* at 2752 (opinion of the Court) ("[T]he Seattle public schools *have not shown* ****821*** that they were ever segregated by law" (emphasis added)), with *ante*, at 2761 – 2762 (plurality opinion) (assuming "the Seattle school district was never segregated by law," but seeming to concede that a school district with *de jure* segregation need not be subject to a court order to be allowed to engage in race-based remedial measures).

A court finding of *de jure* segregation cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated *by law* voluntarily desegregated their schools *without a court order*—just as Seattle did. See, *e.g.,* Coleman, Desegregation of the Public Schools in Kentucky—The Second Year After the Supreme Court's Decision, 25 J. Negro Educ. 254, 256, 261 (1956) (40 of Kentucky's 180 school districts began desegregation without court orders); Branton, Little Rock Revisited:

Desegregation to Resegregation, 52 J. Negro Educ. 250, 251 (1983) (similar in Arkansas); Bullock & Rodgers, Coercion to Compliance: Southern School Districts and School Desegregation Guidelines, 38 J. Politics 987, 991 (1976) (similar in Georgia); *McDaniel v. Barresi,* 402 U.S. 39, 40, n. 1, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971) (Clarke County, Georgia). See also Letter from Robert F. Kennedy, Attorney General, to John F. Kennedy, President (Jan. 24, 1963) (hereinafter Kennedy Report), online at http:// www. gilder lehrman. org/ search/ collection _ pdfs/ 05/ 63/ 0/ 05630. pdf (all Internet materials as visited June 26, 2007, and available *****2811*** in Clerk of Court's case file) (reporting successful efforts by the Government to induce voluntary desegregation).

Moreover, Louisville's history makes clear that a community under a court order to desegregate might submit a race-conscious remedial plan *before* the court dissolved the order, but with every intention of following that plan even *after* dissolution. How could such a plan be lawful the day before dissolution but then become unlawful the very next day? On what legal ground can the majority rest its contrary view? But see *ante,* at 2752 – 2753, 2755, n. 12.

****822*** Are courts really to treat as merely *de facto* segregated those school districts that avoided a federal order by voluntarily complying with *Brown*'s requirements? See *ante*, at 2752 (opinion of the Court), *ante*, at 2761 – 2762 (plurality opinion). This Court has previously done just the opposite, permitting a race-conscious remedy without any kind of court decree. See *McDaniel, supra,* at 41, 91 S.Ct. 1287. Because the Constitution emphatically does not forbid the use of race-conscious measures by districts in the South that voluntarily desegregated their schools, on what basis does the plurality claim that the law forbids Seattle to do the same? But see *ante,* at 2761.

The histories also indicate the complexity of the tasks and the practical difficulties that local school boards face when they seek to achieve greater racial integration. The boards work in communities where demographic patterns change, where they must meet traditional learning goals, where they must attract and retain effective teachers, where they should (and will) take account of parents' views and maintain *their* commitment to public school education, where they must adapt to court intervention, where they must encourage voluntary student and parent action—where they will find that their own good faith, their knowledge, and their understanding of local circumstances are always necessary but often insufficient to solve the problems at hand.

These facts and circumstances help explain why in this context, as to means, the law often leaves legislatures, city councils, school boards, and voters with a broad range of choice, thereby giving “different communities” the opportunity to “try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs.” *Comfort v. Lynn School Comm.,* 418 F.3d 1, 28 (C.A.1 2005) (Boudin, C. J., concurring) (citing *United States v. Lopez,* 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring)), cert. denied, 546 U.S. 1061, 126 S.Ct. 798, 163 L.Ed.2d 627 (2005).

823 With this factual background in mind, I turn to the legal question: Does the United States Constitution prohibit these school boards from using race-conscious criteria in the limited ways at issue here?

II

The Legal Standard

A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it. Because of its importance, I shall repeat what this Court said about the matter in *Swann*. Chief Justice Burger, on behalf of a unanimous Court in a case of exceptional importance, wrote:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a ***2812*** pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities." 402 U.S., at 16, 91 S.Ct. 1267.

The statement was not a technical holding in the case. But the Court set forth in *Swann* a basic principle of constitutional law—a principle of law that has found "wide acceptance in the legal culture." *Dickerson v. United States,* 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (internal quotation marks omitted); *Mitchell v. United States,* 526 U.S. 314, 330, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); *id.,* at 331, 332, 119 S.Ct. 1307 (SCALIA, J., dissenting) (citing " 'wide acceptance in the legal culture' " as "adequate reason not to overrule" prior cases).

Thus, in *North Carolina Bd. of Ed. v. Swann,* 402 U.S. 43, 45, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), this Court, citing *Swann,* restated the point. "[S]chool authorities," the Court said, "have wide discretion ***824*** in formulating school policy, and ... as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." Then–Justice Rehnquist echoed this view in *Bustop, Inc. v. Los Angeles Bd. of Ed.,* 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978) (opinion in chambers), making clear that he too believed that *Swann*'s statement reflected settled law: "While I have the gravest doubts that [a state supreme court] was *required* by the United States Constitution to take the [desegregation] action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action." (Emphasis in original.)

These statements nowhere suggest that this freedom is limited to school districts where court-ordered desegregation measures are also in effect. Indeed, in *McDaniel,* a case decided the same day as *Swann,* a group of parents challenged a race-conscious student assignment plan that the Clarke County School Board had *voluntarily* adopted as a remedy without a court order (though under federal agency pressure—pressure Seattle also encountered). The plan required that each elementary school in the district maintain 20% to 40% enrollment of African–

American students, corresponding to the racial composition of the district. See *Barresi v. Browne,* 226 Ga. 456, 456–459, 175 S.E.2d 649, 650–651 (1970). This Court upheld the plan, see *McDaniel,* 402 U.S., at 41, 91 S.Ct. 1287, rejecting the parents' argument that "a person may not be *included* or *excluded* solely because he is a Negro or because he is white," Brief for Respondents in *McDaniel,* O.T.1970, No. 420, p. 25.

Federal authorities had claimed—as the NAACP and the OCR did in Seattle—that Clarke County schools were segregated in law, not just in fact. The plurality's claim that Seattle was "never segregated by law" is simply not accurate. Compare *ante,* at 2761 – 2762, with *supra,* at 2748 – 2750. The plurality could validly claim that *no court* ever found that Seattle ***825** schools were segregated in law. But that is also true of the Clarke County schools in *McDaniel*. Unless we believe that the Constitution enforces one legal standard for the South and another for the North, this Court should grant Seattle the permission it granted Clarke County, Georgia. See *McDaniel, supra*, at 41, 91 S.Ct. 1287 ("[S]teps will almost invariably require that students be assigned 'differently because of their race.' ... Any other approach would freeze the status quo that is the very target of all desegregation processes").

*****2813** This Court has also held that school districts may be required by federal statute to undertake race-conscious desegregation efforts even when there is no likelihood that *de jure* segregation can be shown. In *Board of Ed. of City School Dist. of New York v. Harris,* 444 U.S. 130, 148–149, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979), the Court concluded that a federal statute required school districts receiving certain federal funds to remedy faculty segregation, even though in this Court's view the racial disparities in the affected schools were purely *de facto* and would not have been actionable under the Equal Protection Clause. Not even the dissenters thought the race-conscious remedial program posed a *constitutional* problem. See *id.,* at 152, 100 S.Ct. 363 (opinion of Stewart, J.). See also, *e.g., Crawford v. Board of Ed. of Los Angeles,* 458 U.S. 527, 535–536, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982) ("[S]tate courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, *whether or not there has been a finding of intentional segregation* .... [S]chool districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and *they remain free to adopt reassignment and busing plans to effectuate desegregation* " (emphasis added)); *School Comm. of Boston v. Board of Education,* 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778 (1968) *(per curiam)* (dismissing for want of a federal question a challenge to a voluntary statewide integration plan using express racial criteria).

Lower state and federal courts had considered the matter settled and uncontroversial even before this Court decided ***826** *Swann*. Indeed, in 1968, the Illinois Supreme Court rejected an equal protection challenge to a race-conscious state law seeking to undo *de facto* segregation:

> "To support [their] claim, the defendants heavily rely on three Federal cases, each of which held, no State law being involved, that a local school board does not have an affirmative constitutional duty to act to alleviate racial imbalance in the schools that it did not cause. However, the question as to whether the constitution requires a local school board, or a State, to act to undo *de facto* school segregation is simply not here

concerned. The issue here is whether the constitution permits, rather than prohibits, voluntary State action aimed toward reducing and eventually eliminating *de facto* school segregation.

> "State laws or administrative policies, directed toward the reduction and eventual elimination of *de facto* segregation of children in the schools and racial imbalance, have been approved by every high State court which has considered the issue. Similarly, the Federal courts which have considered the issue ... have recognized that voluntary programs of local school authorities designed to alleviate *de facto* segregation and racial imbalance in the schools are not constitutionally forbidden." *Tometz v. Board of Ed., Waukegan School Dist. No. 61,* 39 Ill.2d 593, 597–598, 237 N.E.2d 498, 501 (citing decisions from the high courts of Pennsylvania, Massachusetts, New Jersey, California, New York, and Connecticut, and from the Courts of Appeals for the First, Second, Fourth, and Sixth Circuits; citations omitted).

See also, *e.g., Offermann v. Nitkowski,* 378 F.2d 22, 24 (C.A.2 1967); *Deal v. Cincinnati Bd. of Ed.,* 11 Ohio Misc. 184, 369 F.2d 55, 61 (C.A.6 1966), cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967); *Springfield School Comm. v. Barksdale,* 348 F.2d 261, 266 (C.A.1 1965); ****827 **2814*** *Pennsylvania Human Relations Comm'n v. Chester School Dist.,* 427 Pa. 157, 164, 233 A.2d 290, 294 (1967); *Booker v. Board of Ed. of Plainfield, Union Cty.,* 45 N.J. 161, 170, 212 A.2d 1, 5 (1965); *Jackson v. Pasadena City School Dist.,* 59 Cal.2d 876, 881–882, 31 Cal. Rptr. 606, 382 P.2d 878, 881–882 (1963).

I quote the Illinois Supreme Court at length to illustrate the prevailing legal assumption at the time *Swann* was decided. In this respect, *Swann* was not a sharp or unexpected departure from prior rulings; it reflected a consensus that had already emerged among state and lower federal courts.

If there were doubts before *Swann* was decided, they did not survive this Court's decision. Numerous state and federal courts explicitly relied upon *Swann*'s guidance for decades to follow. For instance, a Texas appeals court in 1986 rejected a Fourteenth Amendment challenge to a voluntary integration plan by explaining:

> "[T]he absence of a court order to desegregate does not mean that a school board cannot exceed minimum requirements in order to promote school integration. School authorities are traditionally given broad discretionary powers to formulate and implement educational policy and may properly decide to ensure to their students the value of an integrated school experience." *Citizens for Better Ed. v. Goose Creek Consol. Independent School Dist.,* 719 S.W.2d 350, 352–353 (citing *Swann* and *North Carolina Bd. of Ed.*), appeal dism'd for want of substantial federal question, 484 U.S. 804, 108 S.Ct. 49, 98 L.Ed.2d 14 (1987).

Similarly, in *Zaslawsky v. Board of Ed. of Los Angeles City Unified School Dist.,* 610 F.2d 661, 662–664 (1979), the Ninth Circuit rejected a federal constitutional challenge to a school

district's use of mandatory faculty transfers to ensure that each school's faculty makeup would fall within 10% of the districtwide racial composition. Like the Texas court, the Ninth Circuit relied upon *Swann* and ***828** *North Carolina Bd. of Ed.* to reject the argument that "a race-conscious plan is permissible only when there has been a judicial finding of *de jure* segregation." 610 F.2d, at 663–664. See also, *e.g., Darville v. Dade Cty. School Bd.,* 497 F.2d 1002, 1004–1006 (C.A.5 1974); *State ex rel. Citizens Against Mandatory Bussing v. Brooks,* 80 Wash.2d 121, 128–129, 492 P.2d 536, 541–542 (1972) (en banc), overruled on other grounds, *Cole v. Webster,* 103 Wash.2d 280, 692 P.2d 799 (1984) (en banc); *School Comm. of Springfield v. Board of Ed.,* 362 Mass. 417, 428–429, 287 N.E.2d 438, 447–448 (1972). These decisions illustrate well how lower courts understood and followed *Swann*'s enunciation of the relevant legal principle.

Courts are not alone in accepting as constitutionally valid the legal principle that *Swann* enunciated— *i.e.,* that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so. That principle has been accepted by every branch of government and is rooted in the history of the Equal Protection Clause itself. Thus, Congress has enacted numerous race-conscious statutes that illustrate that principle or rely upon its validity. See, *e.g.,* No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(2)(C)(v) (2000 ed., Supp. IV); § 1067 *et seq.* (authorizing aid to minority institutions). In fact, without being exhaustive, I have counted 51 federal statutes that use racial classifications. I have counted well over 100 state statutes that similarly employ racial classifications. Presidential administrations for the past half century have used and supported various race-conscious measures. See, *e.g.,* ***2815** Exec. Order No. 10925, 26 Fed.Reg.1977 (1961) (President Kennedy); Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965) (President Johnson); Sugrue, Breaking Through: The Troubled Origins of Affirmative Action in the Workplace, in Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America 31 (J. Skrentny ed.2001) (describing President Nixon's lobbying for affirmative action plans, *e.g.,* the Philadelphia***829** Plan); White, Affirmative Action's Alamo: Gerald Ford Returns to Fight Once More for Michigan, Time, Aug. 23, 1999, p. 48 (reporting on President Ford's support for affirmative action); Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 50 (2002) (describing President Carter's support for affirmation action). And during the same time, hundreds of local school districts have adopted student assignment plans that use race-conscious criteria. See Welch 83–91.

That *Swann*'s legal statement should find such broad acceptance is not surprising. For *Swann* is predicated upon a well-established legal view of the Fourteenth Amendment. That view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery. See *Slaughter–House Cases,* 16 Wall. 36, 71, 21 L.Ed. 394 (1873) ("[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] ... we mean the freedom of the slave race"); *Strauder v. West Virginia,* 100 U.S. 303, 306, 25 L.Ed. 664 (1880) ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated ... all the civil rights that the superior

race enjoy").

There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together. See generally R. Sears, A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866–1904 (1996) (describing federal funding, through the Freedman's Bureau, of race-conscious school integration programs). See also R. Fischer, The Segregation Struggle in Louisiana 1862–77, ***830** p. 51 (1974) (describing the use of race-conscious remedies); Harlan, Desegregation in New Orleans Public Schools During Reconstruction, 67 Am. Hist. Rev. 663, 664 (1962) (same); W. Vaughn, Schools for All: The Blacks & Public Education in the South, 1865–1877, pp. 111–116 (1974) (same). Although the Constitution almost always forbids the former, it is significantly more lenient in respect to the latter. See *Gratz v. Bollinger,* 539 U.S. 244, 301, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (GINSBURG, J., dissenting); *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 243, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (STEVENS, J., dissenting).

Sometimes Members of this Court have disagreed about the degree of leniency that the Clause affords to programs designed to include. See *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 274, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986); *Fullilove v. Klutznick,* 448 U.S. 448, 507, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Powell, J., concurring). But I can find no case in which this Court has followed Justice THOMAS' "color-blind" approach. And I have found no case that otherwise repudiated this constitutional asymmetry between that which seeks to *exclude* and that ****2816** which seeks to *include* members of minority races.

What does the plurality say in response? First, it seeks to distinguish *Swann* and other similar cases on the ground that those cases involved remedial plans in response to *judicial findings* of *de jure* segregation. As *McDaniel* and *Harris* show, that is historically untrue. See *supra,* at 2757 – 2759. Many school districts in the South adopted segregation remedies (to which *Swann* clearly applies) without any such federal order, see *supra,* at 2756 – 2757. See also Kennedy Report. Seattle's circumstances are not meaningfully different from those in, say, *McDaniel,* where this Court approved race-conscious remedies. Louisville's plan was created and initially adopted when a compulsory district court order was in place. And, in any event, the histories of Seattle and Louisville make clear that this distinction—between court-ordered and voluntary desegregation—seeks a line that sensibly cannot be drawn.

***831** Second, the plurality downplays the importance of *Swann* and related cases by frequently describing their relevant statements as "dicta." These criticisms, however, miss the main point. *Swann* did not hide its understanding of the law in a corner of an obscure opinion or in a footnote, unread but by experts. It set forth its view prominently in an important opinion joined by all nine Justices, knowing that it would be read and followed throughout the Nation. The basic problem with the plurality's technical "dicta"-based response lies in its overly theoretical approach to case law, an approach that emphasizes rigid distinctions between holdings and dicta in a way that serves to mask the radical nature of today's decision. Law is not an exercise

in mathematical logic. And statements of a legal rule set forth in a judicial opinion do not always divide neatly into "holdings" and "dicta." (Consider the legal "status" of Justice Powell's separate opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).) The constitutional principle enunciated in *Swann,* reiterated in subsequent cases, and relied upon over many years, provides, and has widely been thought to provide, authoritative legal guidance. And if the plurality now chooses to reject that principle, it cannot adequately justify its retreat simply by affixing the label "dicta" to reasoning with which it disagrees. Rather, it must explain to the courts and to the Nation *why* it would abandon guidance set forth many years before, guidance that countless others have built upon over time, and which the law has continuously embodied.

Third, a more important response is the plurality's claim that later cases—in particular *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), *Adarand, supra*, and *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325 (2003)—supplanted *Swann*. See *ante,* at 2751 – 2752, 2762 – 2763, n. 16, 2764 – 2765 (citing *Adarand, supra,* at 227, 115 S.Ct. 2097; *Johnson, supra*, at 505, 125 S.Ct. 1141, 160 L.Ed.2d 949; *Grutter, supra* at 326, 123 S.Ct. 2325, 156 L.Ed.2d 304). The plurality says that cases such as *Swann* and the others I have described all "were decided before this Court definitively determined ***832*** that 'all racial classifications ... must be analyzed by a reviewing court under strict scrutiny.' " *Ante,* at 2762 – 2763, n. 16 (quoting *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097). This Court in *Adarand* added that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Ibid*. And the Court repeated this same statement in *Grutter*. See 539 U.S., at 326, 123 S.Ct. 2325.

Several of these cases were significantly more restrictive than *Swann* in respect to the degree of leniency the Fourteenth Amendment grants to programs designed ****2817*** to *include* people of all races. See, *e.g., Adarand, supra; Gratz, supra; Grutter, supra*. But that legal circumstance cannot make a critical difference here for two separate reasons.

First, no case—not *Adarand, Gratz, Grutter,* or any other—has ever held that the test of "strict scrutiny" means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same. The Court did not say in *Adarand* or in *Johnson* or in *Grutter* that it was overturning *Swann* or its central constitutional principle.

Indeed, in its more recent opinions, the Court recognized that the "fundamental purpose" of strict scrutiny review is to "take relevant differences" between "fundamentally different situations ... into account." *Adarand,* 515 U.S., at 228, 115 S.Ct. 2097 (internal quotation marks omitted). The Court made clear that "[s]trict scrutiny does not trea[t] dissimilar race-based decisions as though they were equally objectionable." *Ibid* (internal quotation marks omitted). It added that the fact that a law "treats [a person] unequally because of his or her race ... says nothing about the ultimate validity of any particular law." *Id.,* at 229–230, 115 S.Ct. 2097. And the Court, using the very phrase that Justice Marshall had used to describe strict scrutiny's application to any *exclusionary* use of racial criteria, sought to " *dispel the notion* that strict scrutiny" is as likely to condemn *inclusive* uses of "race-conscious" criteria ***833*** as it is to

invalidate *exclusionary* uses. That is, it is *not* in all circumstances " 'strict in theory, but fatal in fact.' " *Id.,* at 237, 115 S.Ct. 2097 (quoting *Fullilove*, 448 U.S., at 519, 100 S.Ct. 2758 (Marshall, J., concurring in judgment)).

The Court in *Grutter* elaborated:

> "Strict scrutiny is not 'strict in theory, but fatal in fact.' ... Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it....
>
> "Context matters when reviewing race-based governmental action under the Equal Protection Clause. See *Gomillion v. Lightfoot,* 364 U.S. 339, 343–344 [, 81 S.Ct. 125, 5 L.Ed.2d 110] (1960) (admonishing that, 'in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts').... Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." 539 U.S., at 326–327, 123 S.Ct. 2325.

The Court's holding in *Grutter* demonstrates that the Court meant what it said, for the Court upheld an elite law school's race-conscious admissions program.

The upshot is that the cases to which the plurality refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is "fatal in fact" only to racial classifications that harmfully *exclude;* they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*.

The plurality cannot avoid this simple fact. See *ante,* at 2764 – 2766. Today's opinion reveals that the plurality would ***834** rewrite this Court's prior jurisprudence, at least in practical application, transforming the "strict scrutiny" test into a rule that is fatal in fact across the board. In doing so, the plurality parts company from ****2818** this Court's prior cases, and it takes from local government the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways.

Second, as *Grutter* specified, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U.S., at 327, 123 S.Ct. 2325 (citing *Gomillion v. Lightfoot,* 364 U.S. 339, 343–344, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960)). And contexts differ dramatically one from the other. Governmental use of race-based criteria can arise in the context of, for example, census forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools, policies that favor minorities when distributing goods or services in short supply, actions that create majority-minority electoral districts, peremptory strikes that

remove potential jurors on the basis of race, and others. Given the significant differences among these contexts, it would be surprising if the law required an identically strict legal test for evaluating the constitutionality of race-based criteria as to each of them.

Here, the context is one in which school districts seek to advance or to maintain racial integration in primary and secondary schools. It is a context, as *Swann* makes clear, where history has required special administrative remedies. And it is a context in which the school boards' plans simply set race-conscious limits at the outer boundaries of a broad range.

This context is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply. It is not one in which race-conscious limits stigmatize ***835** or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.

The importance of these differences is clear once one compares the present circumstances with other cases where one or more of these negative features are present. See, *e.g., Strauder,* 100 U.S. 303, 25 L.Ed. 664; *Yick Wo,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Brown,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750; *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *Adarand*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158; *Grutter, supra; Gratz*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257; *Johnson*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949.

If one examines the context more specifically, one finds that the districts' plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand student choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts. Compare *Wessmann v. Gittens,* 160 F.3d 790, 809–810 (C.A.1 1998) (Boudin, J., concurring), with *Comfort,* 418 F.3d, at 28–29 (Boudin, C. J., concurring). They do not ****2819** seek to award a scarce commodity on the basis of merit, for they are not magnet schools; rather, by design and in practice, they offer substantially equivalent academic programs and electives. Although some parents or children prefer some schools over others, school popularity has varied significantly over the years. In 2000, for example, Roosevelt was the most popular first choice high school in Seattle; in 2001, Ballard was the most popular; in 2000, West Seattle was one of the least popular; by 2003, it was one of the more popular. See Research, Evaluation and Assessment, Student Information ***836** Services Office, Seattle Public Schools, Data Profile: District Summary December 2005 (hereinafter Data Profile: District Summary December 2005), online at http:// www. seattle schools. org/ area/ siso/ disprof/ 2005/ DP05 all. pdf. In a word, the school plans under review do not involve the kind of race-based harm that has led this Court, in other contexts, to find the use of race-conscious criteria

unconstitutional.

These and related considerations convinced one Ninth Circuit judge in the Seattle case to apply a standard of constitutionality review that is less than "strict," and to conclude that this Court's precedents do not require the contrary. See 426 F.3d 1162, 1193–1194 (2005) (*Parents Involved VII*) (Kozinski, J., concurring) ("That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability"). That judge is not alone. Cf. *Gratz, supra,* at 301, 123 S.Ct. 2411 (GINSBURG, J., dissenting); *Adarand, supra,* at 243, 115 S.Ct. 2097 (STEVENS, J., dissenting); Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 433–434 (1988).

The view that a more lenient standard than "strict scrutiny" should apply in the present context would not imply abandonment of judicial efforts carefully to determine the need for race-conscious criteria and the criteria's tailoring in light of the need. And the present context requires a court to examine carefully the race-conscious program at issue. In doing so, a reviewing judge must be fully aware of the potential dangers and pitfalls that Justice THOMAS and Justice KENNEDY mention. See *ante,* at 11–12 (THOMAS, J., concurring); *ante,* at 3, 17 (KENNEDY, J., concurring in part and concurring in judgment).

But unlike the plurality, such a judge would also be aware that a legislature or school administrators, ultimately accountable to the electorate, could *nonetheless* properly conclude that a racial classification sometimes serves a purpose important enough to overcome the risks they mention, for ***837** example, helping to end racial isolation or to achieve a diverse student body in public schools. Cf. *ante,* at 2796 – 2797 (opinion of KENNEDY, J.). Where that is so, the judge would carefully examine the program's details to determine whether the use of race-conscious criteria is proportionate to the important ends it serves.

In my view, this contextual approach to scrutiny is altogether fitting. I believe that the law requires application here of a standard of review that is not "strict" in the traditional sense of that word, although it does require the careful review I have just described. See *Gratz, supra,* at 301, 123 S.Ct. 2411 (GINSBURG, J., joined by SOUTER, J., dissenting); *Adarand, supra,* at 242–249, 115 S.Ct. 2097 (STEVENS, J., joined by GINSBURG, J., dissenting); *Parents Involved VII, supra*, at 1193–1194 (Kozinski, J., concurring). Apparently Justice KENNEDY also agrees that strict scrutiny would not apply in respect to certain "race-conscious" school board policies. See *ante,* at 2793 – 2794 ("Executive and legislative branches, which for generations now have considered these types of policies and procedures, ****2820** should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races").

Nonetheless, in light of *Grutter* and other precedents, see, *e.g., Bakke, supra*, at 290, 98 S.Ct. 2733 (opinion of Powell, J.), I shall adopt the first alternative. I shall apply the version of strict scrutiny that those cases embody. I shall consequently ask whether the school boards in Seattle and Louisville adopted these plans to serve a "compelling governmental interest" and, if so,

whether the plans are "narrowly tailored" to achieve that interest. If the plans survive this strict review, they would survive less exacting review *a fortiori*. Hence, I conclude that the plans before us pass both parts of the strict scrutiny test. Consequently I must conclude that the plans here are permitted under the Constitution.

****838*** III. *Applying the Legal Standard*
A. *Compelling Interest*

The principal interest advanced in these cases to justify the use of race-based criteria goes by various names. Sometimes a court refers to it as an interest in achieving racial "diversity." Other times a court, like the plurality here, refers to it as an interest in racial "balancing." I have used more general terms to signify that interest, describing it, for example, as an interest in promoting or preserving greater racial "integration" of public schools. By this term, I mean the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools and each individual student's public school experience.

Regardless of its name, however, the interest at stake possesses three essential elements. First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. This refers back to a time when public schools were highly segregated, often as a result of legal or administrative policies that facilitated racial segregation in public schools. It is an interest in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes. It is an interest in maintaining hard-won gains. And it has its roots in preventing what gradually may become the *de facto* resegregation of America's public schools. See Part I, *supra,* at 2801 – 2802; Appendix A, *infra.* See also *ante,* at 2796 – 2797 (opinion of KENNEDY, J.) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children").

****839*** Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. Cf. *Grutter,* 539 U.S., at 345, 123 S.Ct. 2325 (GINSBURG, J., concurring). Studies suggest that children taken from those schools and placed in integrated settings often show positive academic gains. See, *e.g.,* Powell, Living and Learning: Linking Housing and Education, in Pursuit of a Dream Deferred: Linking Housing and Education Policy 15, 35 (J. Powell, G. Kearney, & V. Kay eds.2001) (hereinafter Powell); Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L.J. 733, 741–742 (1998) (hereinafter Hallinan).

*****2821*** Other studies reach different conclusions. See, *e.g.,* D. Armor, Forced Justice (1995). See also *ante,* at 2776 – 2777 (THOMAS, J., concurring). But the evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one.

Research suggests, for example, that black children from segregated educational environments significantly increase their achievement levels once they are placed in a more integrated setting. Indeed, in Louisville itself, the achievement gap between black and white elementary school students grew substantially smaller (by seven percentage points) after the integration plan was implemented in 1975. See Powell 35. Conversely, to take another example, evidence from a district in Norfolk, Virginia, shows that resegregated schools led to a decline in the achievement test scores of children of all races. *Ibid*.

One commentator, reviewing dozens of studies of the educational benefits of desegregated schooling, found that the studies have provided "remarkably consistent" results, showing that: (1) black students' educational achievement is improved in integrated schools as compared to racially isolated schools, (2) black students' educational achievement is improved***840** in integrated classes, and (3) the earlier that black students are removed from racial isolation, the better their educational outcomes. See Hallinan 741–742. Multiple studies also indicate that black alumni of integrated schools are more likely to move into occupations traditionally closed to African–Americans, and to earn more money in those fields. See, *e.g.,* Schofield, Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in Handbook of Research on Multicultural Education 597, 606–607 (J. Banks & C. Banks eds.1995). Cf. W. Bowen & D. Bok, The Shape of the River 118 (1998) (hereinafter Bowen & Bok).

Third, there is a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. *Swann,* 402 U.S., at 16, 91 S.Ct. 1267. It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.

Again, data support this insight. See, *e.g.,* Hallinan 745; Quillian & Campbell, Beyond Black and White: The Present and Future of Multiracial Friendship Segregation, 68 Am. Sociological Rev. 540, 541 (2003) (hereinafter Quillian & Campbell); Dawkins & Braddock, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 J. Negro Educ. 394, 401–403 (1994) (hereinafter Dawkins & Braddock); Wells & Crain, Perpetuation Theory and the Long–Term Effects of School Desegregation, 64 Rev. Educ. Research 531, 550 (1994) (hereinafter Wells & Crain).

There are again studies that offer contrary conclusions. See, *e.g.,* Schofield, School Desegregation and Intergroup Relations: A Review of the Literature, in 17 Review of Research in Education 335, 356 (G. Grant ed.1991). See also *ante,* at 2780 – 2781 (THOMAS, J., concurring). Again, however, ***841*** the evidence supporting a democratic interest in racially integrated schools is firmly established and sufficiently strong to permit a school board to determine, as this Court has itself often found, that this interest is compelling.

*****2822*** For example, one study documented that "black and white students in desegregated schools are less racially prejudiced than those in segregated schools," and that "interracial

contact in desegregated schools leads to an increase in interracial sociability and friendship." Hallinan 745. See also Quillian & Campbell 541. Cf. Bowen & Bok 155. Other studies have found that both black and white students who attend integrated schools are more likely to work in desegregated companies after graduation than students who attended racially isolated schools. Dawkins & Braddock 401–403; Wells & Crain 550. Further research has shown that the desegregation of schools can help bring adult communities together by reducing segregated housing. Cities that have implemented successful school desegregation plans have witnessed increased interracial contact and neighborhoods that tend to become less racially segregated. Dawkins & Braddock 403. These effects not only reinforce the prior gains of integrated primary and secondary education; they also foresee a time when there is less need to use race-conscious criteria.

Moreover, this Court from *Swann* to *Grutter* has treated these civic effects as an important virtue of racially diverse education. See, *e.g., Swann, supra,* at 16, 91 S.Ct. 1267; *Seattle School Dist. No. 1,* 458 U.S., at 472–473, 102 S.Ct. 3187. In *Grutter,* in the context of law school admissions, we found that these types of interests were, constitutionally speaking, "compelling." See 539 U.S., at 330, 123 S.Ct. 2325 (recognizing that Michigan Law School's race-conscious admissions policy "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races," and pointing out that "the skills needed in today's increasingly global marketplace can only be developed through exposure***842** to widely diverse people, cultures, ideas, and viewpoints" (internal quotation marks omitted; alteration in original)).

In light of this Court's conclusions in *Grutter,* the "compelling" nature of these interests in the context of primary and secondary public education follows here *a fortiori*. Primary and secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry with us to the end of our days. As Justice Marshall said, "unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken v. Bradley,* 418 U.S. 717, 783, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (dissenting opinion).

And it was *Brown,* after all, focusing upon primary and secondary schools, not *Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950), focusing on law schools, or *McLaurin v. Oklahoma State Regents for Higher Ed.,* 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950), focusing on graduate schools, that affected so deeply not only Americans but the world. R. Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality, p. x (1975) (arguing that perhaps no other Supreme Court case has "affected more directly the minds, hearts, and daily lives of so many Americans"); J. Patterson, *Brown v. Board of Education* p. xxvii (2001) (identifying *Brown* as "the most eagerly awaited and dramatic judicial decision of modern times"). See also *Parents Involved VII,* 426 F.3d, at 1194 (Kozinski, J., concurring); Strauss, Discriminatory Intent and the Taming of *Brown,* 56 U. Chi. L. Rev. 935, 937 (1989) (calling *Brown* "the Supreme Court's greatest anti-discrimination decision"); Brief for United States as *Amicus Curiae* in *Brown,* O.T. ****2823** 1952, No. 8 etc.; Dudziak, *Brown* as a Cold War Case, 91 J. Am. Hist. 32 (2004); A Great Decision, Hindustan Times (New Delhi, May

20, 1954), p. 5; USA Takes Positive Step, West African Pilot (Lagos, May 22, 1954), p. 2 (stating that *Brown* is an acknowledgment that the "United States should set an example for all other nations by taking ***843** the lead in removing from its national life all signs and traces of racial intolerance, arrogance or discrimination"). Hence, I am not surprised that Justice KENNEDY finds that "a district may consider it a compelling interest to achieve a diverse student population," including a *racially* diverse population. *Ante,* at 2796 – 2797.

The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general "societal discrimination," *ante,* at 2758 (plurality opinion), but of primary and secondary school segregation, see *supra,* at 2803, 2807; it includes an effort to create school environments that provide better educational opportunities for all children; it includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not "compelling," what is?

The majority acknowledges that in prior cases this Court has recognized at least two interests as compelling: an interest in "remedying the effects of past intentional discrimination," and an interest in "diversity in higher education." *Ante,* at 2806, 2807. But the plurality does not convincingly explain why those interests do not constitute a "compelling interest" here. How do the remedial interests here differ in kind from those at issue in the voluntary desegregation efforts that Attorney General Kennedy many years ago described in his letter to the President? *Supra,* at 2810 – 2811. How do the educational and civic interests differ in kind from those that underlie and justify the racial "diversity" that the law school sought in *Grutter,* where this Court found a compelling interest?

The plurality tries to draw a distinction by reference to the well-established conceptual difference between *de jure* segregation ("segregation by state action") and *de facto* segregation ("racial imbalance caused by other factors"). ***844** *Ante,* at 2815. But that distinction concerns what the Constitution *requires* school boards to do, not what it *permits* them to do. Compare, *e.g., Green,* 391 U.S., at 437–438, 88 S.Ct. 1689 ("School boards ... operating state-compelled dual systems" have an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"), with, *e.g., Milliken, supra*, at 745, 94 S.Ct. 3112 (the Constitution does not impose a duty to desegregate upon districts that have not been "shown to have committed any constitutional violation").

The opinions cited by the plurality to justify its reliance upon the *de jure/de facto* distinction only address what remedial measures a school district may be constitutionally *required* to undertake. See, *e.g., Freeman v. Pitts,* 503 U.S. 467, 495, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). As to what is *permitted,* nothing in our equal protection law suggests that a State may right only those wrongs that it committed. No case of this Court has ever relied upon the *de jure/de facto* distinction in order to limit what a school district is voluntarily allowed to do. That is what is at issue here. And *Swann, McDaniel, Crawford, North Carolina Bd. of Ed., Harris,* and

Bustop made one thing clear: significant as the difference between *de* ***2824** *jure* and *de facto* segregation may be to the question of what a school district *must* do, that distinction is not germane to the question of what a school district *may* do.

Nor does any precedent indicate, as the plurality suggests with respect to Louisville, *ante,* at 2815 – 2816, that remedial interests vanish the day after a federal court declares that a district is "unitary." Of course, Louisville adopted those portions of the plan at issue here *before* a court declared Louisville "unitary." Moreover, in *Freeman,* this Court pointed out that in "one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of ***845** history. And stubborn facts of history linger and persist." 503 U.S., at 495, 112 S.Ct. 1430. See also *ante,* at 2807 – 2808 (opinion of KENNEDY, J.). I do not understand why this Court's cases, which rest the significance of a "unitary" finding in part upon the wisdom and desirability of returning schools to local control, should deprive those local officials of legal *permission* to use means they once found necessary to combat persisting injustices.

For his part, Justice THOMAS faults my citation of various studies supporting the view that school districts can find compelling educational and civic interests in integrating their public schools. See *ante,* at 2776 – 2777, 2781 (concurring opinion). He is entitled of course to his own opinion as to which studies he finds convincing—although it bears mention that even the author of some of Justice THOMAS' preferred studies has found *some* evidence linking integrated learning environments to increased academic achievement. Compare *ante,* at 2776 – 2777 (opinion of THOMAS, J.) (citing Armor & Rossell, Desegregation and Resegregation in the Public Schools, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 239, 251 (A. Thernstrom & S. Thernstrom eds.2002)); Brief for David J. Armor et al. as *Amici Curiae* 29), with Rosen, Perhaps Not All Affirmative Action is Created Equal, N.Y. Times, June 11, 2006, section 4, p. 14 (quoting David Armor as commenting, " 'we did not find the [racial] achievement gap changing *significantly* ' " but acknowledging that he " 'did find a modest association for math but not reading in terms of racial composition and achievement, but there's a big state variation' " (emphasis added)). If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one. I believe only that the Constitution allows democratically elected school boards to make up their own minds as to how best to include people of all races in one America.

***846** B. *Narrow Tailoring*

I next ask whether the plans before us are "narrowly tailored" to achieve these "compelling" objectives. I shall not accept the school boards' assurances on faith, cf. *Miller v. Johnson,* 515 U.S. 900, 920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), and I shall subject the "tailoring" of their plans to "rigorous judicial review," *Grutter,* 539 U.S., at 388, 123 S.Ct. 2325 (KENNEDY, J., dissenting). Several factors, taken together, nonetheless lead me to conclude that the boards' use of race-conscious criteria in these plans passes even the strictest "tailoring" test.

First, the race-conscious criteria at issue only help set the outer bounds of *broad* ranges. Cf. *id.,* at 390, 123 S.Ct. 2325 (expressing concern about "narrow fluctuation band[s]"). They constitute

but one part of plans that depend primarily upon other, nonracial elements. To use race in this way is not to set a forbidden "quota." See *id.,* at 335, 123 S.Ct. 2325 (opinion of the Court) ("Properly understood, a 'quota' *****2825*** is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups' " (quoting *Croson,* 488 U.S., at 496, 109 S.Ct. 706) (plurality opinion)).

In fact, the defining feature of both plans is greater emphasis upon student choice. In Seattle, for example, in more than 80% of all cases, that choice alone determines which high schools Seattle's ninth graders will attend. After ninth grade, students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria). *Choice,* therefore, is the "predominant factor" in these plans. *Race* is not. See *Grutter, supra,* at 393, 123 S.Ct. 2325 (KENNEDY, J., dissenting) (allowing consideration of race only if it does "not become a predominant factor").

Indeed, the race-conscious ranges at issue in these cases often have no effect, either because the particular school is not oversubscribed in the year in question, or because the ****847*** racial makeup of the school falls within the broad range, or because the student is a transfer applicant or has a sibling at the school. In these respects, the broad ranges are less like a quota and more like the kinds of "useful starting points" that this Court has consistently found permissible, even when they set boundaries upon voluntary transfers, and even when they are based upon a community's general population. See, *e.g., North Carolina Bd. of Ed. v. Swann,* 402 U.S., at 46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (no "absolute prohibition against [the] use" of mathematical ratios as a "starting point"); *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S., at 24–25, 91 S.Ct. 1267 (approving the use of a ratio reflecting "the racial composition of the whole school system" as a "useful starting point," but not as an "inflexible requirement"). Cf. *United States v. Montgomery County Bd. of Ed.,* 395 U.S. 225, 232, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969) (approving a lower court desegregation order that "provided that the [school] board must move toward a goal under which 'in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system,' " and "immediately" requiring "[t]he ratio of Negro to white teachers" in each school to be equal to "the ratio of Negro to white teachers in ... the system as a whole").

Second, broad-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored, see *Grutter, supra,* at 341, 123 S.Ct. 2325, than other race-conscious restrictions this Court has previously approved. See, *e.g., Swann, supra,* at 26–27, 91 S.Ct. 1267; *Montgomery County Bd. of Ed., supra,* at 232, 89 S.Ct. 1670. Indeed, the plans before us are *more narrowly tailored* than the race-conscious admission plans that this Court approved in *Grutter*. Here, race becomes a factor only in a fraction of students' non-merit-based assignments—not in large numbers of students' merit-based applications. Moreover, the effect of applying race-conscious criteria here affects potentially disadvantaged students *less severely,* not more severely, than the criteria at issue in *Grutter*. Disappointed students are not rejected from a ****848*** State's flagship graduate program; they simply attend a different one of the district's many public schools, which in aspiration and in fact are substantially equal. Cf. *Wygant,* 476 U.S., at 283, 106 S.Ct. 1842 (plurality opinion). And, in Seattle, the disadvantaged

student loses at most one year at the high school of his choice. One will search *Grutter* in vain for similarly persuasive evidence of narrow tailoring as the school districts have presented here.

Third, the manner in which the school boards developed these plans itself reflects "narrow tailoring." Each plan was devised to overcome a history of segregated public ****2826*** schools. Each plan embodies the results of local experience and community consultation. Each plan is the product of a process that has sought to enhance student choice, while diminishing the need for mandatory busing. And each plan's use of race-conscious elements is *diminished* compared to the use of race in preceding integration plans.

The school boards' widespread consultation, their experimentation with numerous other plans, indeed, the 40–year history that Part I sets forth, make clear that plans that are less explicitly race-based are unlikely to achieve the boards' "compelling" objectives. The history of each school system reveals highly segregated schools, followed by remedial plans that involved forced busing, followed by efforts to attract or retain students through the use of plans that abandoned busing and replaced it with greater student choice. Both cities once tried to achieve more integrated schools by relying solely upon measures such as redrawn district boundaries, new school building construction, and unrestricted voluntary transfers. In neither city did these prior attempts prove sufficient to achieve the city's integration goals. See Parts I–A and I–B, *supra,* at 2802 – 2809 .

Moreover, giving some degree of weight to a local school board's knowledge, expertise, and concerns in these particular matters is not inconsistent with rigorous judicial scrutiny. It simply recognizes that judges are not well suited to act ****849*** as school administrators. Indeed, in the context of school desegregation, this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils. See *Milliken,* 418 U.S., at 741–742, 94 S.Ct. 3112 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process"). See also *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 49–50, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (extolling local control for "the opportunity it offers for participation in the decisionmaking process that determines how ... local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence"); *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.... By and large, public education in our Nation is committed to the control of state and local authorities"); *Brown v. Board of Education,* 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) ("Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles").

Experience in Seattle and Louisville is consistent with experience elsewhere. In 1987, the U.S. Commission on Civil Rights studied 125 large school districts seeking integration. It reported that most districts—92 of them, in fact—adopted desegregation policies that combined two or more highly ***850** race-conscious strategies, for example, rezoning or pairing. See Welch 83–91.

*****2827** Having looked at dozens of *amicus* briefs, public reports, news stories, and the records in many of this Court's prior cases, which together span 50 years of desegregation history in school districts across the Nation, I have discovered many examples of districts that sought integration through explicitly race-conscious methods, including mandatory busing. Yet, I have found *no* example or model that would permit this Court to say to Seattle and to Louisville: "Here is an instance of a desegregation plan that is likely to achieve your objectives and also makes less use of race-conscious criteria than your plans." And, if the plurality cannot suggest such a model—and it cannot—then it seeks to impose a "narrow tailoring" requirement that in practice would never be met.

Indeed, if there is no such plan, or if such plans are purely imagined, it is understandable why, as the Court notes, *ante,* at 2759 – 2760, Seattle school officials concentrated on diminishing the racial component of their districts' plan, but did not pursue eliminating that element entirely. For the Court now to insist as it does, *ante,* at 2760 – 2761, that these school districts ought to have said so officially is either to ask for the superfluous (if they need only make explicit what is implicit) or to demand the impossible (if they must somehow provide more proof that there is no hypothetical *other* plan that could work as well as theirs). I am not aware of any case in which this Court has read the "narrow tailoring" test to impose such a requirement. Cf. *People Who Care v. Rockford Bd. of Ed. School Dist. No. 205,* 961 F.2d 1335, 1338 (C.A.7 1992) (Easterbrook, J.) ("Would it be necessary to adjudicate the obvious before adopting (or permitting the parties to agree on) a remedy ... ?").

The plurality also points to the school districts' use of numerical goals based upon the racial breakdown of the general school population, and it faults the districts for failing to prove that *no other set of numbers will work*. See ***851** *ante,* at 2755 – 2757. The plurality refers to no case in support of its demand. Nor is it likely to find such a case. After all, this Court has in many cases explicitly permitted districts to use target ratios based upon the district's underlying population. See, *e.g., Swann,* 402 U.S., at 24–25, 91 S.Ct. 1267; *North Carolina Bd. of Ed.,* 402 U.S., at 46, 91 S.Ct. 1284; *Montgomery County Bd. of Ed.,* 395 U.S., at 232, 89 S.Ct. 1670. The reason is obvious: In Seattle, where the overall student population is 41% white, permitting 85% white enrollment at a single school would make it much more likely that other schools would have very few white students, whereas in Jefferson County, with a 60% white enrollment, one school with 85% white students would be less likely to skew enrollments elsewhere.

Moreover, there is research-based evidence supporting, for example, that a ratio no greater than 50% minority—which is Louisville's starting point, and as close as feasible to Seattle's starting point—is helpful in limiting the risk of "white flight." See Orfield, Metropolitan School

Desegregation: Impacts on Metropolitan Society, in Pursuit of a Dream Deferred: Linking Housing and Education Policy 121, 125. Federal law also assumes that a similar target percentage will help avoid detrimental "minority group isolation." See No Child Left Behind Act of 2001, Title V, Part C, 115 Stat. 1806, 20 U.S.C. § 7231 *et seq.* (2000 ed., Supp. IV); 34 CFR §§ 280.2, 280.4 (2006) (implementing regulations). What other numbers are the boards to use as a "starting point"? Are they to spend days, weeks, or months seeking independently to validate the use of ratios that this Court has repeatedly authorized in prior cases? Are they to draw numbers out of thin air? These districts*****2828*** have followed this Court's holdings and advice in "tailoring" their plans. That, too, strongly supports the lawfulness of their methods.

Nor could the school districts have accomplished their desired aims (*e.g.,* avoiding forced busing, countering white flight, maintaining racial diversity) by other means. Nothing in the extensive history of desegregation efforts over the ****852*** past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals. Nevertheless, Justice KENNEDY suggests that school boards

> "may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Ante,* at 2791 – 2792.

But, as to "strategic site selection," Seattle has built one new high school in the last 44 years (and that specialized school serves only 300 students). In fact, six of the Seattle high schools involved in this case were built by the 1920's; the other four were open by the early 1960's. See generally N. Thompson & C. Marr, Building for Learning: Seattle Public School Histories, 1862–2000 (2002). As to "drawing" neighborhood "attendance zones" on a racial basis, Louisville tried it, and it worked only when forced busing was also part of the plan. See *supra,* at 2806 – 2807. As to "allocating resources for special programs," Seattle and Louisville have both experimented with this; indeed, these programs are often referred to as "magnet schools," but the limited desegregation effect of these efforts extends at most to those few schools to which additional resources are granted. In addition, there is no evidence from the experience of these school districts that it will make any meaningful impact. See Brief for Respondents in No. 05–908, p. 42. As to "recruiting faculty" on the basis of race, both cities have tried, but only as one part of a broader program. As to "tracking enrollments, performance, and other statistics by race," tracking *reveals* the problem; it does not cure it.

****853*** Justice KENNEDY sets forth two additional concerns related to "narrow tailoring." In respect to Louisville, he says first that officials stated (1) that kindergarten assignments are not subject to the race-conscious guidelines, and (2) that the child at issue here was denied permission to attend the kindergarten he wanted because of those guidelines. Both, he explains, cannot be true. He adds that this confusion illustrates that Louisville's assignment plan (or its explanation of it to this Court) is insufficiently precise in respect to "who makes the

decisions," "oversight," "the precise circumstances in which an assignment decision" will be made; and "which of two similarly situated children will be subjected to a given race-based decision." *Ante,* at 2790.

The record suggests, however, that the child in question was not assigned to the school he preferred because he missed the kindergarten application deadline. See App. in No. 05–915, p. 20. After he had enrolled and after the academic year had begun, he then applied to transfer to his preferred school after the kindergarten assignment deadline had passed, *id.,* at 21, possibly causing school officials to treat his late request as an application to transfer to the first grade, in respect to which the guidelines apply. I am not certain just how the remainder of Justice KENNEDY's*****2829*** concerns affect the lawfulness of the Louisville program, for they seem to be failures of explanation, not of administration. But Louisville should be able to answer the relevant questions on remand.

Justice KENNEDY's second concern is directly related to the merits of Seattle's plan: Why does Seattle's plan group Asian–Americans, Hispanic–Americans, Native–Americans, and African–Americans together, treating all as similar minorities? *Ante,* at 2790 – 2791. The majority suggests that Seattle's classification system could permit a school to be labeled "diverse" with a 50% Asian–American and 50% white student body, and no African–American students, Hispanic ****854*** students, or students of other ethnicity. *Ante,* at 2749 (opinion of KENNEDY, J.); *ante,* at 2753 – 2754 (opinion of the Court).

The 50/50 hypothetical has no support in the record here; it is conjured from the imagination. In fact, Seattle apparently began to treat these different minority groups alike in response to the federal Emergency School Aid Act's requirement that it do so. A. Siqueland, Without A Court Order: The Desegregation of Seattle's Schools 116–117 (1981) (hereinafter Siqueland). See also F. Hanawalt & R. Williams, The History of Desegregation in Seattle Public Schools 1954–1981, p. 31 (1981) (hereinafter Hanawalt); Pub. L. 95–561, Title VI, 92 Stat. 2252 (prescribing percentage enrollment requirements for "minority" students); Siqueland 55 (discussing Department of Health, Education, and Welfare's definition of "minority"). Moreover, maintaining this federally mandated system of classification makes sense insofar as Seattle's experience indicates that the relevant circumstances in respect to each of these different minority groups are roughly similar, *e.g.,* in terms of residential patterns, and call for roughly similar responses. This is confirmed by the fact that Seattle has been able to achieve a desirable degree of diversity without the *greater* emphasis on race that drawing fine lines among minority groups would require. Does the plurality's view of the Equal Protection Clause mean that courts must give no weight to such a board determination? Does it insist upon especially strong evidence supporting inclusion of multiple minority groups in an otherwise lawful government minority-assistance program? If so, its interpretation threatens to produce divisiveness among minority groups that is incompatible with the basic objectives of the Fourteenth Amendment. Regardless, the plurality cannot object that the constitutional defect is the individualized use of race and simultaneously object that not enough account of individuals' race has been taken.

Finally, I recognize that the Court seeks to distinguish *Grutter* from these cases by claiming that

Grutter arose in ***855** " 'the context of higher education.' " *Ante,* at 2808. But that is not a meaningful legal distinction. I have explained why I do not believe the Constitution could possibly find "compelling" the provision of a racially diverse education for a 23–year–old law student but not for a 13–year–old high school pupil. See *supra,* at 2824 – 2826. And I have explained how the plans before us are more narrowly tailored than those in *Grutter*. See *supra,* at 2824. I add that one cannot find a relevant distinction in the fact that these school districts did not examine the merits of applications "individual[ly]." See *ante,* at 2806 – 2808. The context here does not involve admission by merit; a child's academic, artistic, and athletic "merits" are not at all relevant to the child's placement. These are not affirmative action plans, and hence "individualized scrutiny" is simply beside the point.

The upshot is that these plans' specific features—(1) their limited and historically diminishing use of race, (2) their strong reliance upon other non-race-conscious elements, (3) their history and the manner in which the districts developed and modified their approach, (4) the comparison with ****2830** prior plans, and (5) the lack of reasonably evident alternatives—together show that the districts' plans are "narrowly tailored" to achieve their "compelling" goals. In sum, the districts' race-conscious plans satisfy "strict scrutiny" and are therefore lawful.

IV. *Direct Precedent*

Two additional precedents more directly related to the plans here at issue reinforce my conclusion. The first consists of the District Court determination in the Louisville case when it dissolved its desegregation order that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes," indeed that the board had "treated the ideal of an integrated system as much more than a legal obligation—they consider ***856** it a positive, desirable policy and an essential element of any well-rounded public school education." *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 370 (W.D. Ky. 2000) (*Hampton II*). When the court made this determination in 2000, it did so in the context of the Louisville desegregation plan that the board had adopted in 1996. That plan, which took effect before 1996, is the very plan that in all relevant respects is in effect now and is the subject of the present challenge.

No one claims that (the relevant portion of) Louisville's plan was unlawful in 1996 when Louisville adopted it. To the contrary, there is every reason to believe that it represented part of an effort to implement the 1978 desegregation order. But if the plan was lawful when it was first adopted and if it was lawful the day before the District Court dissolved its order, how can the plurality now suggest that it became *unlawful* the following day? Is it conceivable that the Constitution, implemented through a court desegregation order, could permit (perhaps *require*) the district to make use of a race-conscious plan the day before the order was dissolved and then *forbid* the district to use the identical plan the day after? See *id.,* at 380 ("The very analysis for dissolving desegregation decrees supports continued maintenance of a desegregated system as a compelling state interest"). The Equal Protection Clause is not incoherent. And federal courts would rightly hesitate to find unitary status if the consequences of the ruling were so dramatically disruptive.

Second, *Seattle School Dist. No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896, is directly on point. That case involves the original Seattle Plan, a *more heavily race-conscious predecessor* of the very plan now before us. In *Seattle School Dist. No. 1,* this Court struck down a state referendum that effectively barred implementation of Seattle's desegregation plan and "burden[ed] all future attempts to integrate Washington schools in districts throughout the State." *Id.,* at 462–463, 483, 102 S.Ct. 3187. Because ***857** the referendum would have prohibited the adoption of a school integration plan that involved mandatory busing, and because it would have imposed a special burden on school integration plans (plans that sought to integrate previously segregated schools), the Court found it unconstitutional. *Id*., at 483–487, 102 S.Ct. 3187.

In reaching this conclusion, the Court did not directly address the constitutional merits of the underlying Seattle Plan. But it explicitly cited *Swann*'s statement that the Constitution permitted a local district to adopt such a plan. 458 U.S., at 472, n. 15, 102 S.Ct. 3187. It also cited to Justice Powell's opinion in *Bakke, approving of* the limited use of race-conscious criteria in a university-admissions "affirmative action" case. 458 U.S., at 472, n. 15, 102 S.Ct. 3187 . In addition, the Court stated that "[a]ttending an ethnically diverse ****2831** school," *id.,* at 473, 102 S.Ct. 3187, could help prepare "minority children for citizenship in our pluralistic society," hopefully "teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Ibid.* (internal quotation marks omitted).

It is difficult to believe that the Court that held unconstitutional a referendum that would have interfered with the implementation of this plan thought that the integration plan it sought to preserve was itself an *unconstitutional* plan. And if *Seattle School Dist. No. 1* is premised upon the constitutionality of the original Seattle Plan, it is equally premised upon the constitutionality of the present plan, for the present plan *is* the Seattle Plan, modified only insofar as it places even *less* emphasis on race-conscious elements than its predecessors.

It is even more difficult to accept the plurality's contrary view, namely, that the underlying plan was unconstitutional. If that is so, then *all* of Seattle's earlier (even more race-conscious) plans must also have been unconstitutional. That necessary implication of the plurality's position strikes the 13th chime of the clock. How could the plurality adopt a ***858** constitutional standard that would hold unconstitutional large numbers of race-conscious integration plans adopted by numerous school boards over the past 50 years while remaining true to this Court's desegregation precedent?

V. *Consequences*

The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Hence it is important to consider the potential consequences of the plurality's approach, as measured against the Constitution's objectives. To do so provides further reason to believe that the plurality's approach is legally unsound.

For one thing, consider the effect of the plurality's views on the parties before us and on similar school districts throughout the Nation. Will Louisville and all similar school districts have to return to systems like Louisville's initial 1956 plan, which did not consider race at all? See *supra,* at 2806. That initial 1956 plan proved ineffective. Sixteen years into the plan, 14 of 19 middle and high schools remained almost totally white or almost totally black. *Ibid.*

The districts' past and current plans are not unique. They resemble other plans, promulgated by hundreds of local school boards, which have attempted a variety of desegregation methods that have evolved over time in light of experience. A 1987 Civil Rights Commission study of 125 school districts in the Nation demonstrated the breadth and variety of desegregation plans:

> "The [study] documents almost 300 desegregation plans that were implemented between 1961 and 1985. The degree of heterogeneity within these districts is immediately apparent. They are located in every region of the country and range in size from Las Cruces, New Mexico, with barely over 15,000 students attending 23 schools in 1968, to New York City, with more than one ***859** million students in 853 schools. The sample includes districts in urban areas of all sizes, suburbs (*e.g.,* Arlington County, Virginia) and rural areas (*e.g.,* Jefferson Parish, Louisiana, and Raleigh County, West Virginia). It contains 34 countywide districts with central cities (the 11 Florida districts fit this description, plus Clark County, Nevada and ****2832** others) and a small number of consolidated districts (New Castle County, Delaware and Jefferson County, Kentucky).
>
> "The districts also vary in their racial compositions and levels of segregation. Initial plans were implemented in Mobile, Alabama and Mecklenburg County, North Carolina, and in a number of other southern districts in the face of total racial segregation. At the other extreme, Santa Clara, California had a relatively even racial distribution prior to its 1979 desegregation plan. When the 1965 plan was designed for Harford County, Maryland, the district was 92 percent white. Compton, California, on the other hand, became over 99 percent black in the 1980s, while Buffalo, New York had a virtual 50–50 split between white and minority students prior to its 1977 plan.
>
> "It is not surprising to find a large number of different desegregation strategies in a sample with this much variation." Welch 23 (footnote omitted).

A majority of these desegregation techniques explicitly considered a student's race. See *id.,* at 24–28. Transfer plans, for example, allowed students to shift from a school in which they were in the racial majority to a school in which they would be in a racial minority. Some districts, such as Richmond, California, and Buffalo, New York, permitted only "one-way" transfers, in which only black students attending predominantly black schools were permitted to transfer to designated receiver schools. *Id.,* at 25. Fifty-three of the one hundred twenty-five studied districts used transfers as a component of their plans. *Id.,* at 83–91.

***860** At the state level, 46 States and Puerto Rico have adopted policies that encourage or require local school districts to enact interdistrict or intradistrict open choice plans. Eight of

those States condition approval of transfers to another school or district on whether the transfer will produce increased racial integration. Eleven other States require local boards to deny transfers that are not in compliance with the local school board's desegregation plans. See Education Commission of the States, StateNotes, Open Enrollment: 50–State Report (2007), online at http:// mb 2. ecs. org/ reports/ Report. aspx? id = 268.

Arkansas, for example, provides by statute that "[n]o student may transfer to a nonresident district where the percentage of enrollment for the student's race exceeds that percentage in the student's resident district." Ark. Code Ann. § 6–18–206(f)(1), as amended, 2007 Ark. Gen. Acts no. 552. An Ohio statute provides, in respect to student choice, that each school district must establish "[p]rocedures to ensure that an appropriate racial balance is maintained in the district schools." Ohio Rev. Code Ann. § 3313.98(B)(2)(b)(iii) (Lexis Supp.2006). Ohio adds that a "district may object to the enrollment of a native student in an adjacent or other district in order to maintain an appropriate racial balance." § 3313.98(F)(1)(a).

A Connecticut statute states that its student choice program will seek to "preserve racial and ethnic balance." Conn. Gen. Stat. § 10–266aa(b)(2) (2007). Connecticut law requires each school district to submit racial group population figures to the State Board of Education. § 10–226a. Another Connecticut regulation provides that "[a]ny school in which the Proportion for the School falls outside of a range from 25 percentage points less to 25 percentage points more than the Comparable Proportion for the School District, shall be determined to be racially imbalanced." Conn. Agencies Regs. § 10–226e–3(b) (1999). A "racial imbalance" determination requires the district to submit a plan to correct the ***861** racial imbalance, which plan may include*****2833** "mandatory pupil reassignment." §§ 10–226e–5(a) and (c)(4).

Interpreting that State's Constitution, the Connecticut Supreme Court has held legally inadequate the reliance by a local school district solely upon some of the techniques Justice KENNEDY today recommends (*e.g.,* reallocating resources, etc.). See *Sheff v. O'Neill,* 238 Conn. 1, 678 A.2d 1267 (1996). The State Supreme Court wrote: "Despite the initiatives undertaken by the defendants to alleviate the severe racial and ethnic disparities among school districts, and despite the fact that the defendants did not intend to create or maintain these disparities, the disparities that continue to burden the education of the plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity." *Id.,* at 42, 678 A.2d, at 1289.

At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes. See *supra,* at 2814 – 2815. In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm.

The wide variety of different integration plans that school districts use throughout the Nation suggests that the problem of racial segregation in schools, including *de facto* segregation, is difficult to solve. The fact that many such plans have used explicitly racial criteria suggests that such criteria have an important, sometimes necessary, role to play. The fact that the controlling

opinion would make a school district's use of such criteria often unlawful (and the plurality's "colorblind" view would make such use always unlawful) suggests that today's opinion will require setting aside the laws of several States and many local communities.

As I have pointed out, *supra,* at 2801 – 2802, *de facto* resegregation is on the rise. See Appendix A, *infra*. It is reasonable***862** to conclude that such resegregation can create serious educational, social, and civic problems. See *supra,* at 2820 – 2824. Given the conditions in which school boards work to set policy, see *supra,* at 2811 – 2812, they may need all of the means presently at their disposal to combat those problems. Yet the plurality would deprive them of at least one tool that some districts now consider vital—the limited use of broad race-conscious student population ranges.

I use the words "may need" here deliberately. The plurality, or at least those who follow Justice THOMAS' " 'color-blind' " approach, see *ante,* at 2782 – 2783 (concurring opinion); *Grutter,* 539 U.S., at 353–354, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part), may feel confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria including those with inclusive objectives. See *ante,* at 2767 – 2768 (plurality opinion); see also *ante,* at 2782 (THOMAS, J., concurring). By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing *de facto* segregation, troubled inner-city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for ****2834** them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Ante,* at 2821 – 2822. See also *Parents Involved VII,* 426 F.3d, at 1222 (Bea, J., dissenting) ("The way to end racial discrimination is to stop discriminating by race"). That is why the Equal Protection Clause outlaws***863** invidious discrimination, but does not similarly forbid all use of race-conscious criteria.

Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of "race-conscious" criteria from among their available options. See *Adarand*, 515 U.S., at 237, 115 S.Ct. 2097 ("[S]trict scrutiny" in this context is "[not] 'strict in theory, but fatal in fact' " (quoting *Fullilove,* 448 U.S., at 519, 100 S.Ct. 2758 (Marshall, J., concurring in judgment))). Today, however, the Court restricts (and some Members would eliminate) that leeway. I fear the consequences of doing so for the law, for the schools, for the democratic process, and for America's efforts to create, out of its diversity, one Nation.

VI. *Conclusions*

To show that the school assignment plans here meet the requirements of the Constitution, I have written at exceptional length. But that length is necessary. I cannot refer to the history of

the plans in these cases to justify the use of race-conscious criteria without describing that history in full. I cannot rely upon *Swann*'s statement that the use of race-conscious limits is permissible without showing, rather than simply asserting, that the statement represents a constitutional principle firmly rooted in federal and state law. Nor can I explain my disagreement with the Court's holding and the plurality's opinion without offering a detailed account of the arguments they propound and the consequences they risk.

Thus, the opinion's reasoning is long. But its conclusion is short: The plans before us satisfy the requirements of the Equal Protection Clause. And it is the plurality's opinion, not this dissent, that “fails to ground the result it would reach in law.” *Ante,* at 2815.

Four basic considerations have led me to this view. *First,* the histories of Louisville and Seattle reveal complex circumstances***864*** and a long tradition of conscientious efforts by local school boards to resist racial segregation in public schools. Segregation at the time of *Brown* gave way to expansive remedies that included busing, which in turn gave rise to fears of white flight and resegregation. For decades now, these school boards have considered and adopted and revised assignment plans that sought to rely less upon race, to emphasize greater student choice, and to improve the conditions of all schools for all students, no matter the color of their skin, no matter where they happen to reside. The plans under review—which are less burdensome, more egalitarian, and more effective than prior plans—continue in that tradition. And their history reveals school district goals whose remedial, educational, and democratic elements are inextricably intertwined each with the others. See Part I, *supra,* at 2801 – 2812.

Second, since this Court's decision in *Brown,* the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools. The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities *****2835*** and state action that seeks to bring together people of all races. From *Swann* to *Grutter,* this Court's decisions have emphasized this distinction, recognizing that the fate of race relations in this country depends upon unity among our children, “for unless our children begin to learn together, there is little hope that our people will ever learn to live together.” *Milliken,* 418 U.S., at 783, 94 S.Ct. 3112 (Marshall, J., dissenting). See also Sumner, Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts (Dec. 4, 1849), in 2 The Works of Charles Sumner 327, 371 (1870) (“The law contemplates not only that all shall be taught, but that *all* shall be taught *together*”). See Part II, *supra,* at 2811 – 2820.

****865*** *Third,* the plans before us, subjected to rigorous judicial review, are supported by compelling state interests and are narrowly tailored to accomplish those goals. Just as diversity in higher education was deemed compelling in *Grutter,* diversity in public primary and secondary schools—where there is even more to gain—must be, *a fortiori,* a compelling state interest. Even apart from *Grutter,* five Members of this Court agree that “avoiding racial isolation” and “achiev[ing] a diverse student population” remain today compelling interests. *Ante,* at 2796 – 2797 (opinion of KENNEDY, J.). These interests combine remedial, educational, and democratic objectives. For the reasons discussed above, however, I disagree with Justice

KENNEDY that Seattle and Louisville have not done enough to demonstrate that their present plans are necessary to continue upon the path set by *Brown*. These plans are *more* "narrowly tailored" than the race-conscious law school admissions criteria at issue in *Grutter*. Hence, their lawfulness follows *a fortiori* from this Court's prior decisions. See Parts III–IV, *supra,* at 2820 – 2831.

Fourth, the plurality's approach risks serious harm to the law and for the Nation. Its view of the law rests either upon a denial of the distinction between exclusionary and inclusive use of race-conscious criteria in the context of the Equal Protection Clause, or upon such a rigid application of its "test" that the distinction loses practical significance. Consequently, the Court's decision today slows down and sets back the work of local school boards to bring about racially diverse schools. See Part V, *supra,* at 2831 – 2834.

Indeed, the consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not. Yesterday, the citizens of this Nation could look for guidance to this Court's unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a ***866** full range of means to combat segregated schools. Today, they do not.

The Court's decision undermines other basic institutional principles as well. What has happened to *stare decisis?* The history of the plans before us, their educational importance, their highly limited use of race—all these and more—make clear that the compelling interest here is stronger than in *Grutter*. The plans here are more narrowly tailored than the law school admissions program there at issue. Hence, applying *Grutter*'s strict test, their lawfulness follows *a fortiori*. To hold to the contrary is to transform that test from "strict" to "fatal in fact"—the very opposite of what *Grutter* said. And what has happened to *Swann?* To *McDaniel?* To *Crawford?* To *Harris?* To *School Committee of Boston?* To *Seattle School Dist. No. 1?* After decades of vibrant life, they would all, under the plurality's logic, be written out of the law.

And what of respect for democratic local decisionmaking by States and school ****2836** boards? For several decades this Court has rested its public school decisions upon *Swann*'s basic view that the Constitution grants local school districts a significant degree of leeway where the inclusive use of race-conscious criteria is at issue. Now localities will have to cope with the difficult problems they face (including resegregation) deprived of one means they may find necessary.

And what of law's concern to diminish and peacefully settle conflict among the Nation's people? Instead of accommodating different good-faith visions of our country and our Constitution, today's holding upsets settled expectations, creates legal uncertainty, and threatens to produce considerable further litigation, aggravating race-related conflict.

And what of the long history and moral vision that the Fourteenth Amendment itself embodies? The plurality cites in support those who argued in *Brown* against segregation, and Justice THOMAS likens the approach that I have taken to that of segregation's defenders. See

***867** *ante,* at 2767 – 2768 (plurality opinion) (comparing Jim Crow segregation to Seattle and Louisville's integration polices); *ante,* at 2783 – 2786 (THOMAS, J., concurring). But segregation policies did not simply tell schoolchildren "where they could and could not go to school based on the color of their skin," *ante,* at 2767 – 2768 (plurality opinion); they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history, see *ante,* at 2767 (same), is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying "a state-mandated racial label." *Ante,* at 2797 (KENNEDY, J., concurring in part and concurring in judgment). But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.

* * *

Finally, what of the hope and promise of *Brown?* For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It ***868** sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. See *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). Today, almost 50 years later, attitudes toward race in this ****2837** Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

I must dissent.

Fitzgerald v. Barnstable School Committee, 555 U.S. 246 (U.S. Supreme Court 2009).

*****789 *246 Syllabus****

> * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioners filed suit against respondents, the local school district's governing board and superintendent, alleging that *****790*** their response to allegations of sexual harassment of petitioners' daughter by an older student was inadequate, raising claims under, *inter alia,* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and 42 U.S.C. § 1983 for violation of the Equal Protection Clause of the Fourteenth Amendment. Among its rulings, the District Court dismissed the § 1983 claim. The First Circuit affirmed, holding that, under this Court's precedents, Title IX's implied private remedy was sufficiently comprehensive to preclude the use of § 1983 to advance constitutional claims.

Held:
1. Title IX does not preclude a § 1983 action alleging unconstitutional gender discrimination in schools. Pp. 793 – 798.

(a) In *Middlesex County Sewerage Authority v. National Sea Clammers Assn.,* 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435; *Smith v. Robinson,* 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746; and *Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 125 S.Ct. 1453, 161 L.Ed.2d 316, this Court found that particular statutory enactments precluded § 1983 claims where it was established that Congress intended the statute's remedial scheme to "be the exclusive avenue through which a plaintiff may assert [the] claims," *Smith, supra,* at1009, 104 S.Ct. 3457. In determining whether Congress intended for a subsequent statute to preclude the enforcement of a federal right under § 1983, the Court has placed primary emphasis on the nature and extent of that statute's remedial scheme. See *Sea Clammers, supra*, at 20, 101 S.Ct. 2615. Where the § 1983 claim alleges a constitutional violation, a lack of congressional intent to preclude may also be inferred from a comparison of the rights and protections of the other statute and those existing under the Constitution. Pp. 793 – 795.

(b) In the absence of a comprehensive remedial scheme comparable to those at issue in *Sea Clammers, Smith,* and *Rancho Palos Verdes,* and in light of the divergent coverage of Title IX and the Equal Protection Clause, it must be concluded that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights. Pp. 795 – 798.

****247*** (i) Title IX's only express enforcement mechanism, 20 U.S.C. § 1682, is an administrative procedure resulting in the withdrawal of federal funding from noncompliant institutions. This Court has also recognized an implied private right of action, *Cannon v. University of Chicago,*

441 U.S. 677, 717, 99 S.Ct. 1946, 60 L.Ed.2d 560, for which both injunctive relief and damages are available, *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 76, 112 S.Ct. 1028, 117 L.Ed.2d 208. These remedies stand in stark contrast to the "unusually elaborate," "carefully tailored," and " restrictive" enforcement schemes of the statutes in *Sea Clammers, Smith,* and *Rancho Palos Verdes*. Unlike those statutes, Title IX has no administrative exhaustion requirement and no notice provisions. Plaintiffs can file directly in court under its implied private right of action and can obtain the full range of remedies. Accordingly, parallel and concurrent § 1983 claims will neither circumvent required procedures nor allow access to new remedies. Moreover, under *Rancho Palos Verdes,* "[t]he provision of an express, private means of redress in the statute itself" is a key consideration in determining congressional intent, and "the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which ... an action would lie under § 1983 *****791*** and those in which we have held that it would not." 544 U.S., at 121, 125 S.Ct. 1453. Title IX contains no express private remedy, much less a more restrictive one. Pp. 795 – 796.

(ii) Because Title IX's protections are narrower in some respects and broader in others than those guaranteed under the Equal Protection Clause, the Court cannot agree with the First Circuit that Congress saw Title IX as the sole means of correcting unconstitutional gender discrimination in schools. Title IX reaches institutions and programs that receive federal funds, 20 U.S.C. § 1681(a), which may include nonpublic institutions, § 1681(c), but it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals. Moreover, while the constitutional provision reaches only state actors, § 1983 equal protection claims may be brought against individuals as well as state entities. *West v. Atkins,* 487 U.S. 42, 48–51, 108 S.Ct. 2250, 101 L.Ed.2d 40. And Title IX exempts from its restrictions several activities that may be challenged on constitutional grounds. See, *e.g.,* § 1681(a)(5). Even where particular activities and particular defendants are subject to both Title IX and the Equal Protection Clause, the standards for establishing liability may not be wholly congruent. Compare *Gebser v. Lago Vista Independent School Dist.,* 524 U.S. 274, 290, 118 S.Ct. 1989, 141 L.Ed.2d 277, with *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611. Pp. 796 – 797.

(iii) The Court's conclusion is consistent with Title IX's context and history. Because the Congress that enacted Title IX authorized the Attorney General to intervene in private suits alleging sex discrimination ****248*** violative of the Equal Protection Clause, 42 U.S.C. § 2000h–2, Congress must have explicitly envisioned that private plaintiffs would bring constitutional claims to challenge gender discrimination via § 1983. Moreover, Title IX was modeled after Title VI of the Civil Rights Act of 1964, *Cannon, supra,* at 694–695, 99 S.Ct. 1946, and, at the time of Title IX's 1972 enactment, the lower courts routinely interpreted Title VI to allow for parallel and concurrent § 1983 claims. Absent contrary evidence, it follows that Congress intended Title IX to be interpreted similarly to allow for parallel and concurrent § 1983 claims. Pp. 797 – 798.

2. As neither of the courts below addressed the merits of petitioners' constitutional claims or even the sufficiency of their pleadings, this Court will not do so in the first instance here. P. 798.

504 F.3d 165, reversed and remanded.

*****792*** The issue in this case of peer-on-peer sexual harassment is whether Title IX of the Education Amendments of 1972, 86 Stat. 373, 20 U.S.C. § 1681(a), precludes an action under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging unconstitutional gender discrimination in schools. The Court of Appeals for ****249*** the First Circuit held that it does. 504 F.3d 165 (2007). We reverse.

I

Because this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we assume the truth of the facts as alleged in petitioners' complaint. During the 2000–2001 school year, the daughter of petitioners Lisa and Robert Fitzgerald was a kindergarten student in the Barnstable, Massachusetts, school system, and rode the bus to school each morning. One day she told her parents that, whenever she wore a dress, a third-grade boy on the school bus would bully her into lifting her skirt. Lisa Fitzgerald immediately called the school principal, Frederick Scully, who arranged a meeting later that day with the Fitzgeralds, their daughter, and another school official, Lynda Day. Scully and Day then questioned the alleged bully, who denied the allegations. Day also interviewed the bus driver and several students who rode the bus. She concluded that she could not corroborate the girl's version of the events.

The Fitzgeralds' daughter then provided new details of the alleged abuse to her parents, who relayed them to Scully. Specifically, she told her parents that in addition to bullying her into raising her skirt, the boy coerced her into pulling down her underpants and spreading her legs. Scully scheduled a second meeting with the Fitzgeralds to discuss the additional details and again questioned the boy and other students.

Meanwhile, the local police department conducted an independent investigation and concluded there was insufficient evidence to bring criminal charges against the boy. Based partly on the police investigation and partly on the school's own investigation, Scully similarly concluded there was insufficient evidence to warrant discipline. Scully did propose remedial measures to the Fitzgeralds. He suggested transferring their daughter to a different bus or leaving rows of empty seats between the kindergarteners and older students ****250*** on the original bus. The Fitzgeralds felt that these proposals punished their daughter instead of the boy and countered with alternative proposals. They suggested transferring the boy to a different bus or placing a monitor on the original bus. The Barnstable school system's superintendent, Russell Dever, did not act on these proposals.

The Fitzgeralds began driving their daughter to school to avoid further bullying on the bus, but she continued to report unsettling incidents at school. The Fitzgeralds reported each incident to Scully. The Fitzgeralds' daughter had an unusual number of absences during the remainder of the school year.

In April 2002, the Fitzgeralds filed suit in District Court, alleging that the school system's response to their allegations of sexual harassment had been inadequate, resulting in further

harassment to their daughter. Their complaint included: (1) a claim for violation of Title IX against the Barnstable School Committee (the school system's governing body), (2) claims under 42 U.S.C. § 1983 for violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment against the school committee and Dever, and (3) Massachusetts state-law claims against the school *****793*** committee and Dever. The school committee and Dever (respondents here), filed a motion to dismiss, which the District Court granted as to the § 1983 claims and the state-law claims. On the Title IX claim, the school committee filed a motion for summary judgment, which the District Court also granted. *Hunter v. Barnstable School Committee,* 456 F.Supp.2d 255, 266 (Mass. 2006).

The Court of Appeals for the First Circuit affirmed. 504 F.3d 165. Turning first to the Title IX claim against the school committee, the court noted three points that were not in dispute: (1) The school committee was the recipient of federal funds and was therefore subject to Title IX, (2) the ****251*** school committee had actual knowledge of the harassment the Fitzgeralds' daughter suffered, and (3) if the allegations of the complaint were true, the harassment was "severe, pervasive, and objectively offensive." *Id*., at 172. The court concluded that the Fitzgeralds' Title IX claim lacked merit, however, because the response of the school committee and Dever to the reported harassment had been objectively reasonable. *Id*., at 175.

The Court of Appeals turned next to the Fitzgeralds' § 1983 claims. Relying on this Court's precedents in *Middlesex County Sewerage Authority v. National Sea Clammers Assn.,* 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), *Smith v. Robinson,* 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), and *Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005), the court characterized Title IX's implied private remedy as "sufficiently comprehensive" to preclude use of § 1983 to advance statutory claims based on Title IX itself. 504 F.3d, at 179. This reasoning, the court held, "appl[ied] with equal force" to the constitutional claims. *Ibid*. The court concluded that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions." *Ibid*.

The Court of Appeals' decision deepened a conflict among the Circuits regarding whether Title IX precludes use of § 1983 to redress unconstitutional gender discrimination in schools. Compare *Bruneau ex rel. Schofield v. South Kortright Central School Dist*., 163 F.3d 749, 758–759 (C.A.2 1998); *Waid v. Merrill Area Public Schools* 91 F.3d 857, 862–863 (C.A.7 1996); *Pfeiffer v. Marion Center Area School Dist*., 917 F.2d 779, 789 (C.A.3 1990), with *Communities for Equity v. Michigan High School Athletic Assn.,* 459 F.3d 676, 691 (C.A.6 2006); *Crawford v. Davis,* 109 F.3d 1281, 1284 (C.A.8 1997); *Seamons v. Snow,* 84 F.3d 1226, 1234 (C.A.10 1996). We granted certiorari to resolve this conflict, 553 U.S. 1093, 128 S.Ct. 2903, 171 L.Ed.2d 840 (2008), and we now reverse.

**252* II

A

In relevant part, 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In three cases, this Court has found that statutory enactments precluded claims under this statute. *Sea Clammers, supra; Smith, supra*; *Rancho Palos Verdes*, *supra.* These cases establish that "[t]he crucial *****794*** consideration is what Congress intended." *Smith,* 468 U.S., at 1012, 104 S.Ct. 3457. If Congress intended a statute's remedial scheme to "be the exclusive avenue through which a plaintiff may assert [the] claims," *id*., at 1009, 104 S.Ct. 3457, the § 1983 claims are precluded. See *Rancho Palos Verdes,* 544 U.S., at 120–121, 125 S.Ct. 1453 ("The critical question, then, is whether Congress meant the judicial remedy expressly authorized by [the statute] to coexist with an alternative remedy available in a § 1983 action").

In those cases in which the § 1983 claim is based on a statutory right, "evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.,* at 120, 125 S.Ct. 1453 (internal quotation marks omitted). In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ****253*** ways, it is not likely that Congress intended to displace § 1983 suits enforcing constitutional rights. Our conclusions regarding congressional intent can be confirmed by a statute's context. *Id.,* at127, 125 S.Ct. 1453 (BREYER, J., concurring) ("[C]ontext, not just literal text, will often lead a court to Congress' intent in respect to a particular statute").

In determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, we have placed primary emphasis on the nature and extent of that statute's remedial scheme. See *Sea Clammers, supra,* at 20, 101 S.Ct. 2615 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983").

Sea Clammers illustrates this approach. The plaintiffs brought suit under § 1983 for violations of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972. This Court's analysis focused on these two statutes' "unusually elaborate enforcement provisions," which authorized the Environmental Protection Agency to seek civil and criminal penalties for violations, permitted " 'any interested person' " to seek judicial review, and contained detailed citizen suit provisions allowing for injunctive relief. 453 U.S., at 13–14, 101 S.Ct. 2615. Allowing parallel § 1983 claims to proceed, we concluded, would have thwarted Congress' intent in formulating and detailing these provisions.

In *Smith,* the plaintiffs alleged deprivation of a free, appropriate public education for their

handicapped child, in violation of the Education of the Handicapped Act (EHA) and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Departing from the pattern of the plaintiffs in *Sea Clammers,* the *Smith* plaintiffs relied on § 1983 to assert independent constitutional rights, not to assert the statutory rights guaranteed by the EHA. As in *Sea Clammers,* however, this Court focused on the statute's ***254** detailed remedial scheme in concluding that Congress intended the statute to provide the sole avenue for relief. *Smith, supra,* at 1011, 104 S.Ct. 3457 (noting "the comprehensive nature of the procedures and guarantees set out in the [statute] and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child").

****795** In *Rancho Palos Verdes,* we again focused on a statute's remedial scheme in inferring congressional intent for exclusivity. After being denied a permit to build a radio tower on his property, the plaintiff brought claims for injunctive relief under the Telecommunications Act of 1996 (TCA) and for damages and attorney's fees under § 1983. Noting that the TCA provides highly detailed and restrictive administrative and judicial remedies, and explaining that "limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983," we again concluded that Congress must have intended the statutory remedies to be exclusive. 544 U.S., at 124, 125 S.Ct. 1453.

In all three cases, the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit. *Sea Clammers, supra,* at 6, 101 S.Ct. 2615; *Smith, supra,* at 1011–1012, 104 S.Ct. 3457; *Rancho Palos Verdes, supra,* at122, 125 S.Ct. 1453. Offering plaintiffs a direct route to court via § 1983 would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes.[1] "Allowing a plaintiff to circumvent ***255** " the statutes' provisions in this way would have been "inconsistent with Congress' carefully tailored scheme." *Smith, supra,* at1012, 104 S.Ct. 3457.

> 1. The statutes at issue in *Sea Clammers* and *Smith* did not allow for damages. The statute at issue in *Rancho Palos Verdes* did not expressly allow for damages, but some lower courts interpreted it to do so. The statutes at issue in *Smith* and *Rancho Palos Verdes* did not allow for attorney's fees and costs. See *Sea Clammers,* 453 U.S., at 6–7, 13–14, 101 S.Ct. 2615 (addressing the Federal Water Pollution Control Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.* (2000 ed. and Supp. V), and the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052, as amended, 33 U.S.C. § 1401 *et seq.*); *Smith,* 468 U.S., at 1010–1011, 104 S.Ct. 3457 (addressing the EHA, (2000 ed. and Supp. V), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq*.); *Rancho Palos Verdes,* 544 U.S., at 122–123, and nn. 3, 4, 125 S.Ct. 1453 (addressing the TCA, 110 Stat. 56, 47 U.S.C. § 332(c)(7)).

B

1

Section 901(a) of Title IX provides:

> “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 education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

The statute's only express enforcement mechanism, § 1682, is an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance. In addition, this Court has recognized an implied private right of action. *Cannon v. University of Chicago,* 441 U.S. 677, 717, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). In a suit brought pursuant to this private right, both injunctive relief and damages are available. *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 76, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992).

These remedies—withdrawal of federal funds and an implied cause of action—stand in stark contrast to the “unusually elaborate,” “carefully tailored,” and “restrictive” enforcement schemes of the statutes at issue in *Sea Clammers, Smith,* and *Rancho Palos Verdes*. Unlike those statutes, Title IX has no administrative exhaustion requirement and no notice provisions. Under its implied private right of action, plaintiffs can file directly in court, *****796** Cannon, supra,* at 717, 99 S.Ct. 1946, and can obtain the full range of remedies, see *Franklin, supra,* at72, 112 S.Ct. 1028 (concluding that “Congress did not intend to limit the remedies available in a suit brought under Title IX”). As a result, parallel and concurrent § 1983 claims will ****256*** neither circumvent required procedures, nor allow access to new remedies.

Moreover, this Court explained in *Rancho Palos Verdes* that “[t]he provision of an *express,* private means of redress in the statute itself” is a key consideration in determining congressional intent, and that “the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not.” 544 U.S., at 121, 125 S.Ct. 1453 (emphasis added). As noted, Title IX contains no express private remedy, much less a more restrictive one. This Court has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation. See *Franklin, supra,* at 76, 112 S.Ct. 1028 (SCALIA, J., concurring in judgment) (“Quite obviously, the search for what was Congress' *remedial* intent as to a right whose very existence Congress did not expressly acknowledge is unlikely to succeed”). Mindful that we should “not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim,” *Smith,* 468 U.S., at 1012, 104 S.Ct. 3457, we see no basis for doing so here.

2

A comparison of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause lends further support to the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional suits. Title IX's protections are narrower in some respects and broader in others. Because the protections guaranteed by the two sources of law diverge in this way, we cannot agree with the Court of Appeals that “Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination

perpetrated by educational institutions." 504 F.3d, at 179.

***257** Title IX reaches institutions and programs that receive federal funds, 20 U.S.C. § 1681(a), which may include nonpublic institutions, § 1681(c), but it has consistently been interpreted as not authorizing suit against school officials, teachers, and other individuals, see, *e.g., Hartley v. Parnell,* 193 F.3d 1263, 1270 (C.A.11 1999). The Equal Protection Clause reaches only state actors, but § 1983 equal protection claims may be brought against individuals as well as municipalities and certain other state entities. *West v. Atkins,* 487 U.S. 42, 48–51, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

Title IX exempts from its restrictions several activities that may be challenged on constitutional grounds. For example, Title IX exempts elementary and secondary schools from its prohibition against discrimination in admissions, § 1681(a)(1); it exempts military service schools and traditionally single-sex public colleges from all of its provisions, §§ 1681(a)(4)-(5). Some exempted activities may form the basis of equal protection claims. See *United States v. Virginia,* 518 U.S. 515, 534, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (men-only admissions policy at Virginia Military Institute violated the Equal Protection Clause); *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 731, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) (women-only admission policy at a traditionally single-sex public college violated the Equal Protection Clause).

*****797*** Even where particular activities and particular defendants are subject to both Title IX and the Equal Protection Clause, the standards for establishing liability may not be wholly congruent. For example, a Title IX plaintiff can establish school district liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference. *Gebser v. Lago Vista Independent School Dist.,* 524 U.S. 274, 290, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). A plaintiff stating a similar claim via § 1983 for violation of the Equal Protection Clause by a school district or other municipal entity must show that the harassment was ***258** the result of municipal custom, policy, or practice. *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

In light of the divergent coverage of Title IX and the Equal Protection Clause, as well as the absence of a comprehensive remedial scheme comparable to those at issue in *Sea Clammers, Smith,* and *Rancho Palos Verdes,* we conclude that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights. Accordingly, we hold that § 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools.

3

This conclusion is consistent with Title IX's context and history. In enacting Title IX, Congress amended § 902, 78 Stat. 267, 42 U.S.C. § 2000h–2 to authorize the Attorney General to intervene in private suits alleging discrimination on the basis of sex in violation of the Equal Protection Clause. See § 906, 86 Stat. 375 (adding the term "sex" to the listed grounds, which already included race, color, religion, or national origin). Accordingly, it appears that the

Congress that enacted Title IX explicitly envisioned that private plaintiffs would bring constitutional claims to challenge gender discrimination; it must have recognized that plaintiffs would do so via 42 U.S.C. § 1983.

Moreover, Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, *Cannon,* 441 U.S., at 694–695, 99 S.Ct. 1946, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was, *id*., at 696, 99 S.Ct. 1946. At the time of Title IX's enactment in 1972, Title VI was routinely interpreted to allow for parallel and concurrent § 1983 claims, see, *e.g., Alvarado v. El Paso Independent School Dist*., 445 F.2d 1011 (C.A.5 1971); *Nashville I–40 Steering Comm. v. Ellington,* 387 F.2d 179 (C.A.6 1967); *Bossier Parish School Bd. v.* ****259*** *Lemon,* 370 F.2d 847 (C.A.5 1967), and we presume Congress was aware of this when it passed Title IX, see *Franklin,* 503 U.S., at 71, 112 S.Ct. 1028 (in assessing Congress' intent, "we evaluate the state of the law when the Legislature passed Title IX"). In the absence of any contrary evidence, it follows that Congress intended Title IX to be interpreted similarly to allow for parallel and concurrent § 1983 claims. At the least, this indicates that Congress did not affirmatively intend Title IX to preclude such claims.[2]

> 2. Respondents argue that constitutional protections against gender discrimination were minimal in 1972, as the only gender-based equal protection case this Court had decided employed a rational-basis standard. *Reed v. Reed,* 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). But see Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection, 86 Harv. L. Rev. 1, 34 (1972) (*Reed* exemplified the application of rationality review "with bite"). They further argue that because Congress could not have viewed the Equal Protection Clause as offering a meaningful remedy for sex discrimination by schools, it could not have envisioned and intended for Title IX and § 1983 constitutional claims to proceed side by side. But the relevant question is not whether Congress envisioned that the two types of claims would proceed together in addressing gender discrimination in schools; it is whether Congress affirmatively intended to preclude this result. The limited nature of constitutional protections against gender discrimination in 1972 offers no evidence that Congress did.

***798* III

One matter remains. Respondents contend that the judgment of the Court of Appeals should be affirmed on independent grounds—namely, that the Fitzgeralds have no actionable § 1983 claim on which to proceed. They contend that the Court of Appeals' holding that neither the school committee nor Dever acted with deliberate indifference is conclusive and forecloses a § 1983 constitutional claim based on a similar theory of liability. They contend that all other § 1983 constitutional claims on these facts are precluded by the Fitzgeralds' failure to allege such claims adequately or to preserve them on appeal.

****260*** The Fitzgeralds respond that they have no intention of relitigating the issue of deliberate indifference. They intend, they say, to advance claims of discriminatory treatment in the investigation of student behavior and in the treatment of student complaints, which they were

foreclosed from developing at the earliest stages of litigation by the dismissal of the § 1983 claims.

As the Fitzgeralds note, no court has addressed the merits of their constitutional claims or even the sufficiency of their pleadings. Ordinarily, “we do not decide in the first instance issues not decided below,” *National Collegiate Athletic Assn. v. Smith,* 525 U.S. 459, 470, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999), and we see no reason for doing so here.

Accordingly, we reverse the Court of Appeals' judgment that the District Court's dismissal of the § 1983 claims was proper and remand this case for further proceedings consistent with this opinion.

It is so ordered.