Public and Private Education: Is There a Constitutional Difference?

Mark Tushnet
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Discussions of education frequently deal with the differences between policy in connection with public education and policy in connection with private education. Analysts believe that the policies necessarily differ to some extent because the federal Constitution places different constraints on each with respect to the regulation of public and private education.¹ For example, as a matter of federal constitutional law, public schools cannot segregate students on the basis of race, whereas, again as a matter of constitutional law, private schools can.² In this Article, I argue that with respect to most policy-relevant constitutional questions—that is, questions that arise in connection with policies that are close to the current public agenda—the federal Constitution does not impose different constraints on public and private schools. More precisely, my argument is two-fold: First, if a government identifies a private school’s policy that it believes would benefit public schools, the federal Constitution allows it to adopt that policy (with minor exceptions). Second, if a government faces a constitutional constraint on the policies it may pursue, the federal Constitution allows it to impose that same constraint on private schools (with even fewer exceptions).

In making this argument, I rely mostly on rather straightforward readings of the main cases bearing on these questions. Ingenious lawyers could almost certainly devise alternative interpretations, or draw attention to additional cases, that would allow a judge who wanted to reject my conclusions to do so. My main point is that, when these straightforward interpretations of the principal cases are brought together, the most direct conclusion is

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¹ In this Article I am concerned solely with the restraints placed on education policy by the federal Constitution. State constitutional constraints are surely different with respect to many of the issues I discuss.

² Compare Brown v Board of Educ., 347 US 483 (1954), with Norwood v Harrison, 413 US 455, 469 (1973) (“private bias is not barred by the Constitution”).

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that the distinction between public and private schools that is part of the standard conceptual apparatus of constitutional lawyers turns out to be substantially thinner than many would find comfortable. The exercise, in short, might be thought of as a deconstruction of the public/private distinction that operates on an unsophisticated doctrinal level.¹

I. THE IRRELEVANCE OF THE PUBLIC/PRIVATE DISTINCTION IN THE EXPERIENCE OF EDUCATION: AN ANECDOTAL INTRODUCTION

As a preface to my discussion of the Constitution, I think it helpful to recount some observations about public and private education that probably motivate that discussion. I have taught at a large public university in a state whose public culture is militantly secular, and I now teach at a large private university affiliated with the Society of Jesus. With a minor exception, probably attributable more to different arrays of power within the universities than to the public/private distinction, my experience as a teacher, and I believe the experiences of students as well, has been essentially indistinguishable in both institutions. Similarly, my children have attended both public and private schools in the District of Columbia, and, again, the quality of their experience, and ours, seems to have been roughly the same. I do not deny that there are private schools and universities, particularly elementary schools and small colleges affiliated with religious denominations, where the quality of the experience differs substantially from that which I have had.⁴

¹ I will not discuss in detail complex arguments resting on controversial interpretations of the state action doctrine, the conclusions of which might well be that private schools are indeed subject to the same substantive limitations, particularly with respect to race, as are public schools. For my view of the state action doctrine, see Mark Tushnet, Shelley v. Kraemer and Theories of Equality, 33 NY L Sch L Rev 383 (1988).

⁴ Georgetown University was involved in prolonged litigation over its obligations under the human rights ordinance of the District of Columbia, as that ordinance was constrained by the Constitution, to deal with associations of gay and lesbian students. For the litigation outcome, see Gay Rights Coalition v Georgetown Univ., 536 A2d 1 (DC App 1987). Notably, the University ultimately accepted a settlement in which it agreed to refrain from discriminating against such associations. Most of the comments on the case, frequently written before it was settled, assume that, as one commentator put it, the University “could not, in light of traditional Catholic teaching, regard sexual orientation as a matter of institutional indifference,” and that the application of the ordinance therefore intruded on the religious institutional autonomy of the University. Gerard Bradley, Church Autonomy in the Constitutional Order: The End of Church and State?, 49 La L Rev 1057, 1062 (1989). See also Comment, The Collision of Religious Exercise and Governmental Nondiscrimination Policies, 41 Stan L Rev 1201 (1989). In light of the University’s ultimate position, that assumption cannot be sustained, at least in a strong form.

⁵ I do wonder, however, about the extent to which, were there public elementary schools and colleges of a size similar to those of these private institutions and which applied
but the fact that there may be rather small differences in the quality of life across what seems to me a rather broad range of public and private education leads me to question whether the federal Constitution actually requires that there be any differences at all.

I offer another view of the question by describing the organic documents of some major institutions of higher education. The 1650 Charter of Harvard College established a Corporation consisting of seven named members. The members of the Corporation were given the power to designate their successors. Although each of the first members of the Corporation was a minister, the Charter does not require that their successors maintain any religious affiliation. Harvard, then, is a paradigm of the private secular university. Georgetown University, in contrast, is a university affiliated with the Society of Jesus. Its Charter, however, is an 1815 Act of Congress authorizing the University to confer degrees. Adopted when James Madison was President, the charter makes no reference to any church affiliation; indeed, neither do the current By-laws of the University.

The certificate of incorporation of the University of Chicago, in contrast, requires that two-thirds of the trustees of the University, and the University’s President, be “members of regular Baptist Churches—that is to say, members of churches of that denomination of Protestant Christians now usually known and recognized under the name of regular Baptist denomination.” The Charter of Duke University requires that one-third of the members of its Board of Trustees be members of the North Carolina Conference of the Methodist Episcopal Church, South, and another third be members of the Western North Carolina Conference of that church. The University’s by-laws state that “the aims of Duke University are to assert a faith in the eternal union of knowledge and

secular criteria for selecting students, the experiences in such schools would be different from the experiences in the schools and colleges to which I refer in the text.


7 See Office of Undergraduate Admissions, Georgetown University Undergraduate Bulletin 1986-87 (Georgetown U, 1986) (“[Georgetown is] . . . an institution that is Catholic”).

6 Stat 152 (1856).

* At present the University has a contract with the Society of Jesus that specifies the University’s obligations regarding its religious and educational missions. This contract might be regarded as one of the University’s organic documents as well, in which case the statement in the text would have to be qualified. Interview with J. Peter Byrne, Washington, DC, Apr 24, 1991.

religion set forth in the teachings and character of Jesus Christ, the son of God; . . . to develop a Christian love of freedom and truth; . . . and to render the largest permanent service to the individual, the state, the nation, and the church.”

I think that many students at Georgetown would be surprised to discover that, according to its organic documents, the University is not a religiously affiliated institution, and that many students at Chicago and Duke would be equally surprised to discover that, according to organic documents, they attend religiously affiliated institutions. As with my experiences with elementary schools and universities, my point here is to suggest that the formalities of corporate organization may not capture much of the differences among schools and universities. The public/private distinction is a similar formality, and I now turn to an examination of the constitutional constraints on the organization of public and private education.

II. Abolishing the Public/Private School Distinction

A. Existence, Entry, and Exit

The first topic I consider is whether states could obliterate the differences between public education and private education by abolishing the former or prohibiting the latter. The short answer is that they almost certainly can abolish public schools, subject to one minor qualification, and that they cannot prohibit private schools, with one possible, important exception.

1. Abolishing public schools.

Dicta in San Antonio Indep. School Dist. v Rodriguez suggest that states might have a constitutional obligation to make education available on terms other than a market-based ability to

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12 In dealing with the abolition of public education, I also consider the constitutional constraints on adopting an unregulated voucher system in which parents use vouchers to pay for the education provided by schools, whether those schools be nominally private or nominally public. I confess that I am hard-pressed to explain the sense in which any school in an unregulated voucher system is a public school, other than the fact that its governing authorities are chosen by a broader electorate than the ones that select the governing authorities of private schools.
13 However, if, as I argue in the next section, governments can impose the same regulations of curricula on private schools that they place on public schools, then it is unclear why a government would care about going through the formalities of attempting to prohibit the operation of private schools.
CONSTITUTIONAL DIFFERENCE

pay: “If . . . education were made available by the State only to those able to pay a tuition assessed against each pupil. . . . [the] case would present a far more compelling set of circumstances for judicial assistance . . . .”\(^\text{16}\) The Court suggested that a constitutional claim might be made “if a State’s financing system occasioned an absolute denial of educational opportunities.”\(^\text{16}\) In light of the DeShaney case,\(^\text{17}\) however, it seems extremely difficult to make a cogent argument that there is a right to a public education. DeShaney holds that the state is under no obligation to provide a minimal level of police protection.\(^\text{18}\) Because most theories of government would place police protection higher in the hierarchy of public functions than public education, and because there seem to be no obvious differences between the courts’ ability to determine what a minimal level of police protection was and their ability to determine what a minimally adequate education would be, there seems to be little to justify treating police protection differently from education on grounds going to the courts’ institutional competence.

One limit on the state’s ability to remit education to the market might arise in connection with desegregation. Suppose that a state decides to close its public schools in the face of desegregation orders.\(^\text{19}\) One case, Palmer v Thompson,\(^\text{20}\) suggests that a state might be able to refuse to offer public goods, such as schools, without violating the Constitution. Palmer involved a city’s decision, when desegregation of its public swimming pool was imminent, to close the pool. The Court held that the closing was constitutionally permissible—even if it was motivated by a desire to avoid desegregation. Palmer, however, may be limited by the principle of Washington v Davis.\(^\text{21}\) In addition, Palmer itself distinguished the operation of swimming pools from the operation of public schools on

\(^{16}\) Id at 25 n 60. But note the Court’s rather clear suggestion that there is no constitutional basis for a right to an education. Id at 35.

\(^{17}\) Id at 37. These dicta were reaffirmed in Papasan v Allain, 478 US 265, 285-86 (1986), where the Court found it unnecessary to decide whether there was a constitutional right to a minimally adequate education.

\(^{18}\) That is, the holding that there was no “state action” in failing to provide police protection to Joshua DeShaney necessarily implies that the state was under no obligation to provide such protection. Id.

\(^{19}\) Virginia’s effort to do so was rebuffed in Griffin v County School Bd. of Prince Edward Cty., 377 US 218 (1964), but there the state had not simply remitted education to the market; it continued to operate public schools in areas not facing desegregation decrees. Id at 222-23.


\(^{21}\) 426 US 229 (1976).
the ground that the latter was "perhaps the most important function of state and local governments." Taking these cases together, one might conclude that a decision to close the public schools, premised on a reconsideration of the merits of public education that itself was occasioned by a desegregation order, might be constitutionally permissible because it is not "intentional" within the meaning of Washington v Davis. The Supreme Court's pronouncements are unclear enough, however, that under these circumstances the state might not be allowed to make the otherwise permissible decision to leave education to the market if its motive could be construed as a constitutionally impermissible deprivation of education.

The desegregation cases also bear on another method of selective withdrawal of public education: the use of a voucher system, or, to use the current term, a system of unregulated but publicly subsidized choice. In Norwood v Harrison the Court invalidated Mississippi's program of providing textbooks to students at both public and private schools because the state did not consider whether the private schools were engaging in racial discrimination. Similarly, in Gilmore v City of Montgomery the Court upheld an injunction barring a city from making its parks available for occasional exclusive use by private schools that discriminated on the basis of race, and it remanded for further consideration the lower court's refusal to enjoin nonexclusive use, as in participation in tournaments with public and other integrated schools.

These cases involve "vouchers" in the sense that the state subsidized all schools' activities without respect to the public/private distinction. They also suggest that the imperatives of desegregation limit a government's ability to ignore the distinction. The Court saw textbooks as "a basic educational tool" the provision of which "has a significant tendency to facilitate, reinforce, and support private discrimination." In Gilmore the availability of parks

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22 403 US at 221 n 6 (quoting Brown v Board of Educ., 347 US 483, 493 (1954)). In addition, the Court later characterized Virginia's plan as "an operation of [the] ... schools under a thinly disguised 'private' school system actually planned and carried out by the State and the county to maintain segregated education with public funds." Palmer, 403 US at 222.
25 Id.
27 Id.
28 Norwood, 413 US at 465, 466.
for the exclusive use of private schools enabled those schools, formed with the purpose of allowing parents to avoid sending their children to desegregated schools, to offer full athletic programs, thereby making them substantially more attractive educational institutions.\footnote{Gilmore, 417 US at 569.} Even nonexclusive use might, according to the Court, "directly impede the progress of court-ordered school desegregation."\footnote{Id at 571.}

The implications of these cases in contexts where no such process is underway are, I think, unclear. Could a state provide tuition vouchers that parents could use at schools that discriminated in admission on the basis of race, where the existence of such schools did not interfere with court-ordered desegregation? As with the DeShaney case, the issue would, I think, be formulated in terms of state action: Does the provision of tuition support to such schools implicate the state enough so that the discriminatory action of the schools can be imputed to the state? State action doctrine in this area is notoriously convoluted. Pointing in favor of state action is Burton v Wilmington Parking Authority,\footnote{365 US 715 (1961).} whose holding can be understood to be that if a state gets something out of private discrimination to which it lends support, it is implicated in that discrimination.\footnote{Id at 724.} Yet, to the extent that a government adopts a voucher system because it concludes that such a system is sound public policy, it benefits from the system in a way that is difficult to distinguish from Burton.

Pointing in the other direction, however, are more recent cases, such as Rendell-Baker v Kohn,\footnote{457 US 830 (1982).} in which the Court suggests that the state must be implicated in the discriminatory decision itself before there can be state action.\footnote{Id at 838 n 6.} Rendell-Baker involved a private school that received essentially all of its funds from the state.\footnote{Id at 832.} It fired a teacher under circumstances which, had the school been public, clearly would have violated the Constitution.\footnote{Id at 834-35.} In finding that there was no state action, the Court said that the discriminatory decisions "were not compelled or even influenced by any state regulation."\footnote{Rendell-Baker, 457 US at 841.} On ordinary understandings of these

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\begin{itemize}
\item \textsuperscript{86} Gilmore, 417 US at 569.
\item \textsuperscript{80} Id at 571.
\item \textsuperscript{31} 365 US 715 (1961).
\item \textsuperscript{32} Id at 724.
\item \textsuperscript{33} 457 US 830 (1982).
\item \textsuperscript{34} Id at 838 n 6.
\item \textsuperscript{35} Id at 832.
\item \textsuperscript{86} Id at 834-35.
\item \textsuperscript{87} Rendell-Baker, 457 US at 841.
\end{itemize}
terms, admission decisions by a school that receives tuition vouchers in an unregulated system would appear to be similarly uninfluenced by the state. My tentative conclusion, then, is that a state could operate an unregulated voucher system unless that system interfered with court-ordered desegregation; I do not think that this exception has large public policy implications.

The state action analysis I have just sketched could be recast to link it to the next question about tuition vouchers. The implication of the state action holding in Rendell-Baker is that there would be no state action if a state adopts a system of regulating the distribution of vouchers that is neutral as to race. The other area of concern in connection with tuition vouchers is, of course, the Establishment Clause of the First Amendment. Here, too, neutrality is the key to the Court's current position. In Mueller v. Allen the Court upheld a statute permitting taxpayers to take deductions for expenses incurred in connection with education. The system was constitutional, according to the Court, because it made the benefit available to "all parents, including those whose children attend public schools and those whose children attend non-sectarian private schools . . . ." Such a "neutral" statute "is not readily subject to challenge under the Establishment Clause." Further, the Court found it irrelevant that by far the largest portion of the benefit would inure to parents who sent their children to sectarian private schools.

In the higher education context, Witters v Washington Dept. of Services for the Blind strongly suggests that there is no Establishment Clause objection to a voucher system that permits vouchers to be used at religiously affiliated schools. Again the Court

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\^88 It might be suggested that the courts would be willing to find state action where the action by the nominally private actor involved discrimination based on race rather than, as in Rendell-Baker, an infringement on principles of free expression. See, for example, Jackson v Metropolitan Edison Co., 419 US 345, 374 (1974) (Marshall dissenting). Compare Moose Lodge No. 107 v Irvis, 407 US 163 (1972) (finding no state action in case involving race discrimination). The present formulations of the state action doctrine do not appear readily adaptable to such a distinction.

\^89 463 US 388 (1983).
\^90 Id at 397.
\^91 Id at 399.
\^92 Id at 400-02.

\^93 474 US 481 (1986). The most sophisticated legal discussions of voucher systems were written well before the relevant constitutional doctrine took its contemporary shape. They understandably devoted substantial attention to arguments that vouchers, or choice systems, might violate the Establishment Clause or might violate Equal Protection norms respecting race in areas not covered by court-ordered desegregation. See, for example, Walter McCann and Judith Areen, Vouchers and the Citizen—Some Legal Questions, 72 Teachers
stressed that the system was neutral, and that the state’s money flowed to religious schools solely because of the intervening decision made by the student.

While *Witters* may perhaps be confined to higher education, though little in the Court’s express analysis indicates why, *Mueller* appears to provide strong support for the proposition that a facially neutral voucher system is constitutionally permissible without regard to who the ultimate recipients of the funds are. To the extent that there are any residual questions about whether it is permissible to create such a system, they arise from the theory, adopted by the Court in *Aguilar v Felton*, that some forms of public support for education—perhaps direct grants of funds to religious schools—are so visibly endorsements of the religious mission of religiously affiliated schools as to violate the “no endorsement of religion” principle that, for now, defines the Establishment Clause prohibition. The “no endorsement” principle is malleable enough that I would suppose that some ingenious lawyer could convince us that an unregulated voucher system sends a signal of government support for religion, but on the face of it I find the proposition difficult to accept.

One final wrinkle remains. May a state create a voucher system that bars the use of vouchers at church-related schools? Such an exclusion appears to violate the fundamental principle of

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Coll Rec 389 (1971). The development of constitutional doctrine has made the constitutional defense of unregulated systems much more straightforward. This is not to say that the policy issues regarding religion, race, and class have been simplified, but is to say only that the constitutional ones have been.

Although I do not believe that the cases have yet been juxtaposed to make this point, one might argue that the Court’s willingness to accept statutory accommodations of religion, but only if they sweep within their scope some substantial amount of nonreligious activity (see *Texas Monthly v Bullock*, 489 US 1 (1989)), rests on its perception that the breadth of the statute blurs the signal of support for religion that would, standing unblurred, violate the Establishment Clause. Id. If that analysis is correct, then even direct grants to religious schools, as part of a comprehensive system of supporting parental choice, would be constitutionally permissible.

The most plausible argument, I believe, is that in the social context of general misgivings about the merits of public education—in particular because public schools have failed adequately to inculcate important values—providing general support for religiously affiliated schools, even through a voucher system, would be seen by the reasonable observer as an endorsement of the religious values that those schools inculcate and that, by inference, the public schools do not. It seems to me, however, that this argument specifies to a greater degree of precision than is warranted what the message of a voucher system really is.

On remand in *Witters*, the state supreme court concluded that the state constitution did not permit the use of grants from the state at religiously affiliated schools, and that this prohibition did not violate the Free Exercise Clause of the national constitution. *Witters*, 112 Wash 2d 363, 771 P2d 1119, cert denied, 110 S Ct 147 (1989).
the religion clauses that a government may not discriminate in favor of or against religion in its provision of benefits. This principle is sometimes controversial when invoked to bar acts that favor religion but seems entirely uncontroversial with respect to acts that disfavor religion. Recently the courts have begun to develop a principle of "accommodation of religion," according to which governments deal specially with religious institutions, making benefits available to them that are not available to non-religious institutions, without violating the Establishment Clause. The government's reason is that this sort of permissible accommodation of religion respects the values protected by the Free Exercise Clause even in situations where failure to accommodate would not itself violate that clause. Perhaps there might be a parallel sort of accommodation, under which governments could exclude religious institutions from benefits for which they would otherwise be eligible, in order to respect the values protected by the Establishment Clause, even when making the benefits available would not violate that clause.

*Widmar v Vincent* suggests that we should be skeptical about the Court's willingness to entertain the idea of this sort of "reverse accommodation." There the Court held unconstitutional a ban on religious assemblies at a public university, which the university attempted to justify by citing its concern that allowing the assemblies would violate the Establishment Clause. *Widmar* is not a true "reverse accommodation" case for two reasons, however. First, the Court held that the denial violated the free speech rights of the students who wished to conduct the religious assemblies. A parallel free speech argument almost certainly is not available to religious institutions excluded from participation in voucher systems. Second, the claim that allowing the assemblies would violate the Establishment Clause, or even that allowing them would significantly intrude on the values protected by the Establishment Clause, is quite weak in the context of prayer meetings to be held in ordinary university buildings where all sorts of other student-

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49 Roberts v Madigan, 921 F2d 1047 (10th Cir 1990).


51 Id at 270-71.

52 Id at 276.
sponsored activities take place.\textsuperscript{53} Still, Widmar suggests that the Court might not be enthusiastic about a “reverse accommodation” principle.

To summarize, a state could indeed eliminate its public schools, either entirely or by adopting an unregulated voucher system, subject only to some limitations in the context of ongoing judicial supervision of desegregation. Current Establishment Clause doctrine would not bar the government from developing a voucher system in which some vouchers would be used at religious elementary and secondary schools. In this sense, then, the Constitution does not distinguish between public and private education.

2. Prohibiting private schools.

The next question is whether a state could prohibit private schools. Here there appears to be a definitive answer. \textit{Pierce v Society of Sisters} squarely held unconstitutional a state effort to eliminate private schools.\textsuperscript{54} Without attempting to undermine the authority of \textit{Pierce} entirely,\textsuperscript{55} I would note that it arose in a context of nativist hostility to Catholics, and that the police power justification for prohibiting private schools was quite attenuated.\textsuperscript{56} In addition, \textit{Pierce} relied on the doctrine of substantive due process.\textsuperscript{57} According to the Court in \textit{Bowers v Hardwick},\textsuperscript{58} “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”\textsuperscript{59} In consequence, according to the Court, “[t]here should be . . . great resistance to expand the substantive reach” of the due process clause.\textsuperscript{60}

It is difficult to imagine contemporary contexts in which legislatures might actually abolish private schools, and thus it is difficult to assess what the balance would be between the interest protected in \textit{Pierce} and the goals the government was trying to attain.

\begin{itemize}
\item \textsuperscript{53} See also \textit{Board of Educ. of Westside Community Schools v Mergens}, 110 S Ct 2356 (1990) (upholding against constitutional challenge the Equal Access Act, 20 USC §§ 4071-74 (1990)).
\item \textsuperscript{54} 268 US 510 (1925).
\item \textsuperscript{55} The holding has repeatedly been endorsed, most recently in \textit{Employment Division, Dept. of Human Resources v Smith}, 110 S Ct 1595, 1601 (1990).
\item \textsuperscript{56} For a discussion of the background of \textit{Pierce}, see David Tysack, \textit{The Perils of Pluralism: The Background of the Pierce Case}, 74 Am Hist Rev 74 (1968).
\item \textsuperscript{57} \textit{Pierce}, 268 US at 535.
\item \textsuperscript{58} 478 US 186 (1986).
\item \textsuperscript{59} Id at 194.
\item \textsuperscript{60} Id at 194-95.
\end{itemize}
Consider, however, the possibility that Congress, acting pursuant to its power under section five of the Fourteenth Amendment, concluded that the availability of private schools interfered with society's ability to reach a point of social integration where judgments about people's worth are made solely on the basis of individual merit, and therefore prohibited the operation of private schools. That justification is more substantial than the one offered in Pierce, and it might be sufficient to overcome the weakened protection given substantive due process rights by the Court's analysis in Bowers.

In short, there is no reason to believe that governments would try to abolish private schools. Yet, despite Pierce, the doctrinal materials are available to uphold such an abolition under certain circumstances. Under those circumstances, the difference between public and private schools would of course disappear as well.

B. State Regulation of Private Schools

1. Entry.

Even if states may not completely eliminate private schools, however, the Constitution may allow them to regulate these schools so extensively that there is no real point in worrying about whether they "survive" as distinct entities or not. Before examining regulations of curricula, I think it helpful to examine the con-

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61 I use an example of congressional legislation, but I believe that states, though they lack the specific power granted by § 5 of the Fourteenth Amendment, have equivalent authority as part of their general police powers. The holding to the contrary in City of Richmond v J.A. Croson Co., 488 US 469 (1989), seems to me completely insupportable. In our constitutional system, states are governments with general legislative authority while the national government has only the authority given it through enumerated grants of power. Except in connection with powers granted to the national government that are designed to exclude the exercise of power by state governments, the national government has no greater power than a state government. Section 5 of the Fourteenth Amendment does not appear to be such an "exclusively national" power. In any event, to the extent that Croson holds that state authority to eliminate the effects of discrimination is not as broad as Congress's power under § 5, it does so in the context of a statute that on its face distinguished between African-Americans and other racial groups. Croson, 488 US at 478. The statute hypothesized here, in contrast, is facially neutral in the relevant sense, though it may be "race specific." For a discussion of the latter category, see Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein and Mark V. Tushnet, Constitutional Law 575-76 (Little, Brown & Co., 1986). The Court's treatment of "race specific" statutes has been inconsistent; sometimes it has subjected them to the strict requirements imposed on facially discriminatory statutes, and sometimes it has subjected them to the less strict requirements imposed on statutes that are facially neutral. See id at 577-78.
stitutional constraints on entry to and exit from public and private schools.

One apparent difference between public and private schools is that the Constitution bars the former but not the latter from using invidious entrance criteria. Public schools may not deny entry on the basis of race or, certainly in higher education and probably in elementary and secondary education, on the basis of gender, and, presumably, they may not define admissions criteria that demand acceptance of specified religious tenets. In contrast, private schools may do all of these things, although there may be some state action limitations on the tax benefits or other forms of general public assistance that governments can give to such schools.

In light of the strong public policy against invidious discrimination, the fact that public and private schools are treated differently with respect to invidious discrimination may have relatively few consequences for policy relevant discussions. More interesting, perhaps, are the cases of schools that adopt admissions criteria or curricula that have predictable consequences for the racial or gender composition of their student bodies. Consider a state university system that has a graded set of admissions criteria, with admission to the system's "flagship" schools determined by highly selective academic criteria, and open admission to other schools. Suppose that the use of these different criteria means that the students at the schools with open admissions are predominantly African-American and members of other minority groups. The administrators of these schools decide that the academic quality of their programs would be enhanced by instituting an aggressive ethnic studies program, the effect of which is to retain more of the students admitted to the schools and, not coincidentally, to increase the attractiveness of these schools relative to the flagship schools for

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64 As to higher education, see Mississippi Univ. for Women v Hogan, 458 US 718 (1982). Earlier the Court had divided evenly on the constitutionality of maintaining separate secondary schools for men and women, Vorheimer v School Dist. of Philadelphia, 532 F2d 880 (1976), aff'd without opinion, 430 US 703 (1977), but that result is unlikely to survive Hogan.
65 See, for example, Everson v Board of Educ., 330 US 1, 15 (1947) ("The 'establishment of religion' clause . . . means neither a state nor the Federal Government . . . can force [a person] to profess a belief or disbelief in any religion.").
66 Allen v Wright, 468 US 737 (1984), denied standing to plaintiffs seeking to challenge what they claimed was an inadequate system of detecting the existence of racial discrimination in private schools; had such discrimination occurred, statutory policy barred granting the schools tax exempt status. See also Bob Jones Univ. v United States, 461 US 574 (1983).
members of minority groups. This maintains the racial identifiability of the schools.

The question of the constitutionality of programs such as these has been litigated only in connection with historically African-American state colleges and universities located in states with a history of legally mandated segregation. At least so far, the courts have not been receptive to the claims by the administrators of these institutions. The history of segregation complicates the constitutional analysis in these cases, because implementing programs such as those I have sketched may, in the courts' eyes, interfere with the process of desegregating flagship institutions, which were all-white because of segregation statutes rather than because of differential admissions criteria. Thus the Court's reluctance might be diminished, as in the case of vouchers, when there is no process of on-going desegregation.

If it were possible to consider the question in other states, I am not sure what the proper constitutional response would be. Most of the programs are facially neutral and, under Washington v. Davis, would be unconstitutional only if adopted in order to discriminate. The academic justification for the programs would, I believe, be sufficient to defeat the claim that they were intentionally discriminatory. If that analysis is correct, it might be constitutionally permissible for states to operate schools that were, in the language of the desegregation cases, racially identifiable.

The preceding argument seems sufficient to defend the most recent proposals to establish schools with Afro-centric curricula. Some of these proposals, however, go beyond using a distinctive curriculum to respond to the perceived academic needs of the students most likely to attend, and would limit attendance to, for ex-

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66 See Ayers v. Allain, 914 F2d 676 (5th Cir 1990), motion granted, cert granted, in part, United States v Mabus, 113 L Ed 2d 644 (1991); United States v Louisiana, 692 F Supp 642 (E D La 1988), vacated and motion for summary judgment granted, 751 F Supp 606 (E D La 1990). In Ayers, the Fifth Circuit, sitting en banc, held that in the context of higher education, because students chose which colleges to attend, it was sufficient for Equal Protection purposes that the state adopted and implemented admissions policies that were facially neutral as to race. Ayers, 914 F2d at 692. See also Derrick Bell, Black Colleges and the Desegregation Dilemma, 28 Emory L J 949 (1979); Felix V. Baxter, The Affirmative Duty to Desegregate Institutions of Higher Education: Defining the Role of the Traditionally Black College, 11 J L & Educ 1 (1982).

67 See text accompanying notes 23-38.

68 For a description of one such proposal, see Civil Liberties Union Likens Minority-School Plan to Segregation, NY Times 1-20 (Jan 13, 1991).
ample, African-American males. Such admissions requirements are of course not facially neutral. Their constitutionality depends on what the mandate of Brown v Board of Educ. is taken to be. The common interpretation of Brown is that it stands for the proposition that, with exceptions not relevant to this discussion, it is impermissible for governments to allocate benefits or burdens using explicitly racial criteria. Under that interpretation, the limitations on admissions would be unconstitutional.

An alternative interpretation, however, would emphasize that Brown relied on social scientific data to support the proposition, apparently important to the Court’s reasoning, that segregating students “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.” Proponents of schools limited to African-American males argue that such schools are either essential or at least appropriate ways of overcoming feelings of inferiority that persist even after other social responses to de facto segregation have been tried. If race-based admissions criteria are impermissible under Brown only when they lead to feelings of inferiority, schools with attendance limited to African-American males might be constitutional, depending on the degree of deference the courts would give to legislative determinations that separate schools best address feelings of inferiority. And, if courts accept their findings, the differences between public and private schools become even less significant in a constitutional sense.

If public programs with distinctive curricula or with limited admissions criteria are justifiable, however, it is ultimately because the resulting patterns of attendance are not invidious. While the Constitution permits private schools to use invidious entry criteria, there are numerous statutory prohibitions on invidious discrimination by private schools. With respect to most private schools, for example, the Civil Rights Act of 1866, as interpreted in Runyon v

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**Footnotes:**

* For a description of such proposals, see Milwaukee Creating 2 Schools for Black Boys, NY Times 1-1 (Sept 30, 1990); All Male School Gets Green Light in Detroit, NY Times A16 (Mar 1, 1991).
* Brown, 347 US at 494.
* See, for example, Milwaukee Creating 2 Schools, NY Times at 1-1.
McCrary, bars racial discrimination in private schools' admissions. Would broader prohibitions on discrimination on the basis of gender or religious belief be constitutional?

Discriminatory private schools might object to such regulation on the ground that it violates their constitutional rights of association or, where the discrimination is based on political or religious views, their other rights under the First Amendment. In Runyon the Court rejected a claim based on the right of association, on the ground that discriminatory practices receive no protection under the Constitution. The Court has also said that state and local legislation banning discrimination by private clubs does not violate the associational rights of members of those clubs where the clubs were relatively large. Finally, Bob Jones Univ. v United States held that the University's religious rights were not violated when the government chose not to allow it tax exempt status because it discriminated on the basis of race. These cases rather strongly suggest that substantial regulatory restrictions might be placed on discriminatory private schools, and that in many instances discrimination probably can be prohibited outright.

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77 Here I do not intend to distinguish between a state government's general police power authority to ban discrimination and the perhaps more limited power of the national government to act with respect to categories other than race. As to the latter, see EEOC v Wyoming, 460 US 226, 260 (1983) (Burger dissenting) (arguing that Congress lacks power to enforce Fourteenth Amendment except where discrimination would, or perhaps might, itself violate the Constitution).

78 Runyon, 427 US at 175-76 (citing Norwood v Harrison, 413 US 455 (1973)).

79 The most recent case in this line is New York State Club Ass'n v City of New York, 487 US 1 (1987), upholding a ban on discrimination by clubs with more than 400 members and which provide regular meal service and receive substantial funds from nonmembers for services. See also Michael Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harv CR-CL L Rev 321 (1983), though written before the Supreme Court dealt with these issues, provides a comprehensive analysis that fully comports with what the Court has since done.

80 See also Comment, 41 Stan L Rev at 1228 (cited in note 4), arguing that Georgetown University "was not acting as a religious community turned inward" because it admitted students regardless of religious affiliation, did not require attendance at chapel, and had a basically secular educational mission. To the extent that small schools, organized essentially by word of mouth, might be able to claim rights of association even after Runyon and the club cases, it seems likely that government requirements that schools provide a specified range of curricular choices would be sufficient to make it uneconomic to operate such schools. For a discussion of the curricular requirements, see text accompanying notes 116-29.
2. Exit.

Analogous conclusions can be drawn about regulation of exit from schools. The Due Process Clause imposes limits on the methods government can use to expel or suspend students from public schools.\(^1\) Private schools, however, are limited, in the absence of legislation, only by the contracts they make with their students (and, where relevant, the parents of those students). Yet, it seems to me unquestionable that a state could use its general police power to require that private schools use the same procedures that the public schools do in expelling students.\(^2\)

In short, the difference between what governments must do with respect to public schools and what they may do with respect to private schools is narrower than the sharp legal distinction between public and private schools suggests. To the extent that there are real differences in the actual degree of regulation of public and private schools, those differences result from choices made by governments not to exercise power that they could use in a constitutionally permissible manner to make private schools resemble public schools, or to make public schools resemble private schools, more substantially.\(^3\)

C. State Regulation of Curricula

The basic questions with respect to the curricula of public and private schools are: Does the Constitution require public schools to have any particular course offerings? Does it prohibit them from having certain offerings?\(^4\) Does it permit governments to require private schools to offer certain courses? Does it permit governments to prohibit private schools from offering other courses?\(^5\)

\(^1\) See, for example, Goss v Lopez, 419 US 565 (1975). The questions raised by limitations on the substantive grounds on which public schools can expel students, and the imposition of similar limitations by statute on private schools, are the same questions about associational, political, and religious rights that I have already discussed in connection with entry restrictions. See text accompanying notes 76-79.

\(^2\) Here, rather than earlier, it seems particularly appropriate to note that doing so might not be good public policy. My concern in this Article, however, is not with what good policy is, but with what the Constitution requires and permits.

\(^3\) For a similar conclusion, though stated as a suggestion for revision of existing law rather than as account of that law, see J. Peter Byrne, Academic Freedom: A “Special Concern of the First Amendment”, 99 Yale L J 251, 299-300 n 184 (1989) (“I would be . . . inclined to treat reasonably autonomous state universities as private parties, freeing universities more broadly from strictures designed for governmental entities”).


\(^5\) Occasionally one sees claims that teachers in public schools may have independent constitutional rights to refrain from teaching courses to which they have religious or politi-
1. Public schools.

No cases hold, and there appears to be no justification for holding, that the Constitution requires public schools to offer any particular course. *Epperson v Arkansas*, however, stands for the proposition that, once a public school decides to offer a course, it may be required to include a particular version of the subject matter. *Epperson* invalidated a statute barring the teaching of the biological theory of human evolution. According to the Court, the statute violated the Establishment Clause because it excluded from the range of permissible approaches to the subject of biology only one approach, and did so "for the sole reason that it is deemed to conflict with a particular religious doctrine."

Even in the modest form in which the Court stated the principle, the implications of this analysis are puzzling. It would be difficult to contend that a school is required to offer a biology course at all. Yet suppose that the school board decides not to offer the course solely because, under *Epperson*, if offered the course would have to include instruction regarding the theory of evolution. Or, suppose that the board decides not to offer the course because, all things considered, doing so would engender too much controversy. Even relatively narrow readings of *Epperson* suggest that such a board action would be unconstitutional. If so, the government is indeed required to include subjects in the curriculum, if the sole reason for excluding the subjects would be their conflict with the teachings of a particular religion. I assume, however, that the "sole reason" criterion would rarely be satisfied, even if it encompasses reasons going to the avoidance of controversy. Ordinarily, public schools will be able to offer reasons based on judgments about the most effective way to use limited resources to justify excluding some subjects from the curriculum.

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* 393 US 97 (1968).
* Id.
* Id at 103.
* Justice Black, concurring in *Epperson*, suggested that the statute there might have been adopted to ensure that "this controversial subject" would not be part of the curriculum. Id at 112-13.
* But see *Epperson*, 393 US at 109, where the Court suggests that Arkansas could have excised all discussion of human origins from its curricula without violating the Establishment Clause.
The obverse of Epperson was presented in Edwards v Aguilard,1 the creationism case, where the Court was asked to decide what the government is prohibited from offering in its schools. One commonly accepted principle underlying the First Amendment is that the Establishment Clause bars governments from offering instruction in religion, though they may offer instruction about religion. Invoking this principle, the Court in Aguillard invalidated Louisiana's requirement that, whenever the theory of evolution was taught, the school had to provide balanced treatment of the theory of scientific creationism as well.2 The Court's articulated reason was that the state's primary purpose for adopting the requirement, as revealed in the legislative history and the Court's perusal of the issues surrounding the debate about evolution and creationism, was to promote a religious view on the origin of human life.3 This position is intelligible only on the supposition, rejected by Justice Scalia's dissent,4 that "creation science" was a misleading label for what was essentially a religious view. To the extent that the Court believed that it had the capacity to determine that a purportedly scientific theory was in fact a religious one, the decision in Aguillard must rest on the Court's determination that governments are barred from presenting as "truth" matters that are not "truths"—whether because they are false or because they are neither true nor false.

The Establishment Clause singles out one subject matter, religion, that governments are barred from advocating. The distinction between "truths" and "other than truths" on which Aguillard seems to rest casts some light on the question of whether there are other subjects, or approaches to subjects, that the government may not teach. The question can be posed in its starkest form by asking whether it is constitutionally permissible for a school board to insist that courses in government provide instruction supporting the platform of the board's preferred political party. I suspect that the immediate intuition of most readers is that such a curricular requirement would be unconstitutional, but I hope to show that the question is more difficult than it initially appears.

Consider first a program of instruction in civics the primary goal of which is to communicate the message that, for all its flaws, the political system of the United States is substantially better

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2 Id.
3 Id at 591-94.
4 Id at 611-12.
than almost every other political system in the world. If that program is unconstitutional, nearly every civics course in the elementary and secondary schools of the United States is unconstitutional. To generalize, it would seem that simply taking sides on controvertible questions of political theory does not violate the Constitution even though taking sides on controvertible questions of religion does.

Next consider a statute requiring that courses in economics show that a market-based economy along the lines of this country or Western Europe is superior, both in terms of efficiency and distribution, to command economies—or, more bluntly, that the courses demonstrate the evils of communism. Again, I doubt that such a statute is unconstitutional. One reason might be that, like the theory of evolution, the economic theory prescribed by the statute simply is correct. Yet, in the evolution cases the Court was careful to refrain from suggesting that what was wrong with prohibiting the teaching of evolution or with requiring that creation science be taught was that the theory of evolution is correct and creation science is wrong. Alternatively, the statute might be constitutional because, again, nothing in the Constitution limits governments from taking positions on matters of political theory.

Finally, consider the fact that political figures routinely use public funds to advocate the partisan programs they were elected to advance. Here too the government “takes sides” on controversial political issues without facing constitutional limitations.

In all of these areas, there appear to be no constitutional limitations on the power of government to advance a particular political program in its schools. The civics and economics examples might be limited by the suggestion that, at least in this country, the consensus on the correctness of the views asserted is so broad as to validate the programs; with such a limitation, perhaps a government might not be authorized to advocate positions as to which there was less consensus. The fact that speech of political figures

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88 The American Bar Association had a committee that urged the adoption of such programs of instruction. See American Bar Association—Special Committee on Education in the Contrast between Liberty under Law and Communism, Instruction on Communism and Its Contrast with Liberty Under Law (American Bar Association, 1962) (chaired by Lewis F. Powell, Jr.). This pamphlet reports that Florida and Louisiana adopted statutes requiring education on the subject. Id at 8. The Special Committee became a Standing Committee on Education Against Communism in 1962, and sponsored conferences that produced a suggested syllabus, published as Democracy Confronts Communism in World Affairs (ABA, 1965).

89 For a general discussion, see Mark Yudof, When Government Speaks (UC Berkeley, 1983).
appears to be free of constitutional constraint, however, suggests that this limitation, while perhaps attractive as a policy matter, is not compelled by the Constitution.\(^{97}\)

What, then, of the program of instruction in the truth of the tenets of a political party? In elementary and secondary schools, and in some courses in higher education,\(^{98}\) such a program might infringe on the constitutional rights of a captive audience. For example, people generally have an interest in avoiding undesired communications such as junk mail. The "captive audience" idea, in its usual forms, authorizes the government to protect that interest by, for example, providing some mechanism by which people can tell the government not to transmit junk mail to them.\(^{99}\) The government moves against a speaker and justifies its action as protecting the interests of the captive audience.\(^{100}\) The "captive audience" doctrine, that is, deals with the existence of governmental authority, not, as it would act in the present context, as a source of limitation on government power.\(^{101}\)

Moving from the idea of a protectible interest in avoiding undesired communication to a doctrine that would elevate that interest to the status of a constitutional right seems quite difficult. Outside the schools, of course, there are few situations in which people are truly captive audiences for government communications.\(^{102}\) Yet, I doubt whether the courts would seriously entertain an objection to public service messages or poems placed by the government on its buses.\(^{103}\) The case coming closest to recognizing a right to be free of undesired communications is *Wooley v May-*

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\(^{97}\) I stress that in speaking of the speech of political figures I am referring to speech not in their personal or merely political capacity, which might be protected by the First Amendment, but speech in their official capacity, as indicated by the fact that they use public funds in support of their actions.

\(^{98}\) I am referring here to those that are formally or as a practical matter required.


\(^{101}\) No helpful analogy can be drawn from the occasional suggestion in discussions of school prayer that such prayers should be barred because public school students are like a captive audience. See, for example, *Abington School Dist. v Schempp*, 374 US 203, 318-19 (1963) (Stewart dissenting). The Free Exercise Clause implies that the government may not impose its views about religion on a captive audience, whereas there is no analogous principle of free expression generally.

\(^{102}\) I put aside "special environments" such as the military and prisons, which have become the subject of special constitutional rules. See, generally, Stone, et al, *Constitutional Law* at 1267-73.

\(^{103}\) Nor do I think that what underlies that response is the thought that bus riders are not truly a captive audience because they could use some other form of transportation. See *Public Utilities Commission v Pollak*, 343 US 451 (1952).
nard, which invalidated a New Hampshire statute requiring drivers to display the state slogan on their license plates. The Court treated the statute as one forcing people to distribute the state's message and not, as the argument being considered would demand, as a statute forcing the government's message on an unwilling listener. In short, governments engage in too many activities, the constitutionality of which seems unquestionable, that could be characterized as intruding on the interest of some captive audience for such a doctrine limiting the government's power to communicate in these situations to be practicable.

Another source of constitutional objection to a prescribed curriculum is the teacher who is required to provide the instruction. Suppose that a school board defines the curriculum of its family life course to include instruction in the availability of abortion, and the regular teacher of that course has a religiously grounded objection to presenting that material. Or suppose that an economics teacher has a politically grounded objection to presenting material on the role of advertising in a market economy in the manner prescribed by the school board. Must the board relieve the teachers of the obligation to follow the prescribed curriculum? Both exam-

105 For discussions of the freedom of teachers, each reaching contradictory conclusions, see Stephen Goldstein, The Asserted Right of Public School Teachers to Determine What They Teach, 124 U Pa L Rev 1293 (1976); William Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L J 841. Van Alstyne argues that a school board violates the Constitution when it "so rigidly determines the exact and preselected details of each course that in fact it employs the teacher as a mere mechanical instrument of its impermissible design." Van Alstyne, 1970 Duke L J at 856. The design is impermissible because it involves "arbitrary restrictions on alternative sources of information or opinion, resulting not from understandable budgetary constraints or the restraint upon the time available for study." Id at 857. I confess that, as I read Van Alstyne's argument, all the analytic work is done by the characterizations "impermissible" and "arbitrary," and that the accuracy of those characterizations is precisely what is at issue. Van Alstyne's other argument appears to be that it is impermissible for a teacher to use the classroom to indoctrinate students in his or her views, and that, by some sort of symmetry, it ought to be equally impermissible for the school board to use the classroom for such purposes. Id at 856. The board's indoctrination, however, has a source in a prior decision by the electorate that is entirely absent in the case of teachers' indoctrination. In our constitutional system, decisions made through the regular processes of election have a degree of justification that is absent from decisions made by professionals exercising professional judgment. That seems to me sufficient to defeat any argument based on symmetry. It could be, of course, that for some reason the validation given by professional judgment has equivalent status to the validation given by democratic processes, but, though I have read such arguments, I confess that I have not yet found one to be persuasive.

The Free Exercise and Free Speech rights of teachers in this context are, I believe, essentially identical, because the "exercise" that the religious objector wishes to engage in is the unimpaired holding of a set of beliefs. Although the Free Exercise Clause may protect some aspects of religious exercise that are not protected by the Free Speech Clause, the
ples involve government efforts to require people to affiliate themselves with views to which they object. Ordinarily, as *Wooley v Maynard* shows, when governments attempt to impose such duties to "speak" on the general population, serious constitutional questions arise. *Wooley* is limited to some extent by the holding in *PruneYard Shopping Center v Robins*, in which the Court found no constitutional violation in a rule of state law requiring the owner of a shopping center to make its property available for political communication. However, the Court in *PruneYard* emphasized "a number of distinguishing factors" compared to *Wooley*. The government did not prescribe the message, and the setting was such that it would be quite unusual for observers to impute the views expressed in the political activities to the owner of the shopping mall. The school curriculum, in contrast, resembles *Wooley* more than *PruneYard*: The school board does prescribe the message, and the school setting makes it quite difficult as a practical matter for the teacher to disclaim association with the message.

Does it make a difference that, in the curriculum case, the obligation to speak is imposed only on government employees and not on the general public? On one view, the Court’s patronage cases suggest that it does not. The patronage cases hold that the government may not require its employees to affiliate themselves with particular political parties in order to obtain or retain their jobs.

Yet, in a cognate context, the Court has suggested that it does make a difference that the obligation is imposed only on government employees. Until recently, the Court interpreted the Free Exercise Clause of the First Amendment to require that government accommodate the religious beliefs of those affected by its general interest in not being compelled to say things with which one disagrees does not seem to be one of them. That interest is as equally impaired when the source of the disagreement is political as it is when the source is religious. Note, for example, that the Court in *West Virginia State Bd. of Educ. v Barnette*, 319 US 624 (1943), used the Free Speech Clause to protect the interests of religious objectors in refraining from compelled expression. Id at 642. In sum, nothing in the Supreme Court’s cases suggests that religious beliefs as such are more protected than political beliefs. See also William Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn L Rev 545 (1983).


107 Id at 87.

legislation. However, the Court developed an exception to this doctrine. It held that individuals with religious objections to legislation may not "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." Those cases involved objections to the manner in which the government maintained its records and to the government's disposition of its property, and the Court did not carefully spell out the precise contours of the "internal affairs" exception. Nonetheless, at least intuitively it seems to me that the definition of a curriculum is more like an "internal affair" than is the imposition of a regulation on the general population. The patronage cases may be said not to involve "internal affairs" in the same sense, because the obligation to affiliate with a political party has no bearing, as the Court saw it, on the employee's performance of her job duties but related only to the general political program of the party.

On one level the conclusions I have reached seem problematic. Put in its strongest form, the constitutional doctrine I have identified appears to allow a government to insist that an unwilling teacher indoctrinate his or her students on matters that are highly controversial and partisan. I suspect that most readers will

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111 The constitutional limitations on a public school's ability to limit the non-curriculum related speech of teachers and students deserves a brief note. Under Tinker v Des Moines School Dist., 393 US 503 (1969), students may engage in political speech in school if that activity does not interfere with the pedagogical operations of the school. Tinker was limited in Bethel School Dist. No. 403 v Fraser, 478 US 675 (1986), where the Court allowed the school to impose disciplinary sanctions on a student who, during a campaign for class office, made sexually suggestive, though non-obscene, remarks. One distinction the Court drew between the two cases was that Fraser's speech did not refer to "politics" in the same sense that it was used in Tinker; in particular, with reference to political activity outside the school. Id at 680. Another distinction was that the campaign for class office meant that Fraser's statements were in a meaningful sense associated with statements "by" the school, which could not act to disassociate itself from those remarks, unlike the school in Tinker. Id at 685-86. The latter distinction was also important in Hazelwood School Dist. v Kuhlmeier, 484 US 260 (1988), in which the Court allowed a school to censor stories in a newspaper produced in conjunction with a journalism course. (The newspaper was also curriculum-related in the sense I have used, and perhaps the campaign for class office in Fraser was as well. If those activities are considered to be part of the school's curriculum itself, the substantial power of the government to determine a school's curriculum, both by including material and by excluding it, would justify the restrictions at issue in these cases). Finally, in Pickering v Board of Educ., 391 US 563 (1968), the Court prohibited a school board from firing teachers who criticized education policy in public. That is different, however, from
think, at least initially, that there is something wrong with such a doctrine. Other considerations, however, may reduce if not dispel entirely such concerns.

Most suggestive, perhaps, is that school boards and university governing authorities rarely behave in the way I have said they could. The reason is that they are subject to political control, either directly by the electorate or indirectly by state legislatures. Precisely because indoctrination in partisan positions is politically controversial, the political constraints on school boards make it unlikely that they will adopt as extreme a position as I have described. As Dean Yudof has argued, the reason that the constitutional limitations on speech by the government are so loose is that the political limitations on such speech are stringent enough to prevent the government from engaging in the most troubling sorts of indoctrination. Similarly, to the extent that the Court has abandoned the requirement that government accommodate the religious views of those it regulates, it did so with the understanding that objectors could and often would use the political process to obtain an exemption from this regulation.

To say that the political process constrains school boards and other policy-makers is not to say, of course, that it guarantees that the resulting policy will be identical to the policy that a disinterested judge might devise, nor is it to deny that there will be jurisdictions in which troubling results will obtain. To an important extent, though, the question for constitutional law deals with comparative judgments about institutions. I concede that school boards and the like will occasionally adopt policies that are inconst
sistent with constitutional values, and that supervision by the electorate or by state legislatures will not catch all those policies. Still, that addresses only half of the issue. We must also consider whether courts will be able to identify the troubling instances where the political process has failed, while simultaneously allowing political actors to make permissible choices within the range that the Constitution leaves open to them. The judicial process, like the political one, is not perfect, and we can be sure that the courts will make a number of errors: They will fail to invalidate some practices in which constitutional values are in fact infringed, and they will invalidate others when in fact the political process selected a constitutionally permissible policy.

Making the proper comparative judgment is generally quite difficult, and the difficulty is compounded in the present context. Curricula deal with questions about which there may be general agreement as to the right answer, and with matters about which there remains disagreement. There are lines between exposure to competing views, indoctrination in a partisan viewpoint, and instruction in what is generally accepted as essentially uncontroversible. I think it unlikely that the courts would systematically do better than the political process at drawing the lines. Thus, the relatively simple-minded reading of the cases, which yields the conclusion that there are few limits on how governments can define the curricula of public schools, is in my view supported by a more elaborate understanding of the role of the courts and politics in the constitutional system.

2. Private schools.

The preceding analysis provides the basis for considering the extent to which the Constitution limits the power of government to prescribe the curricula at private schools. Here too the question has two parts: May the government prohibit a private school from offering a particular course? May it require private schools to offer particular courses?

Meyer v Nebraska held that the state could not prohibit private schools from offering instruction in foreign languages before the eighth grade. That would seem to dispose of the possibility that, for example, a state legislature could bar private schools from teaching creation science. Because, in some instances, public

116 262 US 390 (1923).
schools cannot teach creation science, this is a place where there is a clear difference between public and private schools.\textsuperscript{117}

State-prescribed courses raise more complex questions. All states enforce their compulsory attendance laws by finding that attendance at private schools will not count as compliance with the laws unless the schools comply with certain minimum standards; these standards often require that the schools’ teachers be certified, and that some specified subjects be offered in the schools. The subjects typically are English, mathematics, and the like, and the standards ordinarily do not prescribe the precise content of the programs of instruction. These requirements have occasionally been challenged by church-related schools, which contend that the First Amendment prohibits the state from imposing the requirements. State courts have regularly rejected these challenges, finding that the burden that complying with the regulations places on religious belief is outweighed by the public interest in assuring that children receive an adequate education.\textsuperscript{118} The courts, however, also routinely note that the church-related schools do not hold it as a tenet of their religion that teachers not receive state certification or that instruction in the specified subjects not be offered.\textsuperscript{119}

\textsuperscript{117} I think it worth noting that it would be quite difficult to devise an effective prohibition. Facing a prohibition, a private school could reorganize itself into a school and a parent cooperative, require that everyone who signs a contract with the school for instruction also become a member of the parent cooperative, and define the school’s operating hours so that every child is taught creation science or German by the parent cooperative outside school hours. Were the state to attempt to prohibit this sort of device, it would be limiting the liberty of parents to “direct the upbringing and education of [their] children,” Pierce v Society of Sisters, 268 US 510, 534-35 (1925), a limitation that might be constitutionally questionable without regard to questions about private schools. The resolution of that constitutional question would draw on cases dealing with the regulation of home schooling. See Neal Devins, A Constitutional Right to Home Instruction?, 62 Wash U L Q 435 (1984). Typically, home education is approved “subject to a process of official approval on matters of curriculum, teacher competence, textbook adequacy, and pupil progress.” Ira Lupu, Home Education, Religious Liberty, and the Separation of Powers, 67 BU L Rev 971, 972 (1987) (summarizing holding of Care and Protection of Charles, 399 Mass 324, 504 NE2d 592 (1987)). See also James Tobak and Perry Zirkel, Home Instruction: An Analysis of the Statutes and Case Law, 8 U Dayton L Rev 1 (1982); Comment, Parental Rights: Educational Alternatives and Curriculum Control, 36 Wash & Lee L Rev 277 (1979). In Duro v District Attorney, 712 F2d 96 (4th Cir 1983), the court found no constitutional violation in an absolute prohibition on home schooling.

\textsuperscript{118} Compare State v Whisner, 47 Ohio St 2d 181, 351 NE2d 750 (1976) (finding it unconstitutional under Wisconsin v Yoder, 406 US 205 (1972) to require religiously-affiliated private school to comply with curricular requirements), with State v Shaver, 294 NW2d 883 (ND 1980) (finding no constitutional violation in teacher certification requirement to which school objected on religious grounds).

\textsuperscript{119} See Comment, The State and Sectarian Education: Regulation to Deregulation, 1980 Duke L J 801, 807-08. But see id at 806 (citing Brief for Defendants, State v Columbus Christian Academy, No. 78 CVS 1678 (Wake Co Superior Ct, NC, Sept 1, 1978)).
Suppose that a state required a school to offer a course to which the school had a religious objection; it might require that private schools offer a biology course, or that evolution be taught in every biology course offered by private schools. Would it violate the free exercise rights of parents or the schools to impose such a requirement? Wisconsin v Yoder suggests that it would.\textsuperscript{120} Yoder held that the Free Exercise Clause required states to exempt from the operation of their compulsory attendance laws students whose parents had a religious objection to attendance where the children had already received what the Court characterized as sufficient education to allow them "to participate effectively and intelligently in our open political system [and] to be self-reliant and self-sufficient participants in our society."

It seems unlikely that exempting schools with religious objections from compliance with any particular curricular requirement would impair the state interest in assuring that students receive that amount of education. In contrast, exempting certain schools from the certification requirements completely would impair that interest, at least when it might be administratively difficult to ensure that students taught by uncertified teachers, or students who did not receive instruction in specified subjects, actually did obtain the desired amount of education.

This analysis calls for balancing the burden a law places on religious exercise against the impairment of some state interest occasioned by exempting religious objectors from the burdensome law.\textsuperscript{122} Employment Division v Smith, the peyote case, casts some doubt on the viability of the balancing approach, even though it specifically reaffirmed the holding in Yoder.\textsuperscript{123}

In Smith the Court held that the Free Exercise Clause did not require states to provide an exemption based on religious belief from criminal laws directed at conduct that as a general matter the state believes to be undesirable. Where such laws were involved, the Constitution did not require that the state interests be balanced against the burden on religious belief.

\textsuperscript{120} 406 US 205.
\textsuperscript{121} Id at 221.
\textsuperscript{122} Formally, the Court would ask whether the burden on the exercise of religion was justified by a compelling state interest. Although this test does not use the term "balance," the Court's determination of the amount of burden, how compelling the state interest is, and whether the state interest justifies the burden amounts to balancing the interests. For a demonstration, see T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L J 943 (1987).
\textsuperscript{123} See Smith, 110 S Ct 1595, 1601 (1990).
The Court reaffirmed *Yoder*, however, and in doing so indicated two grounds on which the cases could be distinguished. With respect to both grounds, the Court indicated that balancing is appropriate only if certain threshold conditions are met: The individual interest must exceed some “floor” before balancing will even be contemplated, and if the state interest is above some “ceiling,” balancing will not be allowed.

The first ground for distinguishing *Smith* from other cases deals with the ceiling. In *Smith* the state expressed its disapproval of the conduct through its criminal law. Where the state embodies its judgment in a purely civil law, such as the regulation of private schools I have hypothesized, its own claim of interest may be weakened sufficiently to allow the courts to engage in the balancing process. This distinction seems to me quite untenable. At first glance it might seem sensible to believe that a state interest asserted in a criminal statute is more substantial than one asserted in a civil statute, but that belief cannot be sustained on close inspection; some civil statutes exceed the ceiling, and some criminal ones do not. For example, a state may have a strong policy against discrimination in employment based on race or sexual preference, but its legislature may reasonably have concluded that embodying that policy in a criminal prohibition would actually be less effective, because it would heighten tensions, than embodying it in a purely civil statute. And, in the other direction, it may be worth pointing out that the prohibition in *Yoder* was expressed in a criminal statute, albeit one for the violation of which the defendant was fined only $5. To the extent that the criminal/civil distinction is used as a method of triggering the balancing process, it does not appear to operate in an intuitively appealing way.

The second ground involves the floor of individual interest. In *Yoder* the free exercise claim was combined with a claim predicated on the parents’ constitutional right “to direct the education of their children,” a right also asserted in the hypothetical I am discussing. When there is such a combination of claims, once again the courts might properly engage in balancing the interests.

This distinction also seems problematic. According to its reasoning, there may be some circumstances in which a claim based on the Free Exercise Clause standing alone would not trigger the balancing process, but a Free Exercise claim joined with another claim would. It is important to understand that this model makes

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124 Id.
sense only on the assumption that the second claim standing alone would also not trigger the balancing process, for otherwise it is the second claim alone, and without any contribution from the Free Exercise claim, that does the work. For example, suppose that the parents' right to direct their children's education is strong enough itself to require balancing. It then would not matter whether a parent's objection to instruction in biology or evolution was grounded in religious belief or sheer ignorance; in either case the court would be authorized to balance the state interest against the impairment of the parent's interest.2

The idea underlying this second distinction, then, must be that there are "interests" related to values protected by the Constitution which are not themselves rights protected by the Constitution, and that sometimes these interests can be added together to yield the equivalent of a constitutional right. I think it fair to say that this is not the usual way in which lawyers think about constitutional rights. In addition, the additive model of interests resembles one interpretation of Justice Marshall's approach to Equal Protection analysis. Under that interpretation, there are interests not amounting to constitutional rights—such as an interest in education, in voting, and others—which trigger a process of balancing competing interests when they occur in combination.2 The Court, however, rejected this approach to the Equal Protection clause, at least in part because of its skepticism about its ability to identify and then add up nonconstitutional interests.2 If that skepticism is justified in the Equal Protection context, it would seem to be equally justified in the Free Exercise context. If so, the second ground for distinguishing Yoder from Smith, the former being a case involving additive interests and the latter being a case involving only a single interest, disappears.

More fundamental than these difficulties, though, is the primary reason the Court gave for rejecting the balancing process in

126 Recall that the analysis in Smith is that the Court will not engage in balancing unless the threshold is crossed. Once the Court finds that balancing is permissible because the threshold is crossed, presumably an interest grounded in religious belief will have more weight than one grounded in ignorance.

127 See San Antonio Indep. School Dist. v Rodriguez, 411 US 1, 102-03 (1973) (Marshall dissenting). On this interpretation of Justice Marshall's approach, the Equal Protection Clause requires a two-step analysis: first, determine the importance of the affected interests when they are cumulated; second, apply an appropriate level of scrutiny to the fit between the classification used and the government's goals. On an alternative interpretation of Marshall's approach, the analysis is one-step: balance the interests adversely affected by the classification against the governmental interests.

127 Id at 33.
Smith. The Court concluded its substantive analysis with a parade of horribles, the point of which was to demonstrate that the balancing process was too open-ended for courts to employ. This was particularly so, the Court said, because any coherent process of determining whether a compelling state interest justified the imposition of burdens on the exercise of religion would have to take into account the centrality of the belief that was burdened, which was, according to the Court, a task beyond the capacity, and perhaps beyond the constitutional authority, of the courts.128

In terms I have already introduced, the critique of balancing identifies one important source of possible failures in the judicial process. When coupled with attention to the operation of the political process, the Smith critique of balancing rather strongly suggests that there ought to be few constitutional restrictions on the ability of legislatures to prescribe curricula for private schools. I have used an example, requiring that evolution be taught, where the centrality of the belief seems apparent.129 As a practical or policy-relevant matter, however, legislatures are unlikely to impose such curricular requirements; the religious pluralism of the nation, and indeed of essentially all the states, joined with a widespread public commitment to religious toleration, means that legislatures will rarely if ever require that a private school teach subjects inconsistent with the beliefs of a substantial minority of the population. And, should such a school object to teaching, for example, social studies because it embodies the philosophy of secular humanism, it seems quite likely that legislatures and courts both would find the claim sufficiently far-fetched that they would regard the belief that social studies is inconsistent with religious tenets as “not central” and outweighed by the interests the state was seeking to promote.

CONCLUSION

I have argued that constitutional doctrine, taken in relatively straightforward ways, does not support a strong distinction between public and private schools. To the extent that regulation of

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129 See text accompanying notes 120-21. I noted, however, that it would be relatively easy to argue that adoption of beliefs inconsistent with the theory of evolution is derivative of a more fundamental or more central understanding of the proper relation between the deity and humans. This would contrast with rituals, such as the use of peyote or wine in a religious sacrament, that are not derivative but constitutive of the exercise of the religious belief system. This contrast illustrates why it would be improper for courts to investigate the centrality of particular beliefs in a religion.
one differs from that of the other, the reason is that legislatures have chosen not to exercise the power they have. There may be constitutional limits on what legislatures can prescribe or prohibit with respect to private schools, as there are on what they can do with respect to public schools, but these limits are sufficiently loose that contemporary policy issues dealing with public and private schools ought to be discussed without regard to the Constitution. The policy issues are just that, policy issues, and public deliberation about their wisdom or folly ought to proceed unpolluted by concern that some policy choices would be unconstitutional.