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THE CHILDREN WE ABANDON: RELIGIOUS EXEMPTIONS TO CHILD WELFARE AND EDUCATION LAWS AS DENIALS OF EQUAL PROTECTION TO CHILDREN OF RELIGIOUS OBJECTORS

JAMES G. DWYER*

The story of children who die because their parents, in observance of their own religious principles, withhold conventional medical treatment from them is a familiar one. In this Article, James G. Dwyer shows that the phenomenon of parents denying secular benefits to their children for religious reasons goes far beyond these few highly publicized cases, extending into the realm of education as well as medical care. Moreover, Dr. Dwyer shows that the federal and state governments endorse this practice by statutorily exempting 'religious objector' parents from otherwise generally applicable compulsory child care and education laws. He argues that courts addressing such exemptions, in emphasizing the parents' free exercise rights, have failed to observe that they infringe upon the children's equal protection rights. These children, solely because of their parents' beliefs, do not receive the same legal protections from harm (for instance, inferior health care and an inferior education) that other groups of children receive. After describing in detail the types of discrimination that religious exemptions to child welfare laws inflict upon these children, Dr. Dwyer considers how each element of an equal protection analysis would apply to these exemptions. He concludes ultimately that very few, if any, of the exemptions should survive an equal protection challenge—a conclusion with radical practical implications, particularly with regard to the educational system in this country. Finally, the author discusses the practical impediments to bringing equal protection claims, especially the fact that neither the parents nor the children themselves are likely to raise or support them, and proposes methods by which courts might nevertheless hear these claims.

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We commonly excuse parents, legally and morally, for inflicting upon their children what most people would regard as harm, when the parents act on the basis of religious belief. While states have prosecuted some parents for causing their children to die by failing to

obtain necessary medical care, even though the parents had sincere religious objections to medical care,¹ these few cases represent only the most extreme situations and mask a quite widespread but generally overlooked phenomenon. In numerous areas of the law relating to children's care and education, certain parents enjoy an exemption from normal parental legal responsibilities solely because they have religious beliefs in opposition to the conduct that those responsibilities would entail. These exemptions and the cultural ethos that supports them reflect a pervasive social indifference to the interests of particular groups of children. These children cannot speak for themselves and have no one to speak for them except the very parents who want to deny them the benefits and protections that the law guarantees other children. This Article challenges the legal community to recognize and address squarely the law's denial of equal protection to some children simply because of their parents' religious beliefs.

Numerous instances of discrimination among children based upon the religious beliefs of their parents appear in the laws relating to child-rearing. This Article focuses on the areas of medical care and school regulation.² In these areas, the harms to children arising from the law's discriminatory treatment are readily discernable, and the children are unlikely to have any advocate for their independent interests. In these areas, myriad state and federal laws impose on parents and educators responsibilities to undertake or to refrain from certain actions, reflecting a legislative judgment that imposing these responsibilities is necessary to protect and promote the well-being of children. As a general rule, for example, parents by law must ensure that their children receive vaccinations, physical examinations, adequate nutrition, and medical treatment for disease or injury.³ States also legally mandate that parents send their children to schools that comply with regulations regarding teachers' qualifications, content and methodology of instruction, and several other aspects of school operation.⁴

1. See Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, 48 n.28 (1994) (noting that 42 such prosecutions have been documented).

2. Other areas in which such discrimination exists include adoption and foster care. See *infra* note 161 and accompanying text.

3. See *infra* notes 126, 140-42, 156-58 and accompanying text.

4. See *infra* notes 22-52 and accompanying text.

At the same time, however, these laws typically restrict their application to avoid conflict with the beliefs and practices of minority religious groups.⁵ Significantly, legislatures have included religious exemptions in child welfare and education laws even in many areas in which the courts have found that religious accommodation is not constitutionally required. As a result of these exemptions, the children of members of some religious groups do not receive the benefits and protections that the laws afford children generally.

Substantial litigation and legal commentary has surrounded religious objections to a few sorts of state child welfare and education laws. Most relates to objections to vaccinations or to blood transfusions or other medical care for children at risk of dying, and objections by church school officials or home schooling parents to teacher certification requirements.⁶ These are cases in which a state has refused to accommodate the religiously grounded desires of parents regarding the care and education of their children, and the parents have sued the state claiming a violation of their constitutional rights. No one has ever advanced in court, however, a claim that when the state *does* accommodate "religious objector" parents it thereby violates a fundamental right of *their children*—namely, the children's Fourteenth Amendment right to equal protection of the laws.⁷ That no one has ever asserted such a claim is unsurprising, since neither state officials nor parents would have an interest in advancing such a claim, and whether anyone else *could* advance such a claim is unclear.

Legal commentators, too, have failed to perceive the problem of equal protection for children that such exemptions create.⁸ Instead, both courts and commentators have analyzed religious exemptions principally in terms of the religious free exercise rights of the parents who receive the exemptions, and in terms of the equal protection rights of *other parents*—those who object to a particular child welfare

5. See *infra* notes 60-75, 110-19, 127-39, 146-49, 159-60 and accompanying text.

6. See *infra* notes 86-87, 113-14, 133-39 and accompanying text.

7. One state court has commented that a spiritual treatment exemption to neglect laws violates the equal protection rights of children who fail to receive medical care as a result. *State v. Miskimens*, 490 N.E.2d 931, 935 (Ohio 1984).

8. The only recognition of this problem the author has encountered in the scholarly literature are very brief discussions of spiritual treatment exemptions to neglect laws in equal protection terms in Ann M. Massie, *The Religion Clauses and Parental Health Care Decisionmaking for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L.Q. 725, 771-73 (1994), and in Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 348-50 (1991).

law but do not fall within the law's exemption because they do not have the right sort of beliefs or religious affiliation.⁹ Occasionally legal commentators, troubled by the consequences of religious exemptions for the welfare of children, assert on the children's behalf moral claims to state protection of their welfare. They typically balance such claims against parents' constitutional rights in order to argue that courts should limit or eliminate the religious exemptions.¹⁰ They fail to perceive, however, that a fundamental problem of inequality

9. See, e.g., *Dalli v. Board of Educ.*, 267 N.E.2d 219, 223 (Mass. 1971) (holding that religious exemption to immunization law violates Establishment Clause and equal protection rights of parents not covered); *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979), *cert. denied*, 449 U.S. 887 (1980) (holding that religious exemption to compulsory immunization law violates equal protection rights of parents not covered by the exemption); *Miskimens*, 490 N.E.2d at 933-35 (holding that spiritual treatment exemption to child neglect law violates the Establishment Clause and the equal protection rights of parents not covered by the exemption); *Massie*, *supra* note 8, at 736-46 (arguing that Free Exercise Clause does not require spiritual treatment exemption); Shelli Dawn Robinson, Commentary, *Commonwealth v. Twitchell: Who Owns the Child?*, 7 J. CONTEMP. HEALTH L. & POL'Y 413, 425-31 (1991); Judith Inglis Scheiderer, Note, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429, 1439-41 (1990); Edward E. Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491, 1494-1509 (1991) (discussing free exercise rights of religious objectors).

Commentators and courts have also viewed religious objection exemptions to child welfare laws as violations of the Establishment Clause. E.g., *Dalli*, 267 N.E.2d at 223; *Massie*, *supra* note 8, at 747-71. In addition, many scholars have discussed the due process problems that arise when states include spiritual treatment exemptions in their child neglect laws while at the same time imposing criminal liability on any parent who causes a child to die by failing to secure appropriate medical care, regardless of the reason. See, e.g., Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559, 584-88 (1990); Rosato, *supra* note 1; Scheiderer, *supra*, at 1441-43.

Notably, all of the works cited, which are typical of the scholarly work that has been done on religious parenting, discuss only instances in which children die because their parents rely exclusively on spiritual treatment. The more common and widespread practice of denying children immunization and periodic physical examinations apparently has not captured the attention of legal writers. Similarly, in the area of education, much has been written about battles between religious conservatives and states over state certification of church schools and home schools, while day-to-day practices of these schools that might be harmful to the secular interests of their pupils, such as sexist teaching, receive almost no attention. See, e.g., Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise*, 60 GEO. WASH. L. REV. 818 (1992); Mark Murphy, Note, *A Constitutional Analysis of Compulsory School Attendance Laws in the Southeast: Do They Unlawfully Interfere with Alternatives to Public Education?*, 8 GA. ST. U. L. REV. 457 (1992); Daniel J. Rose, Note, *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 B.C. L. REV. 861 (1989).

10. See, e.g., John T. Gathings, Jr., Comment, *When Rights Clash: The Conflict Between a Parent's Right to Free Exercise of Religion Versus His Child's Right to Life*, 19 CUMB. L. REV. 585, 604-08, 615-16 (1989); Wayne F. Malecha, Note, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith Versus Medical Care for Children*, 12 J. LEGIS. 243, 259-63 (1985).

among groups of children inheres in these situations, a problem that rises to constitutional dimensions and throws into question in its entirety this very common practice of according some parents a right to deny their children important secular benefits. Indeed, even the fact that some children must have their interests balanced against the religious preferences of other persons, before a court can determine whether they are to receive the legal protections guaranteed other children, is a form of unequal treatment that requires justification. Courts would never consider the religious views of other persons as a justification for the state denying benefits to a particular group of adults.

This Article demonstrates that a compelling legal argument against religious exemptions to child welfare and education laws is that they discriminate among groups of children, in the conferral of important state benefits, on an arbitrary and improper basis—namely, the religious beliefs of other persons. Such a Fourteenth Amendment equal protection challenge on behalf of the adversely affected children would be stronger than other approaches to protecting their well-being because it would elevate the children's status in these situations from that of parental appendages or petitioners for state largesse to that of constitutional right-bearers.¹¹ Asserting that an exemption violates some children's constitutional right would force the courts to focus more closely on the underlying purpose of child welfare laws—to provide children with forms of protection that a majority of citizens (not just liberal child advocates) deems important enough to mandate.¹² It would induce judges to recognize the distinct personhood of children and the ways in which children's welfare interests may conflict with the preferences of parents, facts that courts

11. Massie argues that spiritual treatment exemptions violate children's free exercise rights. Massie, *supra* note 8, at 769-71. This argument does attempt to raise children's status to that of right-bearers, but it is not a very strong argument. If a child himself does not have religious beliefs inconsistent with those of his parents, a supposed free exercise right of the child would have to depend on one of three claims: (1) that children have a right not to have any religious (or other?) views impressed upon them, which is implausible, (2) that present treatment of a child might be contrary to his future views concerning religion, which is highly speculative, or (3) that present treatment of a child might be contrary to the child's future interest in religious freedom (e.g., if it caused the child to die or stifled the growth of intellectual capacities), which is better characterized as the child's present interests in health and cognitive development.

12. This has been the result in equal protection suits that parents have brought on behalf of particular groups of children. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 221-25 (1982) (holding that denial of free public education to undocumented alien school-age children violates Equal Protection Clause).

routinely overlook.¹³ It would also reveal the impropriety of balancing children's fundamental interests against parents' wishes, for whatever reason, to depart from societal standards of parental responsibility. Finally, an equal protection challenge on behalf of children would force states to do something they have never been called on to do—to articulate in court a legitimate reason for their practice of *de jure* discrimination among different groups of children in providing protection from parents' harmful practices and decisions. Thus, rather than requiring a showing that the state (that is, the rest of us) has a compelling interest in protecting the child of a religious objector, as is required when parents' free exercise rights are the only constitutional rights asserted, an equal protection claim on behalf of the child would impose on the state the burden of showing that *it* (and not just the parents) has a sufficiently strong interest in *denying* protection to the child.

In searching for such a rationale, state officials and judges would have to confront some very difficult questions about the moral, political, and legal standing of children born into minority religious communities, about the state's responsibility for the welfare of these children, about the permissible bases for state decisionmaking in this realm, and about the coherence and legitimacy of a notion of parental authority and entitlement that precludes treating all children as equal human beings. The answers they arrive at may force state officials and judges not only to eliminate religious exemptions that are *not*, according to past judicial decisions, constitutionally compelled, but also to reconsider the prevailing judicial interpretation of the First and Fourteenth Amendments as conferring on parents a right to control the lives of their children.¹⁴

This Article analyzes the theoretical, doctrinal, and practical issues that an equal protection claim on behalf of religious objectors' children would raise. Part I describes several of the ways in which federal and state laws discriminate among groups of children based upon the religious preferences of their parents. It highlights two particular legal provisions—one in the area of education and one in the area of medical care—that child advocates might wish to challenge on equal protection grounds. The first is a religious exemption from prohibitions against sex discrimination and sex bias in elementary and

13. See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1394-96, 1399-1402 (1994).

14. For an argument on different grounds for eliminating parents' rights, see Dwyer, *supra* note 13.

secondary education.¹⁵ The second is a religious exemption from compulsory child immunization laws.¹⁶ Focusing on the sexist practices of certain types of religious schools brings out particularly sharply the conflict that all of these situations pose between, on the one side, accommodation of minority religious practices and the political values supporting such accommodation and, on the other side, the commitment of a liberal democracy to the value of equality among persons.

Part II of the Article sets forth the elements of an equal protection claim and analyzes with respect to each the arguments that advocates for children might advance against parental religious exemptions, as well as arguments that parents and the state might advance in response. Of particular importance are discussions concerning the level of scrutiny that courts should apply to these statutory provisions and discussions concerning the legitimacy of the legislative purposes that states might assert in defense of parental religious exemptions. Part II argues that child welfare and education laws containing parental religious exemptions should be subjected to heightened judicial scrutiny.¹⁷ Further, it explains why the actual legislative purpose underlying these exemptions (deference to or accommodation of the religiously-grounded wishes of parents) is not only insufficient to satisfy this standard, but is in fact an *illegitimate* state purpose that courts should not even consider.¹⁸ Part II also constructs a number of other potential rationales for parental religious exemptions, and shows that these too are inadequate.¹⁹ It thus concludes that most, if not all, religious exemptions to child welfare and education laws violate the Fourteenth Amendment Equal Protection Clause. Accordingly, courts should invalidate them.

However, a serious practical obstacle lies in the way of securing equal protection of the laws for religious objectors' children. An equal protection claim of the type that Part II articulates would not have the support of parents, state officials, or the general public, and would be unlikely to have the support of the children themselves. Part III addresses this dilemma and finds that, while the rules of federal procedure do not formally preclude a suit going forward despite the absence of support from any of the parties directly

15. See *infra* notes 43-59, 72-85 and accompanying text.

16. See *infra* notes 140-55 and accompanying text.

17. See *infra* notes 230-343 and accompanying text.

18. See *infra* notes 352-69 and accompanying text.

19. See *infra* notes 371-446 and accompanying text.

affected by the challenged state action, past judicial applications of the relevant rules suggest that it would in practice be quite difficult to bring a claim on behalf of religious objectors' children.²⁰ Any judge would likely be reluctant to confer child-representation status on an outside advocate when none of the parties involved supports such representation. So applied, the federal rules may themselves present an equal protection problem, by precluding claims to enforce the constitutional rights of a certain class of persons. Thus, Jenny Doe, a young girl about to begin school for the first time, whose parents wish to send her to a fundamentalist Christian school that will teach her to assume a role subordinate to men for the rest of her life, suffers discrimination at three levels. (1) Her parents, her school, and her parents' religious community treat her as inferior by virtue of her gender. (2) Federal and state law-makers treat her as less deserving than children in secular schools of protection against sexist teaching. (3) Finally, the courts treat her as less deserving of enforceable constitutional rights than the rest of society.

Part III suggests a strategy for initiating an equal protection suit on behalf of such a child despite existing obstacles.²¹ It also considers possible compromise positions regarding various religious exemptions that would allow states to protect somewhat the developmental interests of the children involved while minimizing parents' inevitable resistance. As a matter of legal principle, avoiding such resistance is not a legitimate reason for legally discriminating against these children, but as a matter of political reality it is, of course, something courts and state officials will—and perhaps should—consider.

I. CHILD WELFARE AND EDUCATION LAWS THAT DISCRIMINATE AMONG CLASSES OF CHILDREN

A. School Regulations

States regulate public schools extensively. All states require, for example, that public schools hire only teachers possessing state-awarded credentials,²² and all prescribe specific training and tests as

20. See *infra* notes 447-64 and accompanying text.

21. See *infra* notes 465-74 and accompanying text.

22. See EDMUND REUTTER, JR., *THE LAW OF PUBLIC EDUCATION* 437 (3d ed. 1985). This requirement is explicit in state education statutes. See, e.g., ALA. CODE § 16-23-1 (1995); CAL. EDUC. CODE §§ 44065, 44261, 44830(a), 44866 (West 1993); *id.* § 44265.5 (West Supp. 1996); CONN. GEN. STAT. ANN. § 10-145 (West 1986 & Supp. 1995); ILL.

prerequisites to obtaining credentials.²³ Many states also require that public school teachers periodically receive additional training²⁴ and evaluation,²⁵ and that teachers whose work is unsatisfactory undergo special remedial training and reassessment or be dismissed.²⁶ Statutory provisions governing public school teacher qualifications reflect a legislative judgment that the educational needs of children are likely to be fulfilled only by teachers with proper preparation under appropriate supervision, and that the quality of teacher training bears a close relation to the successful performance and development of students.²⁷

In addition to controlling who teaches in public schools, states typically also exercise substantial control over the content of education in public schools. They mandate that public schools teach certain subjects,²⁸ follow prescribed curricular guidelines,²⁹ use only

COMP. STAT. ANN. ch. 105, para. 5/21-1 (West 1993 & Supp. 1995); MINN. STAT. ANN. § 120.101.7 (West 1993); NEB. REV. STAT. § 79-1233(1) (1994); N.Y. EDUC. LAW § 3001 (McKinney 1995).

23. See, e.g., ALA. CODE § 16-23-14, 15 (1995); CAL. EDUC. CODE §§ 44259, 44261 (West 1994); ILL. COMP. STAT. ANN. ch. 105, paras. 5/21-1a, -2a, -2b, -3, -5 (West 1993); MICH. STAT. ANN. § 15.41531 (Callaghan 1987 & Supp. 1995); N.Y. EDUC. LAW § 804(6) (McKinney 1988) *id.* § 3004 (West 1995); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 492-95 (8th Cir. 1987) (describing elements of teacher training program in Iowa). Many state statutes direct a state agency, typically the state board of education, to define the prerequisites and standards for obtaining teaching credentials. ROBERT C. O'REILLY & EDWARD T. GREEN, *SCHOOL LAW FOR THE 1990S: A HANDBOOK* 62 (1992).

24. E.g., ALA. CODE §§ 16-23-8, 16-23-13.1 (1995); CAL. EDUC. CODE § 44277 (West 1993 & Supp. 1996).

25. E.g., CAL. EDUC. CODE § 44662(b) (West 1993 & Supp. 1996); *id.* § 44830(b) (West 1993) (requiring that all teachers pass basic skills proficiency exam); *id.* § 44664 (requiring annual evaluation of probationary teachers and annual evaluation of tenured teachers); ILL. COMP. STAT. ANN. ch. 105, para. 5/24A-5 (West 1993) (requiring school districts to establish teacher evaluation plans and evaluate all teachers at least once every two years).

26. E.g., CAL. EDUC. CODE § 44664(b) (West 1993); ILL. COMP. STAT. ANN. ch. 105, paras. 5/24A-5(f), (g), (h) (West 1993).

27. See, e.g., 1992 Cal. Stat. ch. 1245, § 15(d), (e) (1994); *Fellowship Baptist*, 815 F.2d at 492-95 (describing teacher training program in Iowa as "essential if one is to become a good teacher") (quoting *Fellowship Baptist Church v. Benton*, 620 F. Supp. 308, 316 (S.D. Iowa 1985)); cf. *Douglas v. Faith Baptist Church*, 301 N.W.2d 571, 579 (Neb.) ("[I]t goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people."), *appeal dismissed*, 454 U.S. 803 (1981).

28. See MARTHA M. MCCARTHY & NELDA H. CAMBRON-MCCABE, *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* 80 (3d ed. 1992) (noting that all states require instruction regarding the United States Constitution, that most require instruction in American history, and that other subjects commonly required are English, mathematics, drug education, health and safety, and physical education); O'REILLY & GREEN, *supra* note 23, at 121 ("[I]n all states, the local public school district must offer a curriculum that the state prescribes."). Roughly half of the states empower local school boards to adopt

textbooks and other instructional materials approved by state officials,³⁰ and regularly administer standardized tests and other evaluative devices.³¹ Some states also dictate minimum requirements for progress to higher grades and for a high school diploma.³² State and local school officials regularly inspect public schools to ensure their compliance with these directives.³³

California's education code is one of the most extensive.³⁴ Like many other states, California requires that all public schools teach core subjects such as English, mathematics, social studies, sciences, fine arts, health, and physical education.³⁵ California also goes beyond core requirements.³⁶ It mandates, for example, that public schools implement "programs in ethics and civic values" that (1) teach children to value "[h]uman individuality, dignity, and worth," "[f]reedom and autonomy," "the common good," and "[e]quality of opportunity," and (2) foster in children self-respect, cooperativeness, and "critical thinking skills necessary for sound judgment in matters

courses of study, but often the local board must obtain approval of its decisions from the state board of education. MCCARTHY & CAMBRON-MCCABE, *supra*, at 80.

29. *E.g.*, ALA. CODE §§ 16-40-1.1, 16-40A-2, 16-40A-3 (1995); CAL. EDUC. CODE § 51215 (West 1989 & Supp. 1996) (requiring local school boards to adopt student proficiency standards); *id.* § 51980 (West 1989) (health education); *id.* § 60200.6 (social science courses); *id.* § 51220.5 (West Supp. 1996) (parenting skills course); *id.* § 51553 (sex education); IND. CODE ANN. §§ 20-10.1-4-8, -9.1, -11 (Burns 1994) (health education); *id.* § 24-10.1-4-7, -10 (Burns 1991 & Supp. 1995); *id.* § 24-10.1-4-13, -14 (Burns Supp. 1995); MICH. STAT. ANN. § 15.41507 (Callaghan 1987 & Supp. 1995) (sex education).

30. *E.g.*, ALA. CODE § 16-36-5 (1995); CAL. EDUC. CODE §§ 60001, 60200 (West 1989 & Supp. 1996); IND. CODE ANN. § 20-10.1-9-1 (Burns 1991); *see also* O'REILLY & GREEN, *supra* note 23, at 122 (listing other states that require local school boards to select textbooks from an approved list). A number of states delegate the textbook designation function to local school boards. *Id.* at 123.

31. *E.g.*, CAL. EDUC. CODE §§ 60603, 60605, 60608 (West 1989 & Supp. 1996).

32. *See, e.g.*, CAL. EDUC. CODE § 51225.3 (West 1994 & Supp. 1996); ILL. COMP. STAT. ANN. ch. 105, paras. 5/27-22 (West 1993 & Supp. 1995).

33. *See, e.g.*, CAL. EDUC. CODE § 1240 (West 1994 and Supp. 1996).

34. New York's public school regulations are comparably extensive. *See Blackwelder v. Safnauer*, 689 F. Supp. 106, 122-23 (N.D.N.Y. 1988) (detailing legislative and administrative provisions governing public schools).

35. CAL. EDUC. CODE § 51210 (West 1989 & Supp. 1996); *see also id.* § 51220 (requiring additionally that in middle and high schools instruction be given in foreign languages, applied arts, vocational-technical skills, and driving); *id.* §§ 51222-23 (establishing minimum time for physical education).

36. Many other states' curricular mandates also go beyond the core academic subjects. *See, e.g.*, ALA. CODE §§ 16-35-4, 16-40-1 (1995) (physical education), 16-40-1.1 (personal and parental responsibility instruction), 16-40A-2 (sex education), 16-40A-3 (drug education) (1995); ILL. COMP. STAT. ANN. ch. 105, para. 5/27-5 (West 1993) (physical education); MINN. STAT. § 120.101.6(4) (1993 & Supp. 1996) (health and physical education).

of ethical conduct and civic responsibility.”³⁷ The critical thinking skills that public schools are to foster include the abilities “to recognize when a claim is reasonable . . . in view of the relevant evidence and supporting arguments” and “to understand and entertain the reasons for points of view other than one’s own.”³⁸ The California Code further requires that in adopting textbooks for use in public schools, the State Board of Education select “materials that illustrate diverse points of view, represent cultural pluralism, and provide a broad spectrum of knowledge, information, and technology-based materials.”³⁹ These provisions reflect a legislative judgment that children must develop habits of cooperativeness and critical thinking in order to thrive as adults in the pluralistic social and business environment of contemporary mainstream America.

Other California statutes require that middle schools and high schools provide instruction in AIDS prevention, including information about “the failure and success rates of condoms and other contraceptives in preventing sexually transmitted HIV infection,” and that they endeavor to inculcate in students compassion for persons with AIDS.⁴⁰ Public school students must also take, in either seventh or eighth grade, a course in parenting skills designed to teach them about child development, nutrition, effective parenting strategies, child abuse prevention, personal relationships, how to promote self-esteem in children, and family health.⁴¹ That children benefit by learning how to avoid sexually transmitted diseases is obvious. Learning to be successful future parents arguably also benefits the students, in addition to benefiting the children they will have and society as a whole, since failing as a parent can also be a source of great suffering for the parent.

One particular type of school regulation on which the analysis below focuses is a prohibition against sex discrimination and sexist teaching in elementary and secondary schools. In this area, the United States Congress—which historically has left regulation of the

37. CAL. EDUC. CODE § 44790 (West 1993).

38. *Id.*

39. CAL. EDUC. CODE § 60200(h) (West Supp. 1996).

40. *Id.* § 51201.5; *see also* CAL. EDUC. CODE § 51202 (West 1993 & Supp. 1996) (mandating instruction in personal and public health and safety, “including venereal disease and the effects of alcohol, narcotics, drugs, and tobacco upon the human body”).

41. CAL. EDUC. CODE § 51220.5 (West Supp. 1996); *see also id.* § 51553 (West 1994) (prescribing content of sex education curriculum); 1992 Cal. Stat. ch. 763 (endorsing State Board of Education’s “Model Curriculum for Human Rights and Genocide”).

internal practices of schools to state and local government⁴²—has been sufficiently concerned to enact federal legislation prohibiting a practice it perceives to be harmful. Title IX of the Education Amendments of 1972 forbids sex discrimination of any kind against any persons in schools that receive direct or indirect financial assistance from the federal government.⁴³ Although the majority of claims under Title IX have challenged exclusion of female students from certain school activities or programs or unequal distribution of school resources among male and female programs,⁴⁴ the language of the statute is broad enough to encompass also sexist teaching and other forms of unequal treatment of boys and girls in the classroom and in academic and career counseling. It states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"⁴⁵

Many states also have passed legislation prohibiting sex discrimination and sex bias in education. These are partly redundant of the federal legislation, but in many cases they serve to clarify and/or extend the mandate. The state prohibitions take two forms. First, they proscribe inequities in the availability of classes and extracurricular activities (most often athletic programs) between male and female students.⁴⁶ New York's Education Law, for example,

42. See David L. Kirp, *Introduction: The Fourth R: Reading, Writing, 'Rithmetic—and Rules*, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 1-17*, at 1 (David L. Kirp & Donald L. Jensen, eds., 1986); ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA 2* (1986).

43. 20 U.S.C. § 1681 (1994).

44. MCCARTHY & CAMBRON-MCCABE, *supra* note 28, at 154-60.

45. 20 U.S.C. § 1681(a) (1994); *see also* 20 U.S.C. § 1703 (1994) (prohibiting states from denying equal educational opportunity to an individual on account of his or her sex). The implementing regulations echo this broad language, 34 C.F.R. § 106.31 (1995), but also contain the qualification that textbooks and curricular materials are not covered. 34 C.F.R. § 106.42 (1995) ("Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials."). The Supreme Court substantially curtailed the effectiveness of Title IX by its decision in *Grove City College v. Bell*, 465 U.S. 555, 570-74 (1984), which held that only the particular program or activity within a school that receives federal financial assistance need comply with the law's requirements. *See* SALOMONE, *supra* note 42, at 130-33. However, the Civil Rights Restoration Act of 1987, P.L. 100-259, 102 Stat. 28, amended Title IX to extend explicitly the prohibition to the entirety of any educational institution that receives federal aid for any of its programs.

46. *E.g.*, WYO. CONST. art. VII, § 10; ALASKA STAT. § 14.18.010 (1992) ("A person in the state may not on the basis of sex be excluded from participation in, be denied the

states that "no person shall be refused admission into or be excluded from any course of instruction offered in the state public and high school systems by reason of that person's sex. No person shall be disqualified from state public and high school athletic teams, by reason of that person's sex"⁴⁷ Second, they proscribe giving instruction or career counseling in a sexist manner and prohibit the use of sexist instructional materials.⁴⁸ The State of Washington, for example, has mandated that the "superintendent of public instruction shall develop regulations and guidelines to eliminate sex discrimination . . . in textbooks and instructional materials used by students."⁴⁹ Washington law also stipulates that counseling and guidance personnel "shall be required to stress access to all career and

benefits of, or be subjected to discrimination under any education program or activity receiving federal or state financial assistance."); *id.* § 14.18.040 (respecting athletics and recreation); *id.* § 14.18.050 (respecting course offerings); CAL. EDUC. CODE §§ 40-41 (prohibiting school districts from discriminating by sex in class enrollment or opportunities for athletic participation); *id.* §§ 220, 230(a) (West 1994) (prohibiting exclusion from or denial of benefits of "any academic, extracurricular, research, occupational training, or other program or activity" on the basis of sex); *id.* § 49020 (high school athletics); HAW. REV. STAT. § 296-61 (1985); ILL. COMP. STAT. ANN. ch. 105, para. 5/27-1 (West 1993 & Supp. 1995) (courses of instruction and athletic programs); MICH. STAT. ANN. § 15.41289 (Callaghan 1987 & Supp. 1995) (athletic programs); MINN. STAT. ANN. § 126.21 (West 1994) (athletic programs); NEB. REV. STAT. § 79-3003 (1994); R.I. GEN. LAWS § 16-38-1.1 (1988) (curricular programs and athletics); WASH. REV. CODE ANN. §§ 28A.640.010 (West Supp. 1996) (inequality in educational opportunities); *id.* § 28A.640.020(1)(c), (d) (recreational and athletic activities, access to course offerings); WIS. STAT. ANN. § 119.22 (West Supp. 1996) (physical education courses).

47. N.Y. EDUC. LAW § 3201-a (McKinney 1995).

48. *See, e.g.*, ALASKA STAT. § 14.18.030 (1992) ("Guidance and counseling services in public education . . . shall stress access to career and vocational opportunities to students without regard to sex."); *id.* § 14.18.060 (sex bias in textbooks); CAL. EDUC. CODE § 40 (West 1989) (prohibiting differences by sex in conducting classes or counseling for careers, and requiring that school personnel "affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex"); *id.* §§ 220, 230 (West 1994); *id.* § 45 (West Supp. 1996); *id.* § 51500 (West 1989) ("No teacher shall give instruction nor shall a school district sponsor any activity which reflects adversely upon persons because of their . . . sex"); *id.* § 51501 ("No textbook, or other instructional materials shall be adopted by . . . any governing board for use in the public schools which contains any matter reflecting adversely upon persons because of their . . . sex."); *id.* § 60040 (requiring school boards to adopt only instructional materials that portray "contributions of both men and women in all types of roles, including professional, vocational, and executive roles"); *id.* § 60044; NEB. REV. STAT. § 79-3003 (1994); R.I. GEN. LAWS § 16-38-1.1 (1988); WASH. REV. CODE ANN. § 28A.640.020 (West Supp. 1996).

49. WASH. REV. CODE ANN. § 28A.640.020(1) (West Supp. 1996). California affirmatively requires that courses in social studies in the public schools include "study of the role and contributions of both men and women." CAL. EDUC. CODE § 51204.5 (West 1989).

vocational opportunities to students without regard to sex.”⁵⁰ Some states go beyond these prohibitions to require that teachers act affirmatively to counteract sexism, particularly by promoting the self-esteem of female students. Illinois, for example, requires that all public elementary and secondary schools include in their curriculum a unit of instruction on the history of women in America, including “a study of women’s struggles to . . . be treated equally as they strive to earn and occupy positions of merit in our society.”⁵¹ California statutes encourage public school teachers to “impress upon the minds of pupils the meaning of equality and human dignity” and to foster an environment among students “that is free from discriminatory attitudes.”⁵²

These statutory provisions regarding sexism in schools clearly rest on a legislative judgment that sexist education and denial of equal opportunity are harmful to female students.⁵³ Voluminous research supports this judgment. Even subtle forms of discrimination and bias in curriculum, teaching methods and language, and teacher interactions with students result in diminished self-esteem, inhibited cognitive development, passivity, reduced aspirations, and lower achievement on the part of female students.⁵⁴ In addition to the psychological

50. WASH. REV. CODE ANN. § 28A.640.020(1)(b) (West Supp. 1996).

51. ILL. COMP. STAT. ANN. ch. 105, para. 5/27-20.5 (West 1993).

52. California Schools Hate Violence Reduction Act of 1995, 1994 Cal. Stat. ch. 1198(2); *see also* CAL. EDUC. CODE § 33032.5(3) (West Supp. 1996) (directing State Board of Education to develop guidelines for training teachers to “promote an appreciation of diversity and to discourage the development of discriminatory attitudes and practices that prevent pupils from achieving their full potential”).

53. *See, e.g.*, Women’s Educational Equity Act of 1994, 20 U.S.C. § 7231(b)(3)(7) (1994) (finding that “teaching and learning practices in the United States are frequently inequitable as such practices relate to women and girls” and that “the full participation of women and girls in American society . . . cannot be achieved without educational equity for women and girls”); CAL. EDUC. CODE § 51004 (West 1989) (“The Legislature further recognizes that all students need to be provided with opportunities to explore and make career choices and to seek appropriate instruction and training to support those choices.”); HAW. REV. STAT. § 296-60 (1985 & Supp. 1992) (“[E]qual access to education . . . cannot be achieved when our students are required to assume stereotyped sexual roles.”); WASH. REV. CODE ANN. § 28A.640.010 (West Supp. 1996) (“This violation of [equal educational opportunity] rights has had a deleterious effect on the individuals affected”); 60 Op. Att’y Gen. 326 (Cal. 1977) (“The important governmental objective served by [California Interscholastic Federation Bylaw 200, which sets forth the conditions under which high school students may compete on opposite sex or mixed teams.] is that of providing equal opportunities for girls in high school athletics.”)

54. *See* JANICE STREITMATTER, TOWARD GENDER EQUITY IN THE CLASSROOM: EVERYDAY TEACHERS’ BELIEFS AND PRACTICES 57, 61, 66 (1994) (stating that girls “are increasingly more hesitant to compete with boys in the academic arena,” and less persistent in efforts to succeed in school work as they pass on to higher grades); *id.* at 68 (stating that

harm arising directly from a sense of lesser competence and inferior status,⁵⁵ and the material harm that ultimately results from their

male students outscore female students on tests measuring higher cognitive skills); *id.* at 70 (observing that by middle school, girls become less confident of their ability to do well in math); *id.* at 71 (observing that female students tend to develop "learned helplessness"); *id.* at 72 (observing that male students outperform females in science); *id.* at 73 (observing that by the end of high school, female students tend to see themselves as less competent in science than boys); *id.* at 79 (observing that girls need to see successful women depicted in curricular materials in order to develop high expectations for themselves); *id.* at 153-54 (stating that because teachers exert greater pressure on males to find answers and solve problems, while expecting less achievement from females, "females may accomplish less than males due to the lower expectations of them" and "are more likely to go through the system with fewer challenges"); LYN YATES, *THE EDUCATION OF GIRLS: POLICY, RESEARCH AND THE QUESTION OF GENDER* 35-41 (1993); Sharyl Bender Peterson & Mary Alyce Lach, *Gender Stereotypes in Children's Books: Their Prevalence and Influence on Cognitive and Affective Development*, 2 *GENDER & EDUC.* 185, 194 (1990) ("[G]ender stereotypes affect not only self-concept, potential for achievement and perceptions of others, but a variety of dimensions of cognitive performance as well."); Mid-Atlantic Center for Sex Equity, *Cost of Sex Bias in Schools: The Report Card*, in *SEX EQUITY IN EDUCATION: READINGS AND STRATEGIES* 25, 26 (Anne O'Brien Carelli ed., 1988) [hereinafter *SEX EQUITY IN EDUCATION*] (stating that female students are "less likely to believe they can do college work," that they develop "learned helplessness," and they show less career commitment); Craig Flood, *Stereotyping and Classroom Interactions*, in *SEX EQUITY IN EDUCATION*, *supra*, at 109, 115 (citing studies analyzing correlation between gender-bias in classroom interactions and lowered self-esteem, lesser achievement, and lesser commitment to careers on the part of girls); Dolores A. Grayson & Mary D. Martin, *Gender Expectations and Student Achievement (GESA): A Teacher Training Program Addressing Gender Disparity in the Classroom*, in *SEX EQUITY IN EDUCATION*, *supra*, at 127, 129 ("Repeatedly the studies have indicated a correlation between these perceived expectations and classroom interactions and their impact on academic achievement."); *id.* at 131 (low-ability boys are more likely to give themselves a high self-concept than girls, and high-ability girls are more likely to give themselves a low self-concept than high-ability boys); Irene Payne, *A Working-Class Girl in a Grammar School*, in *LEARNING TO LOSE: SEXISM AND EDUCATION* 19 (Dale Spender & Elizabeth Sarah eds., 1988) [hereinafter *LEARNING TO LOSE*] ("The curriculum, career advice and construction of the 'feminine' within the school all served to reproduce the sexual division of labour."). One author writes:

[G]irls learn to reduce their expectations, to lower their self-esteem. They have been persuaded to distort their own being in order to be consistent with the distortions which surround them. . . . Having been subjected to this constant barrage [of sexist images], they are lucky if they can visualise any alternatives to the advantaged male and the disadvantaged female.

Dale Spender, *Education or Indoctrination?*, in *LEARNING TO LOSE*, *supra*, at 22, 27.

55. Pippa Brewster writes:

This shift, which occurred with all of us, has been variously described as female under-achievement, as lack of motivation, or as the emergence of the home-making instinct, but regardless of what it is called, it is quite clear that for all of us during secondary school, we came to be in a losing position in terms of our culture's criteria for achievement. We were conscious that it was occurring but were resigned to it.

failure to achieve what they are capable of in school,⁵⁶ many female students suffer great frustration because they are discouraged from pursuing any interests that are "non-traditional," have lesser opportunities than boys, and receive fewer rewards for achieving in traditionally male-dominated domains, such as athletics and science.⁵⁷ These harms afflict females not only while they are in school but throughout their lives.⁵⁸ Moreover, research has revealed that boys, too, are

Pippa Brewster, *School Days, School Days*, in *LEARNING TO LOSE*, *supra* note 54, at 5, 8. Another author writes:

Biased behavior on the part of educators has a powerful impact on the development of students' self-images and expectations, as well as their attitudes toward their own sex and the other sex. Restrictions by sex can cause students to become insecure about their abilities and interests, even at an early age.

SEX EQUITY IN EDUCATION, *supra* note 54, at xiv (citations omitted).

56. See STREITMATTER, *supra* note 54, at 61 (noting that males "still tend to dominate certain areas, most notably higher-level math and science classes, which lead the way to occupations that hold higher societal prestige and pay higher salaries"), 71, 91; YATES, *supra* note 54, at 37 ("[M]athematics continues to dominate as a 'critical filter' for entry to a wide range of occupations and tertiary courses, well beyond its specific relevance to the fields in question."); SEX EQUITY IN EDUCATION, *supra* note 54, at xviii ("The effect of this sex role division on women is heavily economic. Girls and women are conditioned to be dependent, compliant, and of secondary status in the home and workplace." (citation omitted)); Spender, *supra* note 54, in *LEARNING TO LOSE*, *supra* note 54, at 31 (stating that as long as schools convey to students the belief that women are inferior, "women will continue to find themselves devalued, in the lowest paid, least skilled jobs, with least power to change those conditions.").

57. One author notes:

The attributes of individual people, as opposed to "boys" and "girls," are often disregarded, especially if the characteristics tend to break a stereotype. The negative consequences of ignoring stereotypical sex roles and biasing influences can include criticism, labeling, and even ostracism. Sex bias can box students into roles that are uncomfortable and inhibitive.

SEX EQUITY IN EDUCATION, *supra* note 54, at xiv. Streitmatter agrees:

Many girls who assume the traditional gender characteristics find their inability to participate in school on an equal footing with the boys extremely frustrating. . . . For the girls who are increasingly choosing to buck tradition within the school structure, there may be few rewards. Although they may achieve in non-traditional academic areas or excel at a sport, the rewards for those activities tend to go to boys rather than girls.

STREITMATTER, *supra* note 54, at 57-58; see also Dorothy B. McKnight, *Issues in Physical Education and Athletics*, in SEX EQUITY IN EDUCATION, *supra* note 54, at 209, 215-16 (arguing that as a result of gender-stereotyped views regarding participation in physical activities and sports, female students have fewer opportunities to perform physically and to lead a group, "are rarely encouraged to achieve high levels of physical skill," and receive fewer rewards for achievement; instead, "women who are active and excel in sports also find rejection and subsequent loss of self-esteem," and so females generally "are likely to avoid participation in sport activities and as a result become physically unfit").

58. See, e.g., JOANNE H. MEEHL, *THE RECOVERING CATHOLIC: PERSONAL JOURNEYS OF WOMEN WHO LEFT THE CHURCH* 69-98 (1995).

harmed by gender stereotyping in education, as it effectively restricts the opportunities and behaviors available to them.⁵⁹

In contrast to this extensive state regulation of public schools, state regulation and oversight of private schools—particularly religious schools—is minimal or non-existent.⁶⁰ In Tennessee, for example, state law prohibits state officials from “regulating the selection of faculty or textbooks or the establishment of a curriculum in church-related schools.”⁶¹ Indiana exempts from all its school regulations any non-public school that does not wish to receive state accreditation.⁶² Many other states also make state approval optional

59. See *SEX EQUITY IN EDUCATION*, *supra* note 54, at xiii (stating that both girls and boys, “by being pressured to adhere to their sex roles . . . have limited opportunities to reject interests, behaviors, and values that do not suit them”); *id.* at xviii (arguing that boys “are discouraged from developing the affective, nurturing side of their personalities. As adults they find themselves successful in varying degrees in the workplace but often lacking the skills and experience appropriate to forming satisfying, close relationships”); *STREITMATTER*, *supra* note 54, at 99 (“When accorded equal social status, students of both genders are freed to interact and learn together in a less inhibited fashion.”).

60. See, e.g., MICH. STAT. ANN. § 15.41578 (Callaghan 1987) (requiring private school administrators to provide local school superintendent with names and ages of enrolled pupils, name and addresses of parents, and names of children enrolled but not in regular attendance); *id.* § 15.1925 (Callaghan 1992) (authorizing state school superintendent to examine private schools’ sanitary condition, records of enrollment, courses of study, and teacher qualifications); MONT. CODE ANN. § 20-5-109(1)-(4) (1995) (requiring merely that nonpublic schools teach the basic courses taught in public schools, give at least 180 days of instruction, maintain records of pupil attendance and immunization, and operate in a building that complies with local health and safety laws); N.Y. EDUC. LAW §§ 3024, 3211 (requiring attendance records), 3204, 3210 (prescribing minimum number of days of instruction) (McKinney 1994).

Most often, general school regulations do not exclude religious schools explicitly but rather do so implicitly by addressing directives only to public schools or only to public schools and private schools receiving state funding (which would include some religious schools but exclude others). *E.g.*, ALA. CODE §§ 16-23-1, 16-23-8, 16-35-4, 16-40A-2 (1995); N.Y. EDUC. LAW § 3001 (McKinney 1994) (teacher certification requirement). Many provisions, however, do explicitly exclude church schools. *E.g.*, ALA. CODE §§ 16-46-3(a)(3) (exemption from licensure requirements), 16-40-1 (church schools excluded from requirement of program of physical education) (1994); N.Y. EDUC. LAW § 3210(2)(e) (McKinney 1994) (established religious groups exempt from school registration requirement). Thus, regulation of secular private schools is typically greater than regulation of church schools, though not as extensive as regulation of public schools. See, e.g., ALA. CODE §§ 16-28-1, 16-46-5 (1995).

61. TENN. CODE ANN. § 49-50-801(b) (1994 & Supp. 1995).

62. IND. CODE ANN. § 20-8.1-3-17.3(a) (Burns Supp. 1995).

for religious schools,⁶³ and exercise little or no control or supervision over instruction in non-approved schools.⁶⁴

States that do require state approval or accreditation for some or all private schools typically do not attempt to control the content or methods of instruction in licensed schools, beyond mandating merely that they offer certain core subjects.⁶⁵ In Kentucky, for example,

63. See, e.g., ALA. CODE §§ 16-46-3, 16-46-5 (1995) (exempting church schools from general licensing requirement); IOWA CODE ANN. § 299.1, 299.2 (West Supp. 1995); N.Y. EDUC. LAW §§ 3210(2)(e) (McKinney 1994) (established religious groups exempt from school registration requirement), 5001 (private kindergarten, nursery, elementary, and secondary schools exempt from licensing requirement); TENN. CODE ANN. § 49-50-801(d) (1994 & Supp. 1995). Iowa law provides an exemption from its compulsory education laws and instructional standards for religious groups that "profess principles or tenets that differ substantially from the objectives, goals, and philosophy of education embodied in the standards." IOWA CODE ANN. § 299.24 (West Supp. 1995). Iowa state courts have, however, confined application of this exemption to the Amish. See *Johnson v. Charles City Community Sch. Bd.*, 368 N.W.2d 74, 82-83 (Iowa), *cert. denied sub nom. Pruessner v. Benton*, 474 U.S. 1033 (1985).

64. See, e.g., ALA. CODE §§ 16-28-3, 16-28-7 (requiring church schools merely to file an enrollment and attendance report with the local public school superintendent), 16-35-4 (requiring state board of education to prescribe minimum contents of courses of study only for public schools) (1995); ALASKA STAT. § 14.07.020(a)(10) (1992) (State Department of Education not authorized "to require religious or other private schools to be licensed"); *id.* § 14.07.020(a)(7) (Department may prescribe health and safety standards for all public and private schools); NEB. REV. STAT. §§ 79-201, 79-1701 (1994) (requiring parents who send their children to a non-approved school and who have religious objections to state regulations merely to submit a statement declaring that their children attend a school for 175 days a year and receive instruction in core curricular subjects). Minnesota's requirements for non-accredited nonpublic schools are somewhat more demanding. See MINN. STAT. ANN. §§ 120.101 to 120.102 (West 1993 & Supp. 1996) (requiring instruction in certain core subjects, employment of teachers satisfying one of several criteria, periodic assessment of student performance, submission of annual reports as to children enrolled and teachers employed, and maintenance of documentation of compliance with subject requirements). Minnesota also gives school superintendents statutory authorization to make on-site inspections of nonpublic schools to monitor compliance with these requirements. *Id.* § 120.103.1 (West 1993). Iowa requires that school-age children in non-approved schools receive "competent private instruction." IOWA CODE ANN. § 299.1 (West Supp. 1995).

65. See, e.g., ALA. CODE §§ 16-28-1(1), 16-46-5 (1995); ILL. COMP. STAT. ANN. ch. 105, para. 5/26-1.1 (West 1993); *cf.* *Nebraska ex rel. Douglas v. Faith Baptist Church*, 301 N.W.2d 571, 579 (Neb.) (describing state-imposed curricular requirements for private schools in Nebraska as "very minimal"), *appeal dismissed*, 454 U.S. 803 (1981). California, which exercises such extensive legislative control over public education, requires private schools merely to provide "verification" that they: employ persons "capable of teaching," offer instruction in the subjects required to be taught in public schools, maintain a record of pupil attendance, and annually submit to the school superintendent an affidavit stating the number of students enrolled and teachers employed and providing assurance that they maintain records of teachers' qualifications and the courses given. CAL. EDUC. CODE §§ 33190, 48222 (West 1993). Section 48222 also states that state verification that a private school has satisfied these requirements "shall not be construed as an evaluation,

state regulation of private schools is limited to the requirement that they give instruction in "the several branches of study required to be taught in the public schools," using the English language, and that they operate for at least as many days each year as do the public schools.⁶⁶ State statutory requirements for instruction in subjects beyond the core, such as sex education or parenting, and for use of prescribed textbooks, usually by their terms apply only to public schools.⁶⁷

Perhaps most importantly, very few states require that teachers in religious schools possess a state-issued credential, receive any particular training, or undergo any evaluations.⁶⁸ A number of states mandate that private schools periodically administer one or more standardized tests to their students and report the grades to state officials, as a limited means of monitoring the quality of education in private schools, but they do not condition continued operation of the schools on students reaching certain levels of achievement.⁶⁹ In any event, such tests are notoriously superficial and indicative of only a very narrow type of skill—rote memorization—that an authoritarian

recognition, approval, or endorsement of any private school or course."

New York is unusual in requiring instruction in a number of non-core subjects in all schools in the state. *See, e.g.*, N.Y. EDUC. LAW § 801 (requiring instruction in "patriotism, citizenship and human rights issues, with particular attention to the study of the inhumanity of genocide, slavery, and the Holocaust" and in "the history, meaning, significance and effect of the provisions of the constitution of the United States, the amendments thereto, the declaration of independence, the constitution of the State of New York and the amendments thereto"); *id.* § 803 (physical education, abuse of alcohol, tobacco, and other drugs); *id.* § 806 (highway safety, traffic regulation, and bicycle safety); *id.* § 808 (fire and arson prevention) (McKinney 1994).

66. KY. REV. STAT. ANN. 158.080 (Michie/Bobbs-Merrill 1992).

67. For citations to these statutes, see *supra* notes 29-30, 36-41, and accompanying text.

68. Alabama, for example, limits all of its statutory provisions regarding teacher qualifications to public schools. ALA. CODE §§ 16-23-1, -8 (1995); *see also* N.Y. EDUC. LAW § 3001 (McKinney 1994) (limiting scope of teacher certification requirement to public schools); Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877, 884 (Ky. 1979) (interpreting Kentucky state constitution to prohibit requirement that teachers in non-public schools be state-certified), *cert. denied*, 446 U.S. 938 (1980). Minnesota requires that teachers in a non-accredited nonpublic school have a state teaching license, be directly supervised by a person holding such a license, complete a teacher competency examination, *or* hold a bachelor's degree, and does not require any qualifications of teachers in accredited nonpublic schools. MINN. STAT. ANN. §§ 120.101.7, .8 (West 1993). Michigan and Nebraska are among the few states that require teachers in religious schools to have state certification. *See* MICH. STAT. ANN. § 15.1923 (Callaghan 1992); NEB. REV. STAT. § 79-1233(1) (1994 & Supp. 1995).

69. *See* Denise M. Bainton, Note, *State Regulation of Private Religious Schools and the State's Interest in Education*, 25 ARIZ. L. REV. 123, 144-45 (1983) (discussing Kentucky and North Carolina testing statutes).

education may promote at the expense of other important capacities—such as critical and creative thinking—and so provide little or no protection against inadequate schooling.⁷⁰ Ample evidence shows that many religious schools in this country, particularly those of fundamentalist Christians, provide what state education officials would regard as an inadequate education (in a non-legal sense) to their pupils, not only because they fail to hire qualified teachers but also because, as part of their distinctively religious mission, they endeavor to stifle rather than nurture students' critical thinking capacities.⁷¹

70. In *New Life Baptist Church Academy v. Town of E. Longmeadow*, 885 F.2d 940 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990), then Judge, now Supreme Court Justice, Breyer wrote:

Can [the School Committee] be certain that good [test] results reflect good teaching, *i.e.*, the teaching of intellectual skills, discipline and complete subject matter, rather than simply teaching the answers to questions the teachers believe will appear on tests? And how can testing measure those important aspects of an adequate education that do not readily reduce themselves to standardized test questions, aspects such as practical vocational skills, the "basic tools by which individuals might lead economically productive lives," . . . or the values of civic participation that are "necessary to the maintenance of a democratic political system" . . . ?

Id. at 948-49 (citations omitted). In *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 494 (8th Cir. 1987), the court wrote:

While testing is a valuable tool, it is not sufficient in and of itself to determine whether a student is receiving an adequate education. Tests primarily determine knowledge of content of the subject matter. They do not test other aspects of education necessary to prepare a student for life in today's society.

(quoting *Fellowship Baptist Church v. Benton*, 620 F. Supp. 308, 316 (S.D. Iowa 1985)); Edward B. Fiske, *America's Test Mania*, N.Y. TIMES, Apr. 10, 1988, § 12 (Education Supp.), at 16, 19, col.2 (stating that multiple choice tests "measure how good students are at recognizing information, not generating it. 'It's testing for the TV generation—superficial and passive We don't ask if students can synthesize information, solve problems or think independently.'") (quoting Linda Darling-Hammond, director of education for the Rand Corporation)); Robert J. Sternberg, *Misunderstanding Meaning, Users Overrely on Scores*, EDUC. WEEK, Sept. 23, 1987, at 28, 22 (standardized tests "do not measure synthetic or insightful-thinking skills . . . nor do they measure practical intellectual skills"); *cf.* *Fleischfresser v. Directors of Sch. Dist.* 200, 15 F.3d 680, 690 n.10 (7th Cir. 1994) (noting that "senses of imagination and creativity . . . are fundamental to children" and that tolerance is among the values schools should instill in students).

71. See, e.g., PETER P. DEBOER, *THE WISDOM OF PRACTICE: STUDIES OF TEACHING IN CHRISTIAN ELEMENTARY AND MIDDLE SCHOOLS* 138 (1989); ALBERT J. MENENDEZ, *VISIONS OF REALITY: WHAT FUNDAMENTALIST SCHOOLS TEACH* 3, 144 (1993); PAUL F. PARSONS, *INSIDE AMERICA'S CHRISTIAN SCHOOLS* 135, 169-70 (1987); ALAN PESHKIN, *GOD'S CHOICE: THE TOTAL WORLD OF A FUNDAMENTALIST CHRISTIAN SCHOOL* 44, 55, 141, 190 (1986); SUSAN D. ROSE, *KEEPING THEM OUT OF THE HANDS OF SATAN: EVANGELICAL SCHOOLING IN AMERICA* 139-40, 179, 205 (1988); see also *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1069 (6th Cir. 1987) (noting that plaintiff fundamentalist parent testified "that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer"), *cert.*

Neither Title IX nor any of the state laws prohibiting sexist schooling applies universally. Title IX, after setting forth the prohibition in very broad terms, specifically exempts from its coverage any "educational institution which is controlled by a religious organization to the extent the application of this part would not be consistent with the religious tenets of such organization."⁷² Most states that have enacted school sex discrimination provisions have drafted them so as to apply in the first instance only to public schools.⁷³ In at least two states, however, statutory provisions mirror the federal legislation. They set forth an anti-discrimination mandate

denied, 484 U.S. 1066 (1988); *cf. New Life Baptist*, 885 F.2d at 951 (noting that trial court record revealed that plaintiff fundamentalist Christian school would likely provide inadequate education if left unregulated).

Regarding the authoritarian nature of Catholic schooling, see PETER McLAREN, *SCHOOLING AS A RITUAL PERFORMANCE: TOWARDS A POLITICAL ECONOMY OF EDUCATIONAL SYMBOLS AND GESTURES* 178, 182-83, 210 (1986); PATRICK H. McNAMARA, *CONSCIENCE FIRST, TRADITION SECOND: A STUDY OF YOUNG AMERICAN CATHOLICS* 99-106 (1992); MEEHL, *supra* note 58, at 27, 38-40; GARY SCHWARTZ, *BEYOND CONFORMITY OR REBELLION: YOUTH AND AUTHORITY IN AMERICA* 165-76 (1987).

This situation, it is worth noting, has implications not only for future state regulation of religious schools, but also for affirmative action policies today. Arguably, persons who received their education from a fundamentalist Christian or other conservative religious school suffered greater educational deprivation than did the vast majority of white women, and a large percentage of minority men and women, who attended other kinds of schools in this country and who are today the beneficiaries of affirmative action programs. One observer of fundamentalist Christian schooling in this country, in fact, has observed that it is very effective in reproducing a class of servile laborers in intellectually unchallenging, low-pay occupations. See ROSE, *supra*, at 200-05. Persons raised in conservative minority religious sects may also suffer negative stigmatization in mainstream American society, because of the very traits that their authoritarian upbringing instills in them—i.e., intolerance, dogmatism, close-mindedness. Yet the debate over affirmative action that rages in this country today does not even address the situation of these persons, let alone suggest that they deserve the same types of redress that women and minorities rightfully receive.

72. 20 U.S.C. § 1681(a)(3) (1994); *see also* 34 C.F.R. § 106.12 (1995) (implementing regulations).

73. *E.g.*, WYO. CONST. art. VII, § 10; ALASKA STAT. §§ 14.18.010-.060 (1992); CAL. EDUC. CODE § 40 (West 1994) (discrimination in school district enrollment policies and public school career counseling); *id.* § 45 (West Supp. 1996) (combatting sexist attitudes among pupils); *id.* § 49020 (West 1993) (equal opportunity in high school athletics); *id.* § 51501 (West 1989) (instructional materials adopted for use in public schools); HAWAII REV. STAT. § 296-61 (1985); ILL. COMP. STAT. ANN. ch. 105, paras. 5/1-3, 5/27-1 (West 1993 & Supp. 1995) (sex-based exclusion from courses of instruction or athletic programs in public schools); *id.* para. 5/27-20.5 (West 1993) (history of women curriculum); NEB. REV. STAT. § 79-3002(1), 3003 (1994); N.Y. EDUC. LAW § 3201-a (McKinney 1994); OR. REV. STAT. § 659.150 (1995); R.I. GEN. LAWS § 16-38-1.1 (1988); WASH. REV. CODE ANN. §§ 28A.640.010, .020 (West Supp. 1996); WIS. STAT. ANN. § 119.22 (1991); *see also* 20 U.S.C. § 1703 (1994) (prohibiting state denial of equal educational opportunity).

applicable to public schools and any private schools that receive state financial aid, or that enroll any students who receive state or federal aid,⁷⁴ but then specifically exempt from the mandate schools operated on the basis of religious beliefs that are sexist.⁷⁵ Thus, certain religious schools are explicitly singled out at the federal and, in some jurisdictions, state level to enjoy special license to engage in sexist practices and instruction.

Substantial evidence indicates that a great number of religious schools in this country exploit this legal privilege by deliberately and systematically inculcating in their students the belief that females are inferior to males, that a woman's purpose in life is to serve a husband and raise children, and that only men should pursue careers outside the home, become active in public affairs, or assert opinions about matters beyond home life. The strongest evidence of sexist teaching pertains to fundamentalist Christian schools.⁷⁶ An ethnographic study of one such school discovered teachers instructing their students that "sexual equality denies God's word,"⁷⁷ and that if a wife does not accept a subordinate, obedient role in the home "the doors are wide open to Satan."⁷⁸ This same school prohibited girls from serving as class president.⁷⁹ Typically, fundamentalist Christian schools also discourage girls from engaging in any form of athletic competition.⁸⁰ Hundreds of thousands of girls in this country today are being taught in fundamentalist Christian schools that they cannot be leaders, that they should not have or pursue dreams of success outside the home, and that they should not be assertive or seek to make important decisions.⁸¹

Sexist teaching is not limited to fundamentalist Christian schools. The sexist nature of Orthodox Jewish teaching appears to be well

74. *E.g.*, CAL. EDUC. CODE §§ 210, 220 (West 1994) (applying prohibition to any public or private school that "receives or benefits from state financial assistance or enrolls students who receive state student financial aid"); KY. REV. STAT. ANN. § 344.550(2) (Michie/Bobbs-Merrill 1994) (applying prohibition to any education program or activity receiving state financial assistance).

75. CAL. EDUC. CODE § 221 (West 1994) (stating that prohibition "shall not apply to an educational institution which is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization"); KY. REV. STAT. ANN. § 344.555(1)(b) (Michie/Bobbs-Merrill 1993) (same).

76. *See, e.g.*, PARSONS, *supra* note 71, at 98-99, 101; PESHKIN, *supra* note 71, at 101, 127, 175; ROSE, *supra* note 71, at 109-10, 163-64.

77. PESHKIN, *supra* note 71, at 137.

78. *Id.* at 127.

79. *Id.* at 101.

80. PARSONS, *supra* note 71, at 109.

81. *See id.* at 98-99; PESHKIN *supra* note 71, at 101; ROSE, *supra* note 71, at 163-64.

known, if not well documented. Published accounts attest to discrimination by gender in access to religious instruction,⁸² but beyond this provide little or no description of the internal practices of these schools. Catholic parochial schools, which constitute the largest group of religious schools in this country, have historically been pervasively sexist,⁸³ though they may have improved significantly in this regard in recent years. The Catholic Church itself remains notoriously patriarchal.⁸⁴ To the extent that instruction within conservative religious schools is sexist, their female pupils may suffer a "double deprivation." Not only may they fail, along with their male classmates, to receive an education from qualified teachers that fosters intellectual growth,⁸⁵ but they also sustain treatment that consigns them to lives of subordination even within the confining community of their upbringing.

The failure of states to regulate religious schools to any significant degree raises the question of whether they could do so constitutionally if they wished. The permissible scope of state regulation of religious schools has been the subject of considerable

82. See Alison Wheeler, *Separatist Religious Groups and the Establishment Clause*, 30 HARV. C.R.-C.L. L. REV. 223, 224 (1995) (describing Satmar sect of ultraorthodox Jewish denomination, author states that the Satmar "remain segregated by sex outside the home Their children are educated in sex-segregated parochial schools, with boys focusing upon study of the Torah and girls preparing to become Satmar wives and mothers"); Harold S. Himmelfarb, *Jewish Day Schools: Growth in an Era of Religious and Educational Decline*, in RELIGIOUS SCHOOLS IN THE UNITED STATES K-12, at 383-418 (Thomas C. Hunt & James C. Carper eds., 1993) (noting varying degrees of gender segregation in Jewish schooling, depending on degree of orthodoxy of sponsoring denomination).

83. See, e.g., MEEHL, *supra* note 58, at 73, 78-79.

84. The most obvious evidence of this is the Pope's continuing opposition to ordination of women as priests. One might also interpret the church's continued stand against priests marrying as reflecting a negative view of women, and the church's continued opposition to divorce, contraception, and abortion as supportive of male dominance within marriage and control over women more generally.

85. Catholic school students do perform better on average than public school students on standardized test scores. MARY A. GRANT, CATHOLIC SCHOOL EDUCATION IN THE UNITED STATES: DEVELOPMENTS AND CURRENT CONCERNS 235 (1992). As noted above, such scores reveal little about the quality of education. See *supra* note 70. In addition, there are well-known problems associated with concluding from the fact of higher scores that instruction in Catholic schools is in any way superior to that in public schools. For example, private schools are able to exclude "difficult" children, and within a given community tend to draw children whose parents are on average more concerned about and involved in their children's education, as evidenced by the parents' willingness to pay tuition rather than take advantage of the 'free' education in the local public school. See Jomills Henry Braddock II, *The Issue Is Still Equality of Educational Opportunity*, 51 HARV. EDUC. REV. 490, 491-92 (1981); Richard J. Murnane, *Evidence, Analysis, and Unanswered Questions*, 51 HARV. EDUC. REV. 483, 485-87 (1981).

litigation, as fundamentalist Christian groups in many states have raised First Amendment Free Exercise Clause challenges to state efforts to exercise a minimal level of control and oversight over their church schools.⁸⁶ However, states have never attempted to go very far to control the nature and content of instruction in private schools, so courts have not had much occasion to define the outer limits of permissible state regulation. Moreover, the outcomes of disputes that have reached the courts do not provide unambiguous indication of how receptive courts are to parental challenges,⁸⁷ and the Supreme Court has yet to articulate any specific guidelines for how far states may go. Determining precisely which types of state regulation of religious schools are constitutionally permissible according to the prevailing judicial interpretation of the Free Exercise Clause is therefore difficult.

There are a few exceptions. State and federal courts have consistently upheld state laws requiring state approval of all private schools,⁸⁸ certification of private school teachers,⁸⁹ instruction in

86. See Dwyer, *supra* note 13, at 1390-96.

87. Compare, e.g., *Nebraska ex rel. Douglas v. Faith Baptist Church*, 301 N.W.2d 571, 573, 575, 580 (Neb.) (upholding state board of education regulations that specified "in detail the subjects required to be taught in both elementary and secondary schools, together with an explanation of the aims sought to be accomplished by each individual program" and prescribed "the use of necessary materials and equipment . . . and requirements relating to health and safety" in private schools), *appeal dismissed*, 454 U.S. 803 (1981) with *State v. Whisner*, 351 N.E.2d 750, 765-70 (Ohio 1976) (invalidating state law mandating amount of instructional time for each subject, requiring that all activities of religious schools conform to policies adopted by local board of education, and requiring religious schools to cooperate with other members of their community).

88. E.g., *New Life Baptist Church Academy v. Town of E. Longmeadow*, 885 F.2d 940, 944-45 (1st Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990); *North Valley Baptist Church v. McMahon*, 696 F. Supp. 518, 530 (E.D. Cal. 1988) (concerning preschool licensing), *aff'd*, 893 F.2d 1139 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *State v. Andrews*, 651 P.2d 473, 475 (Haw. 1982) (licensing for religious schools does not infringe upon religious freedom); *Faith Baptist*, 301 N.W.2d at 579-80; *State v. Rivinius*, 328 N.W.2d 220, 222, 231 (N.D. 1982) (upholding prosecution of parents who sent children to unapproved Christian day school), *cert. denied*, 460 U.S. 1070 (1983); *State v. Corpus Christi People's Baptist*, 683 S.W.2d 692, 696 (Tex. 1984) (licensing of child-care facilities involving compelling state interest), *appeal dismissed*, 474 U.S. 801 (1985). But cf. *State v. LaBarge*, 357 A.2d 121, 124-25 (Vt. 1976) (finding that a state cannot constitutionally require all children to attend public or approved private school when criteria for approval of private schools went beyond those necessary for ensuring minimally adequate education).

89. E.g., *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 492-95 (8th Cir. 1987); *Johnson v. Charles City Community Sch. Bd.*, 368 N.W.2d 74, 81 (Iowa), *cert. denied sub nom. Pruessner v. Benton*, 474 U.S. 1033 (1985); *Faith Baptist*, 301 N.W.2d at 579-80; *Rivinius*, 328 N.W.2d at 229-31 (N.D. 1982); *State v. Shaver*, 294 N.W.2d 883, 892-99 (N.D. 1980); see also *Board of Educ. v. Allen*, 392 U.S. 236, 245-47 & n.7 (1968) ("[A] substantial body of case law has confirmed the power of the States to insist that attendance at private

core subjects,⁹⁰ and reporting of attendance information⁹¹ against challenges under the federal Constitution. Responsibility for any state's failure to impose these requirements on religious schools thus rests entirely with the state's own legislature and administrative bodies. Moreover, states may condition government financial assistance to private schools on their compliance with requirements that the states might not otherwise be constitutionally permitted to impose. In particular, the Supreme Court has upheld against First Amendment challenge Title IX's conditioning of federal financial assistance on compliance with that statute's anti-sex-discrimination provisions, finding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."⁹²

Opponents of state regulation often cite *State v. Whisner*,⁹³ a 1976 decision of the Ohio Supreme Court regarding state control over the content of instruction in religious schools.⁹⁴ In *Whisner*, the court struck down state law provisions mandating instructional time "almost to the minute" for various core subjects, requiring that *all* activities of religious schools conform to policies adopted by the local board of education, and directing religious schools to "cooperate with elements of the community in which it exists."⁹⁵ The court found these provisions "so pervasive and all-encompassing that total

schools, if it is to satisfy state compulsory-attendance laws, be at institutions which . . . employ teachers of specified training, and cover prescribed subjects of instruction."). *But cf.* Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877, 884 (Ky. 1979) (striking down state law requiring that private school teachers be certified, as violative of Kentucky's state constitution), *cert. denied*, 446 U.S. 938 (1980).

90. *E.g.*, *Faith Baptist*, 301 N.W.2d at 579-80; *Shaver*, 294 N.W.2d 892-99 (N.D. 1980); *see also Allen*, 392 U.S. at 245-46 (endorsing power of states to require that instruction not in public schools "be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction").

91. *E.g.*, *Fellowship Baptist*, 815 F.2d at 490-92; *State v. DeLaBruere*, 577 A.2d 254, 266 (Vt. 1990).

92. *Grove City College v. Bell*, 465 U.S. 555, 575 (1984); *cf.* Kline Capps & Carl H. Esbeck, *The Use of Government Funding and Taxing Power to Regulate Religious Schools*, 14 J.L. & EDUC. 553, 573 (1985) (arguing that scope of Congress's ability to include in federal education law, as conditions for receipt of federal aid, requirements that would otherwise be unconstitutional is uncertain, but noting that those Justices of the Supreme Court most likely to uphold such conditions would be the more conservative members of the Court, such as Chief Justice Rehnquist and then Justice White).

93. 351 N.E.2d 750 (Ohio 1976).

94. Opponents of state regulation have cited *Whisner* in *People v. Bennett*, 501 N.W.2d 106, 125 (Mich. 1993) (Boyle, J., dissenting); *Faith Baptist*, 301 N.W.2d at 578-79; and *City of Sumner v. First Baptist Church*, 639 P.2d 1358, 1362 (Wash. 1982).

95. *Whisner*, 351 N.E.2d at 765-67.

compliance with each and every standard by a non-public school would effectively eradicate the distinction between public and non-public education"⁹⁶ by causing "the absolute suffocation of independent thought and educational policy" in non-public schools.⁹⁷ Such extreme public control over religious schools, the court indicated, would be inconsistent with the Supreme Court's ruling in *Pierce v. Society of Sisters*⁹⁸ that parents have a right to educate their children outside the public school system.⁹⁹

However, much stronger authority supports state regulation of religious schools, even when not simply a condition for receipt of aid, at least where the regulation is tied to an important interest of the children in these schools and would not entirely eradicate the distinctively religious nature of the schools. In addition to the lower court decisions cited above upholding particular state regulations,¹⁰⁰ the Supreme Court has since 1923 repeatedly affirmed the general authority of states to impose "reasonable regulations" on private schools, including religious schools.¹⁰¹ In *Pierce*, for example, the Court specially noted that "[n]o question is raised concerning the

96. *Id.* at 768.

97. *Id.* at 770.

98. 268 U.S. 510 (1925).

99. *Whisner*, 351 N.E.2d at 770-71; *see also* *Blackwelder v. Safnauer*, 689 F. Supp. 106, 130 (N.D.N.Y. 1988) (indicating that if state law required "the teaching of secular matters that are inconsistent" with the religious beliefs of home schooling parents, "a serious burden on rights protected by the free exercise clause might be found"), *appeal dismissed*, 866 F.2d 548 (2d Cir. 1989).

100. *See supra* notes 88-92 and accompanying text.

101. *See* *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) ("The Court has repeatedly stressed that . . . [parents] have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."); *Norwood v. Harrison*, 413 U.S. 455, 461 (1973) (emphasizing "the limited scope of *Pierce*"); *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972); *id.* at 239 (White, J., concurring) (stating that the Court's precedents provide "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"); *Board of Educ. v. Allen*, 392 U.S. 236, 246-47 (1968) (dictum) (stating that refusing to permit home schooling is consistent with *Pierce*, given state's interest in ensuring quality of nonpublic education); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *see also* *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994) (rejecting parental free exercise challenge to materials included in state-prescribed reading program of public school alleged to be inconsistent with parents' religious beliefs); *Murphy v. Arkansas*, 852 F.2d 1039, 1042 (8th Cir. 1988) ("[I]t is 'settled beyond dispute, as a legal matter, that the state has a compelling interest in ensuring that all its citizens are being adequately educated.'") (quoting trial court); *Palmer v. Board of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979) ("There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society.").

power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils."¹⁰² Similarly, in *Wisconsin v. Yoder*,¹⁰³ the Court emphasized that "[t]here 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."¹⁰⁴

The Supreme Court might, therefore, uphold quite extensive state regulations of religious and other private schools, if a state can demonstrate the importance of its regulations for children's development and well-being¹⁰⁵ and the unavailability of less restrictive means for achieving its goals.¹⁰⁶ Even were the Court to agree with *Whisner* that religious schools must be able to retain a distinctive character, it could quite reasonably conclude that this would be possible even if religious schools were subject to *all* of the statutory

102. 268 U.S. at 534.

103. 406 U.S. 205 (1972).

104. *Id.* at 213.

105. Significantly, in *Whisner* "[t]he state did not . . . attempt to justify its interest in enforcing the 'minimum standards' as applied to a non-public religious school." 351 N.E.2d at 771. In post-divorce custody disputes, lower courts have been willing to curtail the religious practice of parents, even within the parents' own homes, when "particular religious practices or beliefs pose a threat of or result in actual physical or mental injury to the child." *Bonjour v. Bonjour*, 592 P.2d 1233, 1239 (Alaska 1979). For example, in *LeDoux v. LeDoux*, 452 N.W.2d 1 (Neb. 1990), Nebraska's highest court upheld a lower court order directing a non-custodial Jehovah's Witness parent to refrain from exposing his child to his religious practices during visitation, because doing so caused the child to suffer extreme stress. *Id.* at 4-6. The court stated:

Courts have a duty to consider whether religious beliefs threaten the health and well-being of a child. . . . Thus, when a court finds that particular religious practices pose an immediate and substantial threat to a child's temporal well-being, a court may fashion an order aimed at protecting the child from that threat.

Id. at 5; see also *Bonjour*, 592 P.2d at 1239 ("[W]e think it constitutionally permissible for a court to take account of the actual religious needs of a child in awarding custody to one parent or another."); cf. *Hanson v. Hanson*, 404 N.W.2d 460, 463 (N.D. 1987) ("[M]ost courts . . . have refused to restrain a noncustodial parent during visitation periods from exposing the minor child to his or her religious beliefs and practices, absent a clear, affirmative showing that these religious activities will be harmful to the child."). Curtailling the harmful practices of schools is much less intrusive in family life than imposing restrictions on parents in their interactions with their children, so courts should be even more willing to do the former.

106. The strict scrutiny test under which courts analyze restrictions on parents' freedom to control the education of their children in accordance with their religious beliefs requires that state regulations be the least restrictive means for serving a compelling state interest in children's education. See *North Valley Baptist Church v. McMahon*, 696 F. Supp 518, 524 (E.D. Cal. 1988), *aff'd*, 893 F.2d 1139 (9th Cir.), *cert. denied*, 496 U.S. 937 (1990); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 128-30 (N.D.N.Y. 1988).

regulations that states currently impose on public schools.¹⁰⁷ Arguably, then, the federal government and the states are not constitutionally foreclosed from extending many more of their school regulations, including those regarding sex discrimination, to cover sectarian private schools. At a minimum, they should be able to condition receipt of any financial aid on compliance with all important regulations presently applicable to public schools. If this is the case, then the legislatures bear full responsibility for failing to do so.

It is also worth noting that if courts did strike down on free exercise grounds legislative efforts to extend regulations now applicable only to public and non-sectarian private schools to cover religious schools as well, this judicial action would itself constitute an invidious discrimination between groups of children based on the religious beliefs of their parents. The prevailing jurisprudence regarding parents' constitutional rights does in fact discriminate in this way; doctrinally the state bears a greater burden of justification when its regulations conflict with parents' religious beliefs than when its regulations conflict solely with parents' non-religious preferences regarding their children's upbringing.¹⁰⁸ To the extent that this doctrine

107. Restrictions on religious instruction and ceremonies in public schools generally arise out of federal court decisions interpreting the Establishment Clause of the First Amendment, and out of state constitutional provisions in some jurisdictions, rather than out of state statutes. One lower state court in Iowa has held that a statutory requirement that schools use a "multi-cultural non-sexist approach" to instruction could not constitutionally be applied to a religious school whose religious tenets conflicted with such an approach. The state did not appeal this ruling. See *Johnson v. Charles City Community Sch. Bd.*, 368 N.W.2d 74, 82 n.2 (Iowa 1985).

108. Specifically, laws infringing upon parental free exercise rights under the First Amendment are subject to strict scrutiny, requiring the state to demonstrate that its law is the least restrictive means to serving a compelling state interest, while laws infringing only upon parents' more generalized substantive due process right under the Fourteenth Amendment have generally been subject only to rational basis review, requiring a parent challenging a law to show that it is not rationally related to a legitimate state purpose. *Wisconsin v. Yoder*, 406 U.S. 205, 214-15, 233 (1972); *People v. Bennett*, 501 N.W.2d 106, 111-15 (Mich. 1993) (discussing recent cases). But cf. *Bennett*, 501 N.W.2d at 123-24 n.10 (Boyle, J., concurring in part and dissenting in part) (parents' right to the custody and control of their children under the Fourteenth Amendment Due Process Clause appears increasingly to be treated as a fundamental right triggering what is in effect, if not in name, strict scrutiny); Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 985-92 (1988) (advancing the same argument).

One recent and stark example of the judiciary's disparate treatment of children based on their parents' religious beliefs is a pair of decisions by the Supreme Court of Michigan concerning the constitutionality of the State's teacher certification requirement for home schools. The Court held in companion cases that the requirement violated the free exercise right of parents who object to the requirement on religious grounds, but did not violate the due process right of parents who object to the certification requirement for

causes some children not to receive legislative protections that other children receive, just because of their parents' religious beliefs, it too constitutes discriminatory state action susceptible to equal protection challenge.¹⁰⁹

In addition to leaving religious schools virtually unregulated, nearly all states allow parents to "home school" their children instead of sending them to a public or private school,¹¹⁰ even though courts have consistently held that parents, other than the Amish and similar groups, have no constitutional right to home school.¹¹¹ Approximately one million children in this country are in home schools, and the most common reason parents have for choosing this option is religious opposition to the content and manner of instruction in public schools.¹¹² Home schools are also almost entirely unregulated—again, even though most court decisions indicate that states are constitutionally free to regulate them to a substantial degree.¹¹³

non-religious reasons. See *Bennett*, 501 N.W.2d at 117; *People v. DeJonge*, 501 N.W.2d 127, 129 (Mich. 1993).

109. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948) (holding that judicial decisions constitute state action susceptible to equal protection challenge).

110. Donald D. Dorman, Note, *Michigan's Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REFORM 733, 746 (1990); see, e.g., MINN. STAT. ANN. § 120.101 (4) (West 1993); N.Y. EDUC. LAW § 3204.1 (McKinney 1995).

111. E.g., *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 496-98 (8th Cir. 1987) (holding that so-called "Amish exception" to Iowa's compulsory school attendance law did not apply to fundamentalist Christians); *Duro v. District Attorney*, 712 F.2d 96, 97-99 (4th Cir. 1983) (rejecting Pentecostal parents' claim that compulsory school attendance laws violated their right to free exercise of religion), cert. denied, 465 U.S. 1006 (1984); *Hanson v. Cushman*, 490 F. Supp. 109 (1980); see also *Board of Educ. v. Allen*, 392 U.S. 236, 246-47 (1968) (stating in dictum that refusing to permit home schooling is consistent with *Pierce*, given state's interest in ensuring quality of nonpublic education).

112. Researchers have estimated the number of American children in home schools to be as high as one million. See JOHN W. WHITEHEAD, HOME EDUCATION: RIGHTS AND REASONS 127 (1993). The primary motivation of parents who resort to home schooling for their children, moreover, appears to be a religious one. *Id.* at 131.

113. See, e.g., *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1454, 1458-60 (E.D. Mich. 1989) (upholding teacher certification requirement for home schools); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 112, 135 (N.D.N.Y. 1988) (upholding statute requiring instruction in home schools to be "substantially equivalent" to that in public schools and to be given by "competent" instructors); *Hanson v. Cushman*, 490 F. Supp. 109, 114-15 (W.D. Mich. 1980) (upholding requirement for teacher certification for home instruction); *Jernigan v. State*, 412 So. 2d 1242, 1246-47 (Ala. Crim. App. 1982) (teacher certification); *In re Sawyer*, 672 P.2d 1093, 1097-98 (Kan. 1983) (upholding state regulations dictating minimum hours of instruction and teacher qualifications for home schools); *Bennett*, 501 N.W.2d at 115-17 (same); *In re Kilroy*, 467 N.Y.S.2d 318, 321 (N.Y. Fam. Ct. 1983) (upholding requirement that home schools submit to periodic home visits by state education officials).

For example, not a single state today requires that children whose parents choose to home-school them receive instruction from a state-certified teacher if the parents assert a religious objection to such a requirement.¹¹⁴ Montana's regulation of home schools is typical. It requires merely that parents operating a home school notify the county school superintendent that they are home-schooling their child, maintain records of their child's attendance and immunization, give at least 180 days of instruction each year, teach the same basic subjects taught in the public schools, and operate the school in a building that complies with local health and safety regulations.¹¹⁵ A number of other states require essentially nothing more than that home-schooled students annually take a standardized achievement test,¹¹⁶ and do not even require that students achieve any particular score on these tests in order to continue being home-schooled.¹¹⁷

114. Over 20 states repealed their teacher certification requirements for home schools between 1982 and 1992. Devins, *supra* note 9, at 819. The Supreme Court of Michigan struck down that state's teacher certification requirement as applied to religious home schools in 1993. See *People v. DeJonge*, 501 N.W.2d 127, 129 (Mich. 1993) (holding teacher certification requirement for home schools invalid as applied to parents with religious objection to using certified teachers). Several states now require that home-schooled children receive instruction from a person possessing a certain level of education, but this is most often simply a high school diploma or General Equivalency Degree. *E.g.*, NEB. REV. STAT. § 79-1701 (1994); N.M. STAT. ANN. § 22-1-2.1.C (Michie 1993); N.D. CENT. CODE § 15-34.1-06 (1993 & Supp. 1995). At least three states require that children whose parents choose to home school them for non-religious reasons must receive instruction from a state-certified teacher. See ALA. CODE § 16-28-1 (1995); NEB. REV. STAT. 79-1701(2) (1994); *Bennett*, 501 N.W.2d at 117 (upholding teacher certification requirement against challenge by parents with non-religious objections). These three states thus clearly discriminate between groups of children based upon the religious beliefs of their parents.

115. MONT. CODE ANN. § 20-5-109 (1995); see also MINN. STAT. ANN. § 120.101 (West 1993 & Supp. 1995) (requiring teaching of certain subjects and periodic assessment of home-schooled children by a standard, national norm-referenced achievement test); *id.* § 120.102 (requiring submission of an annual report to the school district superintendent). New York State law requires that instruction in a home school be "substantially equivalent" to instruction in public schools and be provided by "competent" instructors, and that home school instructors maintain attendance records. N.Y. EDUC. LAW §§ 3204(2), 3211 (McKinney 1995). It leaves largely to local school boards the judgment whether particular home school programs satisfy this equivalency requirement. See *Blackwelder*, 689 F. Supp. at 124, 127.

116. *E.g.*, LA. REV. STAT. ANN. § 17:236.1(10) (West Supp. 1995); MINN. STAT. ANN. § 120.101.8 (West 1993); N.C. GEN. STAT. 115C-564 (1994).

117. See Devins, *supra* note 9, at 827 (discussing North Carolina regulation of home schools) ("The law does not require a showing of any particular level of proficiency on the standardized achievement test; it requires no showing of competency on the part of the teacher to teach; it requires no health or safety inspections; and there are no curriculum or minimum attendance requirements, except to operate on a 'regular schedule' during at least nine calendar months.").

In Tennessee, an elementary level home school that is "associated with" and "supervised by" any organization that conducts church-related schools need not comply with any regulations whatsoever,¹¹⁸ while "Mississippi has appeared to have abdicated *any* regulation over home *and* private schools."¹¹⁹

Most states also exempt from certain types of instruction in public schools, such as sex education, students whose parents have religious objections to that instruction.¹²⁰ California's Education Code provides a general exemption: "Whenever any part of the instruction in health, family life education, and sex education conflicts with the religious training and beliefs of the parent or guardian of any pupil, the pupil, on written request of the parent or guardian, shall be excused from the part of the training which conflicts with such religious training and beliefs."¹²¹ Even some children attending public school, therefore, may fail to receive formal instruction regarding contraception, prevention of sexually transmitted diseases, parenting responsibilities and skills, and gender equality solely because of their parents' religious beliefs.¹²²

118. TENN. CODE ANN. § 49-6-3050(a)(2)(A) (1990 & Supp. 1995). Such a home school at the secondary level must provide instruction by someone with a high school diploma or G.E.D., register the student or students with the local education agency, and administer a standardized achievement test. *Id.* § 49-6-3050(a)(2)(B), (C). Home schools not so associated must comply with the sort of minimal regulations imposed in most other states. *Id.* § 49-6-3050(b) (mandating notice to local superintendent, records of attendance and instruction, minimum length of school day and school year, administration of standardized tests, required subject areas, and minimum level of education for instructor).

119. *People v. DeJonge*, 501 N.W.2d 127, 141 n.50 (Mich. 1993) (citing MISS. CODE § 37-13-91(10)) (emphasis added).

120. *E.g.*, ALA. CODE § 16-41-6 (1995) (exemption from instruction regarding "disease, its symptoms, development and treatment"); CAL. EDUC. CODE §§ 51201.5(c), 51550, and 51820 (West 1987-88 & Supp. 1996) (granting parents right to request for any reason that child not attend class discussing prevention of AIDS or venereal disease, or "any class in which human reproductive organs and their functions and processes are described, illustrated or discussed"); ILL. COMP. STAT. ANN. ch. 105, paras. 5/27-9.1 (West 1993) (sex education), 9.2 (instruction in AIDS prevention); IND. CODE ANN. § 20-10.1-4-8 (Burns 1991 & Supp. 1995) (hygiene); MICH. STAT. ANN. § 15.41506-07 (Callaghan Supp. 1995-96) (sex education); N.Y. EDUC. LAW § 3204(5) (McKinney 1995) (health and hygiene).

121. CAL. EDUC. CODE § 51240 (West 1987-88). This provision includes "personal moral convictions" within the meaning of "religious training and beliefs." *Id.*

122. The limits of parents' constitutional rights are unclear in this area as well. *Compare* *Moody v. Cronin*, 484 F. Supp. 270, 277 (C.D. Ill. 1979) (preventing state from compelling student in public school to attend coed physical education class) *with* *Roman v. Appleby*, 558 F. Supp. 449, 456 (E.D. Pa. 1983) ("[P]arental requests that their children be exempted from a part of the general public school programs have been frequently denied.") *and* *Davis v. Page*, 385 F. Supp. 395, 401, 405 (D. N.H. 1974) (stating that parents may not withdraw their children from health education or music classes, nor from any instructional period simply because audio-visual equipment is used).

Finally, in addition to regulations explicitly addressing education, many states include in their abuse and neglect laws provisions prohibiting serious mental and emotional harm to children,¹²³ and courts have occasionally terminated a parent's custody rights based in whole or part on a showing of emotional harm.¹²⁴ As discussed above, sexist socialization of girls at home and in school can result in mental and emotional harm to them that lasts throughout their lives.¹²⁵ Yet, as one might guess, no one has ever brought a claim under the abuse laws against the sexist practices of any religious school.

In fact, public discussion about the sexist treatment of children in some minority religious communities is nearly nonexistent in this country, even among feminist scholars and political leaders, while gender inequality and gender bias in adult workplaces and in public schools and mainstream universities is one of the most discussed topics of our time. This probably reflects in part the discomfort that many people feel with challenging the child-rearing practices of other adults, particularly when the other adults are motivated by sincere religious beliefs and belong to a minority religious community that just wants to be left alone. But it is also no doubt partly a reflection of widespread self-centeredness and indifference to the plight of "other people's children." The children who do not receive the protection of school regulations are particularly easy to ignore, because their parents intentionally isolate them from the "corrupting" influence of the rest of society. We in the mainstream at best forget, and at worst simply abandon, these children.

B. Medical Care Requirements

All states in this country impose on parents both a general responsibility to secure appropriate medical care for their children and more specific obligations to secure particular types of care. The general responsibility arises from child neglect laws that set forth conditions for removal of children from their home and/or for termination or restriction of parental rights. These laws include in

123. *E.g.*, GA. CODE ANN. § 15-11-81(b)(4)(A)(IV), (B)(iv-v) (1994). The federal Child Abuse Prevention and Treatment Act of 1974 also includes mental injury in its definition of child abuse. 42 U.S.C. § 5106g(4) (1988 & Supp. V 1993).

124. *E.g.*, *In re M.C.A.B.*, 427 S.E.2d 824 (Ga. Ct. App. 1993); *In re E.P.N.*, 388 S.E.2d 903 (Ga. Ct. App. 1989).

125. *See supra* notes 53-59 and accompanying text.

their definition of neglect a failure to provide adequate medical care.¹²⁶ In forty-six states, however, the neglect laws carve out an exemption for parents who choose not to seek medical care for their children because such care conflicts with the parents' religious beliefs, and who instead provide "spiritual treatment" or "faith healing" to their children.¹²⁷ States also carve out spiritual treatment exemptions from some criminal laws that prohibit harm to children, such as child-endangerment or manslaughter statutes.¹²⁸ These religious exemptions eliminate an important incentive for parents to secure treatment for their children despite religious misgivings.

126. The United States Department of Health and Human Services requires states to implement a program for reporting and prevention of child neglect as a condition for receiving federal funding for child protection programs, and includes failure to provide medical care in its definition of neglect. See Rosato, *supra* note 1, at 59-61 (discussing 45 C.F.R. § 1340.2).

127. For an overview of and citation to spiritual treatment exemptions in state child welfare laws, see Rosato, *supra* note 1, at 51-59. A large number of states first created such exemptions in response to a federal directive that they do so. Eric W. Treene, Note, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law*, 30 HARV. J. ON LEGIS. 135, 141 (1993). That directive no longer exists, *id.*; present federal regulations expressly state that the federal requirement that states develop reporting and prevention programs should not be read as requiring or prohibiting a spiritual treatment exemption. 45 C.F.R. § 1340.2(d)(2)(ii) (1994). The statutes on their face are actually meaningless, typically stating that a child who is under treatment solely by spiritual means shall not *for that reason alone* be considered neglected. If courts interpreted this provision as allowing a finding of neglect whenever there were *any* other reason for doing so, such as the possibility of *any* harm from the failure to secure medical care, they would have to order treatment in all and only those cases where they would do so even if there were no parental religious opposition to medical care. As discussed below, however, courts have instead interpreted this provision as allowing them to find neglect and order treatment only where a child is at substantial risk of death or grievous harm. See *infra* notes 134-39 and accompanying text. See also *Lybarger v. People*, 807 P.2d 570, 580 (Colo. 1991) (en banc) (noting that interpreting spiritual treatment exemption to apply only when there is no other reason to deem a child's health at risk—that is, when the child is not at all sick or injured—would eviscerate the exemption).

The religious sects most well-known for opposing conventional medical care are Christian Scientists, who oppose all medical care, and Jehovah's Witnesses, who object primarily to blood transfusions, but numerous other sects also oppose all or certain types of medical treatment. See *Lybarger*, 807 P.2d at 572 (en banc) (involving the Word of Faith Evangelistic Association); *In re Hamilton*, 657 S.W.2d 425, 427 (Tenn. Ct. App. 1983) (involving The Church of God of the Union Assembly, Incorporated, which forbids its members "to use medicine, vaccinations or shots of any kind, and teaches them instead to live by faith"); Henry J. Abraham, *Abraham, Isaac, and the State: Faith Healing and Legal Intervention*, 27 U. RICH. L. REV. 951, 964-67 (1993); Rosato, *supra* note 1, at 44 n.2, 45 n.3.

128. See Rosato, *supra* note 1, at 53-54.

Perhaps more important than neglect and criminal laws for the physical health of children, though, is the courts' ability to intervene and order medical care for a child when parents do not seek or consent to such care themselves. States generally require medical and educational professionals to report instances of suspected neglect to state authorities.¹²⁹ However, most reporting statutes also contain exceptions for spiritual treatment,¹³⁰ thereby reducing the likelihood that a child in urgent need of medical care will come to the attention of state officials before dying if her parents have certain religious beliefs about illness. In recent decades, many children have died when their parents, out of religious conviction, deprived them of medical care or other necessities.¹³¹

When children whose parents fail, for religious reasons, to secure or consent to necessary medical care for them *do* come to the attention of state officials, courts have some authority to order medical treatment over the parents' objections.¹³² A substantial amount of litigation and commentary has surrounded the question of when a court order is appropriate.¹³³ Courts have uniformly found it appropriate to order medical treatment for a child, over parents' objection that doing so violates their First Amendment right to the free exercise of religion, when treatment is necessary to prevent the child from dying.¹³⁴ Most courts have held that intervention is also

129. See *id.* at 52 (noting that reporting statutes impose criminal penalties for failure to report incidents of suspected neglect and abuse). Federal regulations require recipients of grants under the Child Abuse Prevention and Treatment Act to "provide by statute that specified persons must report and . . . that all other persons are permitted to report known and suspected instances of child abuse and neglect to a child protective agency." 45 C.F.R. § 1340.14(c) (1994); see also 42 U.S.C. § 5106a(b)(1)(A) (1988 & Supp. V 1993) (requiring states to provide for "the reporting of known and suspected incidents of child abuse and neglect" in order for them to qualify for grants).

130. See Rosato, *supra* note 1, at 52 n.43, 53 n.46. Federal regulations appear to authorize such an exception to reporting mandates for recipients of grants under the Child Abuse Prevention and Treatment Act. See 45 C.F.R. §§ 1340.2(d)(2)(ii), 1340.14(c) (1995).

131. See Rosato, *supra* note 1, at 62-63.

132. Statutes in 11 states specifically authorize courts to intervene in circumstances that involve spiritual treatment. See *id.* at 63 n.101. In other states, courts act on the basis of their general authority to enter appropriate orders to protect children from harm. Federal regulations require that recipients of grants under the Child Abuse Prevention and Treatment Act that have a spiritual treatment exemption to their neglect laws permit "the administrative or judicial authority of the State to ensure that medical services are provided to the child when his health requires it," 45 C.F.R. § 1340.2(d)(2)(ii) (1994), and provide emergency services to protect any child in need of immediate medical attention. 45 C.F.R. § 1340.14(f) (1994).

133. See Dwyer, *supra* note 13, at 1396-1403.

134. *Id.* at 1399.

appropriate when necessary to prevent "grievous harm" to a child,¹³⁵ which one state court defined as "a significant impairment of vital physical or mental functions, protracted disability, permanent disfigurement, or similar defects or infirmities."¹³⁶

A few courts, however, have held that no injury short of death suffices to override the religious objection of parents.¹³⁷ Moreover, no court has ordered treatment to prevent harm to a child that is less than "grievous" when parents objected on religious grounds, and some have indicated that they would not do so.¹³⁸ Thus, state legislatures and state and federal courts allow certain parents, those with particular religious beliefs, to do something that parents generally are prohibited from doing—to deny their children medical care necessary to prevent significant harm. In a few cases, parents have been deemed entitled to do this even when the harm to their children would be grievous.¹³⁹

The most common specific statutory requirement for parents regarding their children's health is the requirement that parents have their children vaccinated against certain diseases—typically, diphtheria, tetanus, hepatitis, pertussis (whooping cough), rubella, mumps, measles, polio, and haemophilus influenza type b.¹⁴⁰ All states require vaccination against all or most of these diseases as a pre-

135. *Id.* at 1399-1401. At least one state statute specifies that a court order is appropriate only in "a life threatening situation or when the condition will result in serious handicap or disability." COLO. REV. STAT. § 19-3-103 (Supp. 1995).

136. *Lybarger v. People*, 807 P.2d 570, 578 (Colo. 1991) (en banc).

137. *E.g.*, *People in the Interest of D.L.E.*, 614 P.2d 873, 873-75 (Colo. 1980) (holding that 12 year-old child with epilepsy cannot be adjudicated neglected, despite refusal of mother and child to comply with program of medical treatment, because child's life not in imminent danger); *In re Green*, 292 A.2d 387, 392 (Pa. 1972) (refusing to order spinal operation to overcome paralysis of boy whose mother objected on religious grounds to the necessary blood transfusion); see also *In re Cabrera*, 552 A.2d 1114, 1120 (Pa. Super. Ct. 1989) (reaffirming *Green* while ordering blood transfusion where six year-old at risk of dying from sickle-cell anemia). The federal Child Abuse Prevention and Treatment Act of 1974 treats as neglect only the withholding of medical treatment when a child would die without it. 42 U.S.C. § 5106g(10) (1988 & Supp. V 1993).

138. *E.g.*, *Lybarger*, 807 P.2d at 578 (en banc) (indicating that parents have no responsibility to seek medical care for a child who is "ill or injured" unless the child's condition meets this standard of seriousness).

139. See cases cited *supra* note 137.

140. See, e.g., ARK. CODE ANN. § 6-18-702 (Michie 1995); CAL. HEALTH & SAFETY CODE § 3380 (1995), superseded by § 126505 (West Supp. 1996); CONN. GEN. STAT. ANN. § 10-204a (West 1986 & Supp. 1995); FLA. STAT. ANN. § 232.032(1) (West 1988 & Supp. 1996); IND. CODE ANN. § 20-8.1-7-9.5(a) (Burns 1994); IOWA CODE ANN. § 139.9(1) (West 1988); N.H. REV. STAT. ANN. § 141-C:20-a(I) (1990); N.Y. PUB. HEALTH LAW § 2164.2 (McKinney 1993 & Supp. 1996); N.C. GEN. STAT. § 130A-152(a) (1995); TENN. CODE ANN. § 49-6-5001(b) (1990).

condition for a child attending any school, public or private.¹⁴¹ These laws reflect a legislative judgment that vaccinations are necessary to prevent serious harm to children.¹⁴² Many of these

141. *E.g.*, ALASKA STAT. § 14.30.125 (1992); ARIZ. REV. STAT. ANN. § 15-872.B (1990); COLO. REV. STAT. § 25-4-902 (1989 & Supp. 1995); D.C. CODE ANN. § 31-502 (1993); FLA. STAT. ANN. § 232.032(3) (West Supp. 1996); GA. CODE ANN. § 20-2-771(b) (1993); HAW. REV. STAT. § 298-42 (1991); IDAHO CODE §§ 39-1118(1) (1993) (day care); *id.* § 39-4801 (preschool - grade 12); ILL. COMP. STAT. ANN. ch. 105, para. 5/27-8.1(5) (West Supp. 1995); IND. CODE ANN. § 20-8.1-7-10.1(c) (Burns 1992 & Supp. 1995); IOWA CODE ANN. § 139.9(2) (West 1989 & Supp. 1993); KAN. STAT. ANN. § 72-5209(a) (1992); KY. REV. STAT. ANN. § 158.035 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. § 17:170.A (West 1992 & Supp. 1996); ME. REV. STAT. ANN. tit. 20-A, § 6355 (West 1992); MASS. ANN. LAWS ch. 76, § 15 (Law. Co-op. 1991); MICH. STAT. ANN. § 14.15(9208) (Callaghan 1995); *id.* § 15.41177(1) (Callaghan 1995 & Supp. 1996); MINN. STAT. ANN. § 123.70 (West 1993 & Supp. 1996); MISS. CODE ANN. § 41-23-37 (1993); MO. ANN. STAT. §§ 167.181(2), 210.003(1) (Vernon 1991 & Supp. 1996); MONT. CODE ANN. § 20-5-403(1) (1995); NEB. REV. STAT. § 79-444.01 (Supp. 1994); NEV. REV. STAT. ANN. § 392.435(1) (Michie 1991 & Supp. 1995); *id.* § 394.192.1, 439.550 (Michie 1991); N.H. REV. STAT. ANN. § 141-C:20-a(II) (1990); N.M. STAT. ANN. § 24-5-2 (Michie 1994); N.Y. EDUC. LAW § 914.I (McKinney 1993 & Supp. 1996); N.Y. PUB. HEALTH LAW § 2164(7) (McKinney 1995 & Supp. 1996); N.C. GEN. STAT. § 130A-155(a) (1995); N.D. CENT. CODE § 23-07-17.1(1) (1991); OHIO REV. CODE ANN. § 3313.671(A) (Baldwin 1994); OKLA. STAT. ANN. tit. 70, § 1210.191(a) (West 1989); OR. REV. STAT. § 433.267(1) (1992); PA. STAT. ANN. tit. 24, § 13-1303a(a) (1992); R.I. GEN. LAWS § 16-38-2 (1988 & Supp. 1995); S.C. CODE ANN. § 44-29-180(A) (Law. Co-op. 1985 & Supp. 1995); TENN. CODE ANN. § 49-6-5001(a) (1990); TEX. EDUC. CODE ANN. § 2.09(a) (West 1995), *superseded by* § 38.001 (West Special Pamphlet 1996); UTAH CODE ANN. § 53A-11-301(1), 302(1) (1994); VT. STAT. ANN. tit. 18, § 1121 (1982 & Supp. 1995); VA. CODE ANN. § 22.1-271.2(A), 271.4 (Michie 1993); W. VA. CODE ANN. § 16-3-4 (1994); WIS. STAT. ANN. § 252.04(2) (West Supp. 1995); WYO. STAT. § 21-4-309(a) (1992).

Many states' vaccination laws also make failure to have one's child immunized a criminal offense, typically a misdemeanor punishable by a fine and/or imprisonment. *E.g.*, ARK. CODE ANN. § 6-18-702(e) (Michie 1995); GA. CODE ANN. § 20-2-771(h) (1992); MD. CODE ANN., EDUC. § 7-301(e)(1) (1992 & Supp. 1995); W. VA. CODE § 16-3-4 (1995). Georgia and Mississippi also punish some children—those receiving AFDC benefits—when their parents fail to get them vaccinated without a legitimate excuse, by denying benefits to such parents. GA. CODE ANN. § 49-4-102.1(a)(2) (1992); MISS. CODE ANN. § 43-49-8(4) (Supp. 1995).

142. For explicit statutory recitations of legislative intent, see CAL. HEALTH & SAFETY CODE § 3381.5(a), *superseded by* § 120430 (West Supp. 1996); NEB. REV. STAT. § 71-527 (Supp. 1994); *see also* 1968 N.Y. Laws ch. 1094, § 1 (stating that immunization is "one of the truly great medical advances of this generation" and that it has proved safe); 1966 N.Y. Laws, ch. 994, § 1 (same); Mandatory Immunization of Students and Religious Exemption, 44 Op. Att'y Gen. No. 7, at 6 (Mont. Feb. 27, 1991); Kleid v. Bd. of Educ., 406 F. Supp. 902, 904-05 (W.D. Ky. 1976) (rejecting Establishment Clause challenge to religious exemption and noting that the legislative purpose behind a vaccination requirement was "to protect the health of school age children" from "certain dreadful diseases"); *In re Christine M.*, 595 N.Y.S.2d 606, 613 (N.Y. Fam. Ct. 1992) ("The Legislature has already made a determination that inoculation of school age children against, *inter alia*, measles constitutes sound and necessary medical care.").

diseases can cause serious permanent damage and even death, particularly in very young children,¹⁴³ and vaccines against them have proven largely safe and effective.¹⁴⁴ Outbreaks of many of

This legislative judgment has its detractors. *See, e.g.*, NEIL Z. MILLER, VACCINES: ARE THEY REALLY SAFE AND EFFECTIVE? 69-70 (1994) (arguing against giving children any of the commonly mandated vaccines). Arguments against vaccines are strongest with respect to those that are not very effective or safe and those aimed at diseases for which herd immunity has been achieved (i.e., more or less complete eradication of the virus within a population as a result of widespread immunity). The polio virus, for example, has been entirely eliminated from this country (outside of laboratories) and almost all other countries of the world, and the oral polio vaccine has itself caused a small number of children to contract polio and a larger number of children to feel quite ill for a period of time. 1995 INFORMATION PLEASE ALMANAC 91-92 [hereinafter ALMANAC]; RONALD W. ELLIS, VACCINES: NEW APPROACHES TO IMMUNOLOGICAL PROBLEMS 208, 211 (1992). However, outbreaks of the other diseases for which vaccines are commonly mandated continue to occur, *see infra* note 145, and non-immunized children are therefore at risk of contracting the disease.

143. Thirty percent of persons who contract tetanus die from respiratory failure as a result. ALMANAC, *supra* note 142, at 91. Pertussis, also known as whooping cough, "is life-threatening, especially in children under 1 year. It's caused by a bacterium that clogs the airways with mucus, causing a severe cough that sounds like a 'whoop.' The coughing can last two months, inviting other infections such as pneumonia or bronchitis." *Id.*; *see also* ELLIS, *supra* note 142, at 24 (noting that complications from pertussis include pneumonia, apnea, seizures, encephalopathy, and death, and that a recent study showed that 0.5% of reported cases of pertussis in children under six months of age were fatal). Before a vaccine for Hib became available in 1987, 0.5% of all children contracted the disease before the age of five, 12,000 children developed meningitis from the disease each year, 3,000 a year suffered brain damage, and 600 died each year. ALMANAC, *supra* note 142, at 91. With regard to measles, a New York court addressing vaccination laws found:

Most children who contract measles merely suffer high fever, cough, red eyes, runny nose and skin rash. However, some develop pneumonia, a complication of measles which can cause permanent lung damage, chronic and recurring infection or death. Another serious complication of measles infection is encephalitis, an inflammation of the brain. Approximately fifteen percent of patients with measles related encephalitis die and another twenty-five to thirty-five have permanent neurological damage. Measles infected children may also develop subacute sclerosing panencephalitis (SSPE) which causes irreversible neurological damage, mental retardation and seizures, and from which there is little chance of recovery.

In re Christine M., 595 N.Y.S.2d at 608.

144. For example, the court in *Christine M.* found that "the measles vaccines currently in use are safe and effective. The measles vaccine causes mild side effects, such as low grade fever and malaise, and is not life-threatening." 595 N.Y.S.2d at 608-09. Ninety-five percent of those who receive the vaccine are fully immune for the rest of their lives, and the other five percent receive some immunity, rendering infection less severe if they do contract measles. *Id.* at 609. The Hepatitis B vaccine has been very effective in this country. ELLIS, *supra* note 142, at 187-88. The Hib vaccine causes very minor side effects, "consisting mostly of low-grade fever and soreness at the site of the shot." ALMANAC, *supra* note 142, at 91. The pertussis vaccine, however, "causes more adverse reactions than any other vaccine. Most common are fever, soreness at the site of the shot, and irritability. In rare cases, the vaccine causes very high fever and convulsions." *Id.* But *cf.* ELLIS,

these diseases continue to occur,¹⁴⁵ and non-immunized children are naturally more likely to contract them.

Nevertheless, nearly all states exempt from their compulsory immunization laws parents who have religious objections to vaccination.¹⁴⁶ These states thereby deny to a certain group of

supra note 142, at 26 (noting that although the whole cell pertussis vaccine is less effective and has more negative side effects than other commonly used vaccines, "risk-benefit evaluations indicate a net benefit" from its use).

145. See, e.g., *Christine M.*, 595 N.Y.S.2d at 608 (noting outbreak of measles in New York City from late 1989 to mid-1991, in which 5,600 reported cases and 19 reported deaths occurred); *Maricopa County Health Dep't v. Harmon*, 750 P.2d 1364, 1370 (Ariz. Ct. App. 1987) (affirming order excluding unvaccinated children from school during outbreak in 1986 in which at least 63 children contracted measles); NEB. REV. STAT. § 71-527(6) (Supp. 1994) (noting that cases of pertussis and cases of mumps exceed 1,000 each year in this country). Outbreaks of pertussis occurred in Alameda County, California in the fall of 1994 and in 1989. Memorandum from Kathleen Jacobsen, Alameda County Public Health Advisor, to John Dunajski, Alameda County Senior Public Health Advisor (Jan. 13, 1995) (available from State of California Dep't of Health Services Immunization Branch). In Texas, there were 121 reported cases of pertussis, 51 reported cases of H-flu infection, and 231 reported cases of mumps among public school children in 1993. TEXAS DEP'T OF PUBLIC HEALTH, TEXAS PUBLIC SCHOOL IMMUNIZATION REPORT FOR 1993-94, at 1 (May 1994) [hereinafter TEXAS REPORT]. In 1993, seven reported cases of tetanus also occurred among children attending public schools in Texas. *Id.*

146. E.g., ALA. CODE § 16-30-3(1) (1994); ARK. CODE ANN. § 6-18-702(f) (Michie 1993); COLO. REV. STAT. § 25-4-903(2)(b) (1989 & Supp. 1995); DEL. CODE ANN. tit. 14, § 131(a)(6) (1994); D.C. CODE ANN. § 31-506(1) (1993); FLA. STAT. ANN. § 232.032(4)(a) (West 1988 & Supp. 1996); GA. CODE ANN. § 20-2-771(e) (1992); HAW. REV. STAT. § 298-44(2) (1991); IDAHO CODE §§ 39-1118(2) (day care), 39-4802(2) (preschool - grade 12) (1994); ILL. COMP. STAT. ANN. ch. 105, para. 5/27-8.1(8) (West 1993 & Supp. 1995); *id.* ch. 410, para. 235/6 (West 1994); IND. CODE ANN. § 20-8.1-7-2(a) (Burns Supp. 1995); IOWA CODE ANN. § 139.9(4)(b) (West 1988); KY. REV. STAT. ANN. § 214.036 (Michie/Bobbs-Merrill 1995); LA. REV. STAT. ANN. 46.1409(H) (West Supp. 1996) (child care facilities); MD. CODE ANN., EDUC. § 7-402(b)(1) (1992); MASS. ANN. LAWS ch. 76, § 15 (Law. Co-op. 1991); MICH. STAT. ANN. § 15.41177(1)(b) (Callaghan 1995 & Supp. 1995-96); MINN. STAT. ANN. § 123.70 subd. 3(d) (West 1993); MO. ANN. STAT. §§ 167.181(3), 210.003(2)(b) (Vernon 1991 & Supp. 1996); MONT. CODE ANN. § 20-5-405(1) (1995); NEV. REV. STAT. ANN. §§ 392.435(1), 394.192(1) (Michie 1991 & Supp. 1995); N.H. REV. STAT. ANN. § 141-C:20-c (1990); N.J. STAT. ANN. § 30:5B-5(c) (West Supp. 1995) (children in day care); N.Y. PUB. HEALTH LAW § 2164.9 (McKinney 1995); N.C. GEN. STAT. § 130A-157 (1995); N.D. CENT. CODE § 23-07-17.1(3) (1991); OHIO REV. CODE ANN. § 3313.671(A)(3) (Baldwin 1994); PA. STAT. ANN. tit. 24, § 13-1303a(d) (1992); R.I. GEN. LAWS § 16-38-2 (1988 & Supp. 1995); TENN. CODE ANN. § 49-6-5001(b) (1990); TEX. EDUC. CODE ANN. § 2.09(c)(1)(B) (West 1995), *superseded by* § 38.001 (West Special Pamphlet 1996); VT. STAT. ANN. tit. 18, § 1121 (1982 & Supp. 1995); VA. CODE ANN. § 22.1-271.4 (Michie 1993); WYO. STAT. § 21-4-309(a) (1992). One typical exemption reads "This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school." N.Y. PUB. HEALTH LAW § 2164(9) (McKinney 1993).

Several states allow for exceptions to the vaccination requirement when parents declare that vaccination conflicts with the religion or religious beliefs of *their child*. See

children—those born to parents having particular religious beliefs—the important protection the vaccination laws were intended to afford children. Tens of thousands of children in this country go unimmunized today because their parents have claimed this religious exemption.¹⁴⁷ Moreover, most states that provide an exemption also

CONN. GEN. STAT. ANN. § 10-204a(a)(3) (West 1986 & Supp. 1995); KAN. STAT. ANN. § 72-5209(b)(2) (1992); NEB. REV. STAT. § 79-444.06 (1994); N.J. STAT. ANN. § 26:1A-9.1 (West 1993); OR. REV. STAT. § 433.267(1) (1992); VA. CODE ANN. § 22.1-271.2.C(i) (Michie 1993); WIS. STAT. ANN. § 252.04(3) (West Supp. 1995). Since the children involved would typically be at most six years of age when parents first claimed the exemption, and might be as young as two or three (the immunization requirement in Kansas, for example, applies to some preschools and day care programs), and since the statutes accept the parents' declaration as conclusive testament to the beliefs of the children, this reference to the children's religious beliefs is clearly an oblique reference to the parents' beliefs. Part II.D below addresses the relevance of children's religious beliefs at some length.

A few states extend the exemption also to parents who object to vaccination for their children based on personal beliefs other than religious beliefs. *E.g.*, ARIZ. REV. STAT. ANN. § 15-873.A.1 (1990); COLO. REV. STAT. § 25-4-903(2)(b) (1989 & Supp. 1995); ME. REV. STAT. ANN. tit. 20-A, § 6355.3 (West 1992); UTAH CODE ANN. § 53A-11-302(3)(b) (1994). In California, roughly half of the parents who claim the exemption do so on the basis of non-religious beliefs about the efficacy and/or safety of particular vaccines. Conversation with Tina Kimmel, Research Analyst, State of California Dep't of Health Services Immunization Branch, Feb. 16, 1995 [hereinafter Conversation with Kimmel]. Louisiana's exemption is the broadest, allowing children to attend school without vaccination if either a student or a student's parent presents a "written dissent." LA. REV. STAT. ANN. § 17:170(E) (West 1982 & Supp. 1996).

Compulsory vaccination statutes also typically excuse parents whose child has a physical condition that, in the judgment of a physician, makes vaccination inadvisable for medical reasons. *E.g.*, ARK. CODE ANN. § 6-18-702(f) (Michie 1995); COLO. REV. STAT. § 25-4-903(2)(a) (Supp. 1995); DEL. CODE ANN. tit. 14, § 131(a)(5) (1993); HAW. REV. STAT. § 298.44(1) (1991); IOWA CODE ANN. § 139.9(4)(a) (West 1988); MASS. ANN. LAWS ch. 76, § 15 (Law. Co-op. 1991); MINN. STAT. § 123.70. subd. 3(c) (1994); N.J. STAT. ANN. § 26:2N-4 (West 1987); N.Y. PUB. HEALTH LAW § 2164(8) (McKinney 1995); N.D. CENT. CODE § 23-07-17.1(3) (1991); OR. REV. STAT. § 433.267(1)(b) (1992); PA. STAT. ANN. tit. 24, § 13-1303a(c) (1992); R.I. GEN. LAWS § 16-38-2 (1994); TEX. EDUC. CODE ANN. § 2.09(c)(1)(A) (1991), *superseded by* § 38001 (West Special Pamphlet 1996); VA. CODE ANN. §§ 22.1-271.2.C(ii), -271.4 (Michie 1993).

147. In 1994, the parents of 2,654 kindergarten students in California claimed the "personal belief" exemption to the state's immunization law. IMMUNIZATION ASSESSMENT OF CALIFORNIA KINDERGARTEN STUDENTS - 1994: FINAL RESULTS (available from State of California Department of Health Services Immunization Branch). If this figure for kindergarten students is representative of every grade level, the total number of children in grades K through 12 in California schools who have not received vaccinations because their parents have personal beliefs that oppose vaccination is roughly 34,500. During the 1993-94 school year in Pennsylvania, at least 6,610 students were unimmunized because their parents claimed the religious exemption. PENNSYLVANIA SCHOOL IMMUNIZATION LAW REPORT: 1993-1994 SCHOOL YEAR (available from Commonwealth of Pennsylvania Dep't of Health - Immunization Program). Among public school students in Texas during the 1993-94 school year, over 2,000 were unimmunized because their parents claimed the religious belief exemption. TEXAS REPORT, *supra* note 145, at 29. If patterns in Texas are

direct school administrators to exclude unvaccinated children from school during outbreaks of any of the diseases for which vaccination is normally required.¹⁴⁸ As a result, religious objectors' children may not only fail to receive the same immunological protection other children receive, but may also be denied schooling for periods of time when other children are receiving it. These states thus permit parents' religious beliefs to effect a double denial of benefits to children in certain, not uncommon, circumstances.¹⁴⁹

These exemptions exist even though states are not constitutionally required to include a religious exemption in their compulsory immunization laws. Courts that have addressed the issue have all held that a law compelling vaccination of all children does not violate the constitutional rights of any parents or children.¹⁵⁰ In doing so,

similar to those in other states, the number of children in private schools in Texas whose parents claimed the religious exemption is at least double this figure, or well over 4,000 children. In Massachusetts, 159 of the children enrolled in kindergarten classes responding to a state survey for the 1993-94 school year were unimmunized because of their parents' religious objection, suggesting a total of over 2,000 children in grades K through 12. MASSACHUSETTS DEP'T OF PUBLIC HEALTH IMMUNIZATION PROGRAM—KINDERGARTEN: RESULTS OF THE ANNUAL SURVEY OF IMMUNIZATION LEVELS, 1993-94 (available from State Laboratory Institute, Boston, MA).

Of course, a much larger number of children fail to receive immunizations because their parents are simply negligent or cannot afford the vaccinations, a situation that elicits expressions of moral outrage in some quarters. See, e.g., Juel Crawford, *Federal Action Improves Immunization for Children*, N.Y. ST. CHILD ADVOC. 1, 4 (Fall 1994).

148. E.g., ARIZ. REV. STAT. ANN. § 15-873.C (1990); CAL. HEALTH & SAFETY CODE § 3385 (West 1990 & Supp. 1996), *superseded by* § 120365 (West Supp. 1996); DEL. CODE ANN. tit. 14, § 131(a)(7) (1993); FLA. STAT. ANN. § 232.032(8) (West 1988 & Supp. 1996); GA. CODE ANN. § 20-2-771(f) (1992); LA. REV. STAT. ANN. § 17:170(F) (West 1982 & Supp. 1996); ME. REV. STAT. tit. 20-A, § 6356(1) (West 1992); MONT. CODE ANN. § 20-5-405(3) (1995); NEV. REV. STAT. § 392.446 (1991); N.D. CENT. CODE § 23-07-17.1(6) (1991); VA. CODE ANN. § 32.1-47 (Michie 1993); WIS. STAT. ANN. § 252.04(7) (West Supp. 1995); WYO. STAT. § 21-4-309(a) (1992). Such exclusion provides some protection from disease to unvaccinated children, and so has an ameliorative effect with respect to risk of contracting the disease, though this strategy is certainly not as effective as vaccination. Exclusion of unvaccinated children may also help to protect those children who have received an ineffective vaccine, which routinely occurs in a small minority of cases with respect to most vaccines. Conversation with Kimmel, *supra* note 146.

149. In California, there is on average one outbreak of disease per year that requires exclusion of unvaccinated children from school. Conversation with Kimmel, *supra* note 146. During the measles outbreak that gave rise to the *Harmon* litigation in Arizona, 158 children had to be excluded from school. *Maricopa County Health Dep't v. Harmon*, 750 P.2d at 1364, 1366 (Ariz. Ct. App. 1987).

150. See *Zucht v. King*, 260 U.S. 174, 176-77 (1922) (holding that city ordinance making certificate of vaccination a pre-condition for school attendance did not violate due process or equal protection rights of excluded child); *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88-92 (E.D.N.Y. 1987) (holding religious exemption limited to members of recognized religious organization violates Establishment Clause);

these courts have found that protecting children from disease is a compelling state interest.¹⁵¹ In contrast, when parents have raised Establishment Clause or Equal Protection challenges to religious exemptions that do not include them, courts have stated that the purpose of the exemptions is simply to accord "respect,"¹⁵² "deference,"¹⁵³ or "heed" to,¹⁵⁴ or to "minimize imposition" upon,¹⁵⁵ the parents' religious beliefs, a purpose that the courts have not treated as a compelling one. Unsurprisingly, no court has found that a legislative intent to further the interests of children underlies these exemptions.

Other common specific parental obligations related to children's health are requirements to ensure that children receive a general physical examination,¹⁵⁶ a vision or hearing test,¹⁵⁷ and screening for diseases such as tuberculosis.¹⁵⁸ Statutes imposing these obligations, like those requiring vaccinations, typically exempt parents who

Harmon, 750 P.2d at 1370; *Wright v. DeWitt Sch. Dist.*, 385 S.W.2d 644, 646, 648 (Ark. 1965); *Cude v. State*, 377 S.W.2d 816, 818 (Ark. 1964); *Davis v. State*, 451 A.2d 107, 111-12 (Md. 1982); *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1980); *Mountain Lakes v. Maas*, 152 A.2d 394, 400-03 (N.J. Super. Ct. App. Div. 1959). These courts have relied on *Zucht* and two other Supreme Court decisions: *Prince v. Massachusetts*, 321 U.S. 158, 170-71 (1944) (upholding a guardian's conviction for allowing her ward to distribute religious literature in the streets at night), and *Jacobson v. Massachusetts*, 197 U.S. 11, 27-30 (1905) (rejecting a free exercise challenge to a state law mandating vaccination of all adults during an outbreak of smallpox). In *Prince*, the Court stated explicitly that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." 321 U.S. at 166-67.

151. See, e.g., *Sherr*, 672 F. Supp. at 83 ("We affirm that the health regulation in question is a reasonable exercise of police power on a subject of paramount and compelling state interest and, therefore, is valid."); *Harmon*, 750 P.2d at 1369-70; *Brown*, 378 So. 2d at 222-23.

152. *Davis*, 451 A.2d at 112.

153. *Hanzel v. Arter*, 625 F. Supp. 1259, 1265 (S.D. Ohio 1985).

154. *Sherr*, 672 F. Supp. at 83.

155. *Id.* at 88.

156. E.g., ALA. CODE § 16-29-1 (1994); CAL. EDUC. CODE § 60608 (West 1995) (providing for rules governing physical fitness test in schools); IND. CODE § 20-8.1-4-18(a) (1995) (requiring a physical examination for employed children aged 14 to 17).

157. E.g., MICH. COMP. LAWS ANN. § 333.9307 (West 1995); N.Y. EDUC. LAW § 905(1) (McKinney 1994) (regarding eye and ear tests).

158. E.g., FLA. STAT. ANN. § 232.032(2), (9) (West 1994); HAW. REV. STAT. § 298-42(b) (1994); 105 ILL. COMP. STAT. ANN. ch. 105, para. 5/27-8.1(1) (West Supp. 1995); KY. REV. STAT. ANN. § 214.034 (Baldwin 1994); MINN. STAT. ANN. § 144.442 (West 1994); N.H. REV. STAT. ANN. § 200:38 (1993); N.J. REV. STAT. § 18A:40-16 (1995). Children might also be screened for sickle cell anemia, IND. CODE § 20-8.1-7-11(a) (1994), lead poisoning, *id.*, or scoliosis, N.Y. EDUC. LAW § 905(1) (McKinney 1994).

have religious objections.¹⁵⁹ As a result, children with a vision or hearing impairment or other physical disability, or who have contracted tuberculosis, may not be diagnosed in a timely manner, thereby suffering avoidable harm because the state has not guaranteed these children the protection it guarantees to children whose parents do not have religious objections. Another very provocative example of a religious exemption related to children's health is that contained in laws requiring that only certified medical doctors perform circumcisions. Many of these laws provide that persons, such as Jewish mohels, who perform circumcisions in the context of a religious ceremony need have no medical training.¹⁶⁰

De jure discrimination among groups of children based on parents' religious beliefs occurs in other contexts as well. For example, foster care and adoption statutes frequently include religious matching provisions, requiring adoption agencies to place children with foster care or adoptive parents of the same religion as the biological parents if the latter so request. These provisions, for the sake of satisfying the religious preferences of biological parents, create an obstacle to placement for some children and prevent others from continuing in a relationship already formed with foster parents who

159. *E.g.*, IND. CODE § 20-8.1-3-19 (1994) ("No child shall be compelled to undergo any examination or treatment under this chapter when his parents object on religious grounds."); *id.* § 20-8.1-4-18(c) (regarding physical exam for employed minors); *id.* § 20-8.1-7-2(a); KY. REV. STAT. ANN. § 214.036 (Baldwin 1994); MICH. COMP. LAWS ANN. § 333.9307 (West 1995); MINN. STAT. § 144.442.1(8) (1994); N.J. REV. STAT. § 30:5B-5.c (1994) (concerning children in day care); N.Y. EDUC. LAW § 905(1) (McKinney 1994) (discussing scoliosis test for children). Alabama's requirement of a physical exam applies only to children attending a public school. ALA. CODE § 16-29-1 (1994).

160. *See, e.g.*, DEL. CODE ANN. tit. 24, § 1703(e)(4) (1995); MINN. STAT. § 147.09(10) (1995); MONT. CODE ANN. § 37-3-103(h) (1993); WIS. STAT. § 448.03(g) (1995). Recently two states enacted another type of law relating to circumcision that raises a different sort of equal protection problem. This legislation outlaws circumcision of females, but not circumcision of males. MINN. STAT. §§ 144.3872, 609.2245 (1995); N.D. CENT. CODE § 12.1-36-01 (1995). Yet the reasons some cultural groups practice female circumcision—tradition, making offspring look like their parents, hygiene, control of sexuality—are the same reasons historically why the United States (alone now among Western nations) practices routine circumcision of males, and are equally invalid in the two cases. *See* William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 339-41 (1984-85); Marilyn Fayre Milos & Donna Macris, *Circumcision: A Medical or a Human Rights Issue?*, 37 J. NURSE-MIDWIFERY 87S, 88S, 90S-94S (1992). Moreover, the reasons Americans have for condemning female circumcision—it inflicts excruciating pain, violates bodily integrity, and destroys healthy protective and functional tissue—apply also to male circumcision. *See* Brigman, *supra*, at 340-41; Milos & Macris, *supra*, at 88S-94S; J.R. Taylor et al., *The Prepuce: Specialized Mucosa of the Penis and Its Loss to Circumcision*, 77 BRIT. J. UROLOGY 291, 291, 294-95 (1996).

want to adopt them, because the latter are not of the right faith.¹⁶¹ Moreover, in addition to these examples of *de jure* discrimination, one could identify numerous instances of *de facto* discrimination against certain groups of children, instances in which states self-consciously fail to enforce child welfare laws with respect to children of certain religious groups. One notable but rarely discussed example is states' failure to investigate and enforce legal restrictions on the child-rearing practices of reclusive religious cults.¹⁶²

The discussion below focuses on religious exemptions to education and medical care laws. The invidious discrimination among groups of children that these exemptions represent is clear on the face of the statutes, yet is less likely than other forms of disparate treatment to be recognized as such and to face challenge. These exemptions cause harm to children who have neither the state nor any set of caretakers advocating for their temporal interests, in contrast to, for example, religious preference provisions in adoption and foster care laws.¹⁶³ In essence, in these contexts the children's caretakers

161. See David S. Rosettenstein, *Trans-racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot"*, 68 ST. JOHN'S L. REV. 137, 147 n.45 (1994) (discussing the impact of biological parents' religious preference in the race-based hierarchy for child placement).

162. See Susan Landa, *Children and Cults: A Practical Guide*, 29 J. FAM. L. 591, 591-92, 607-16, 624-34 (1990-91) (discussing cult practices harmful to children and difficulties associated with intervening in cults to protect children).

Laws also discriminate in numerous ways among groups of children defined by other characteristics. For example, adopted children receive less legal protection of their relationship with their custodial parents than do children who are in the custody of their biological parents. Several recent highly publicized cases involving 'botched adoptions' illustrate this problem. In these cases, a biological father whose parental rights were not properly terminated at the time of adoption sued to obtain custody after adoptive parents had already formed a bond with a child. Neither the adoptive parents nor the child in these cases enjoyed constitutional protection of their relationship. See, e.g., *DeBoer v. Schmidt*, 114 S. Ct. 11, 11 (1993) (Baby Jessica); *Petition of Doe*, 638 N.E.2d 181, 182 (Ill. 1994) (Baby Richard), *cert. denied*, 115 S. Ct. 499 (1994). In contrast, the United States Supreme Court has held in other contexts that biological parents enjoy strong due process rights in state proceedings brought to terminate their relationship with a child. *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) (holding that state must provide clear and convincing evidence to support termination of a biological parent's custody rights based on abuse); *Stanley v. Illinois*, 405 U.S. 645, 658 (1973) (holding that a father of an illegitimate child is entitled to a hearing on his fitness as a parent before the state may remove a child from his custody); see also *supra* note 160 (discussing gender discrimination in the law relating to circumcision of children).

163. See Rosettenstein, *supra* note 161, at 179-81 (describing litigation brought on behalf of children in foster care). The term "temporal interests" here connotes human interests that are secular rather than religious or spiritual in nature. Articulation and defense of a perfectly clear analytical distinction between these two types of interests would be difficult in a short space; a rough-and-ready statement, however, of the particular

collude with the state to deny them equal protection of the laws. Other situations in which young children do not receive equal protection of the laws also involve the problem that the persons harmed are not themselves able to advance a legal claim against the state, and in fact may not even understand that they are being harmed. In the case of religious exemptions to education and medical care regulations, though, the additional problems arise that the parents of the children harmed do not want to challenge the denial of equal protection, and that the children harmed might themselves express *opposition* to the school regulations or medical care, echoing the objections of their parents.

These unique features of the parental religious exemption provisions create real practical obstacles to challenging them in court. Part III below addresses these practical obstacles. In addition, these features raise important substantive doctrinal and theoretical questions concerning the state's treatment of the family—in particular, questions about the rationality of treating families as unitary entities, the propriety of deferring to parents' preferences regarding the upbringing of children, the proper scope of an individual's religious liberty, and the bases upon which state actors make decisions on behalf of children. Part II addresses these substantive questions in the course of constructing and evaluating an equal protection claim on behalf of religious objectors' children.

II. RELIGIOUS EXEMPTIONS AS VIOLATIONS OF CHILDREN'S EQUAL PROTECTION RIGHTS

To simplify the equal protection analysis somewhat, this Part highlights one specific type of religious exemption in each of the two main substantive areas, medical care and education. In the medical area, it considers the constitutionality of religious exemptions to

interests that fall into these categories, and that are relevant to the discussion below, is possible. Avoidance of physical harms such as disease, damaged and malformed body parts, and death is a temporal interest. So too is avoidance of psychological harms such as a diminished sense of self-worth, extreme anxiety, neurosis, and psychosis, or emotional harms such as feelings of abandonment, rejection, and shame. In contrast, being "saved" or "right with the Lord," receiving God's blessing, developing or perfecting one's soul, and securing a place in heaven—benefits whose description necessarily entails reference to an existence beyond this world or the material universe—are spiritual or religious interests. No doubt some would challenge the particular distinction drawn here, and some would dispute the possibility of drawing any meaningful distinction whatsoever, but the above categorization seems consistent with a widespread acceptance in our culture of separate worldly and spiritual realms, the former being the province of science and human authority and the latter being the province of religion.

compulsory vaccination laws. In the area of education, it considers the constitutionality of the failure of the federal government and certain states to apply to religious schools prohibitions against sex discrimination and sex bias that they apply to other schools. For reasons revealed below, the case against vaccination exemptions is the easier one to construct, and so each of the sections of this Part begins with a discussion of vaccination laws.

Narrowing the subject matter of this Part to two specific types of legal provisions by no means renders the equal protection analysis uncomplicated. An equal protection claim involves several elements—showing intentionally discriminatory state action, determining the appropriate level of judicial review, identifying legitimate state purposes, and assessing the importance of these purposes—and each element raises difficult questions in the context of religious exemptions to child welfare mandates. The discussion below gives careful consideration to each element, in the order that an equal protection claim dictates. In doing so, it is able to draw heavily upon the few Supreme Court decisions that have dealt with inequalities in states' distribution of benefits among groups of children in addition to the far more numerous decisions concerning inequalities among groups of adults. While these decisions do not provide the clearest guidance possible, they do consistently enunciate certain principles that underlie the Equal Protection Clause and that clearly show the laws with which this Article is concerned to be violative of the Fourteenth Amendment.

The analysis below, reflecting the topic's complexity, is lengthy and rather formal in character. Careful consideration of the legal principles at stake reveals that simplistic assertions about parents' rights, religious freedom's importance, or the virtue of tolerance are no answer to legitimate concerns about the welfare of children born to members of minority religious communities. A more searching analysis is necessary. This analysis might be used as a starting point for legislative policymaking that must also consider messy political realities, or for litigation or lobbying efforts that must at times pursue compromise positions. Part III does, in closing, suggest compromise positions that might be minimally adequate to protect the interests of children, but working out such positions in detail is not one of the aims of this Article.

A. State Action

The first showing that a plaintiff advancing a Fourteenth Amendment Equal Protection Clause claim must make is that the challenged

discriminatory conduct constitutes state action.¹⁶⁴ The Equal Protection Clause by its terms constrains only the state, not private parties.¹⁶⁵ Both of the situations under discussion in this Part involve ostensibly private action—the choices of parents, the actions of religious schools—as a but-for cause of the supposed harm, so one might think that the problem for children of religious objectors is essentially a private one upon which the Constitution has no bearing. Unless there is also some action attributable to the state that itself constitutes a denial of equal protection, no Fourteenth Amendment violation, and thus no basis for federal court intervention, exists. Whether any state action is present is a distinct and preliminary issue to that of the constitutionality of such state action.

1. Discriminatory Laws

In the case of vaccination laws, state action is readily apparent. States legislatively guarantee to children generally a specific benefit (protection from disease) but then explicitly deny that guarantee to a particular subgroup of children identifiable by their parents' beliefs.¹⁶⁶ The fact that parents must act (by formally objecting to

164. See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (stating that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful"). Similarly, a claim against the federal government under the Fifth Amendment would have to begin by identifying some action of the federal government that discriminates among similarly situated persons. For the sake of writing economy, the discussion below for the most part refers only to actions against states under the Fourteenth Amendment. Analysis of a Fifth Amendment claim against the federal government would be essentially the same. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (observing that the Fifth Amendment Due Process Clause contains an equal protection component that imposes on the federal government the same restrictions that the Fourteenth Amendment Equal Protection Clause imposes on the states).

165. U.S. CONST. amend. XIV, § 1 reads:

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.

166. Denying some group of persons benefits given to others, even those that the federal Constitution does not require states to provide, can be as much a violation of equal protection as the imposition of punishments or other burdens. *Califano v. Westcott*, 443 U.S. 76, 85 (1979) (stating that welfare benefits are subject to the guarantee of equal protection); *Maier v. Roe*, 432 U.S. 464, 468-70 (1977) ("[W]hen a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations."); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 537 (1973) (striking down as irrational Food Stamp Act's exclusion of households containing individuals unrelated to any other household member); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 168 (1972) (holding denial of workmen's compensation benefits to illegitimate children invalid); *Levy v. Louisiana*, 391

vaccination) in order for their children not to receive the statutory benefit does not alter the fact that the state itself acts in a discriminatory fashion. This situation is closely analogous to one the Supreme Court addressed in *Gomez v. Perez*,¹⁶⁷ which held that a state violated the Equal Protection Clause when it conferred on children generally a judicially enforceable right to support from their natural fathers, but denied that right to illegitimate children. That an illegitimate child would only fail to receive support if his or her father chose not to send support, and that the state simply declined to act in those instances rather than affirmatively acting to prevent illegitimate children from receiving support, did not eviscerate the cause of action on state action grounds.¹⁶⁸ Similarly, at issue in the case of compulsory immunization is whether a specific statutory provision that singles out a particular group of children for lesser protection of the laws than other children receive—in the form of an obligation imposed on their parents—violates the constitutional requirement that states treat similarly situated persons similarly.¹⁶⁹

State action is also obviously present in the case of federal and, in at least two jurisdictions, state legislation prohibiting sex discrimination in education. As do the immunization statutes, these laws set forth a requirement that is to apply very broadly—to all schools that receive government financial assistance of any kind, directly or indirectly—but then explicitly single out, on the basis of religious beliefs, certain entities that are responsible for the welfare

U.S. 68, 72 (1968) (holding denial of right of action for wrongful death of parent to illegitimate children invalid); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("Such an opportunity [for an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

167. 409 U.S. 535, 538 (1973).

168. Similarly, a criminal statute that prohibited assault but made an exception for assaults against some particular group of persons, such as African-Americans or atheists, and that ordered police not to act to prevent assaults against such persons, would clearly be reviewable under the Equal Protection Clause. An assault on such persons by private individuals is itself private action, but the statute's discrimination among classes of persons in regard to who will receive the state's protection against such private action is clearly state action.

169. Religious exemptions to state vaccination laws have in fact been the subject of Establishment Clause and Equal Protection Clause challenge on numerous occasions, when parents not covered by the exemption complained to the State that they too wanted to deny their children immunization. On none of those occasions was there any suggestion that the exemption did not constitute state action. See, e.g., *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 83 (E.D.N.Y. 1987); *Kleid v. Board of Educ. of Fulton*, 406 F. Supp. 902, 906 (W.D. Ky. 1976); *Davis v. State*, 451 A.2d 107, 115 (Md. 1982); *Dalli v. Board of Educ.*, 267 N.E.2d 219, 223 (Mass. 1971); *Brown v. Stone*, 378 So. 2d 218, 221 (Miss. 1980).

of children but that are nevertheless to be free from the child-protective mandate.¹⁷⁰ These legislative classifications clearly constitute state action susceptible to constitutional challenge. The same is true of any other school regulations that specifically exempt from otherwise generally applicable requirements all religious schools or those religious schools whose religious tenets conflict with the requirements.

It is important to consider further, though, precisely when state and federal non-regulation of religious schools amounts to state action. Many existing education laws and regulations, including most of those relating to sex discrimination and sex bias, apply in the first instance only to public schools. In addition, if someone successfully challenged a law or regulation of the type discussed in the previous paragraph—one that explicitly excludes only certain religious schools from an otherwise very broad mandate—the state in question might respond by simply scaling back its regulation so that it applies in the first instance only to public schools, rather than taking the more difficult path of attempting to impose the regulation on religious schools that vehemently oppose it.

We must therefore ask whether a failure to regulate religious schools constitutes state action if the state also does not regulate other private schools. We might also ask whether there is discriminatory state action in the not uncommon case in which federal and state regulations extend to all public and private schools that receive government assistance, but do not also include schools that accept no government assistance—which are, for the most part, religious schools. Answering these questions, which go to the very heart of the prevailing scheme of government regulation of education in this country, requires more extensive analysis.

In defense of its choice to limit the scope of its school regulations to public schools or to schools receiving government assistance, a state would probably argue that it is simply acting to control its own functions and their effects, while leaving the 'private' domain unregulated. The notion of a division between public and private domains is a familiar one in our society, which prizes above all else the individual liberty that our system of limited government preserves. In fact, one is more likely to hear expressed the view that a state is over-reaching its proper bounds of authority when it attempts to regulate private

170. See *supra* notes 72-75 and accompanying text. Part II.B below considers whether these education laws can fairly be said to discriminate between classes of children, rather than only between groups of schools. See *infra* text accompanying note 222.

schools, than one is to hear a claim that the state is in some way harming children who attend private schools when it fails to ensure that they receive an adequate education or to protect them from injurious practices.

Thus, a state might contend that its school regulations are analogous to restrictions on employment practices that governmental bodies impose on themselves but do not also impose on private employers. Private sector employees do not complain that this disparate treatment of state and private employment, in terms of the protections afforded employees, violates the Equal Protection Clause. Such a claim would probably fail, since courts generally do not treat a failure to prohibit or prevent private conduct as state action. Courts instead deem such inaction immune from constitutional challenge, unless it reasonably can be viewed as encouraging the private conduct.¹⁷¹ Courts only rarely regard a state's decision not to apply all of the rules governing its own internal operations to the private sector as encouraging any behavior in the private sector. Rather, they view it simply as a manifestation of the state's special vigilance over its own affairs. Regulations that apply only to public schools or only to schools receiving state financial assistance might be viewed in the same light.¹⁷²

It is thus essential to understand why this notion of separate public and private domains, whatever its viability in other contexts, is untenable in the context of children's schooling. Regulation of schooling differs from regulation of government employment or other

171. See *Deshaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 (1989) (holding that a state's failure to protect child from abusive father is not state action under the Due Process Clause); *Norwood v. Harrison*, 413 U.S. 455, 467 (1973) (holding that states may not lend textbooks to racially segregated private schools, and stating that "[a] State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination"); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948). But see *Barbara Rook Snyder, Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1082 (1990) (arguing that *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), "effectively imposed a duty on the state to include an anti-discrimination provision in leases of public property" despite absence of any encouragement). An exception to this rule applies to instances in which a state holds a person in custody against his will; the state is then under a special duty to ensure the safety and well-being of that person. See *Deshaney*, 489 U.S. at 199-200.

172. Actions of public school officials are actions of the state for purposes of constitutional rights adjudication. See *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (holding that public school officials are subject to strictures of the Fourth Amendment when they conduct searches of a student's person or property).

internal practices of government in a number of relevant ways. First, state provision of and support for education is not an internal practice of government, but rather the provision of a government benefit to private persons in the community, like any welfare program. Second, education is an essential good that states undertake to guarantee for all children. State education laws as a whole manifest a governmental intent to assume ultimate authority over this fundamental aspect of children's lives. In fact, compulsory education laws typically take the form of mandating that all children attend public school and then carving out an exception to this mandate for children whose parents prefer some alternative form of schooling that the state deems acceptable.¹⁷³ This element renders state education law more analogous to a law guaranteeing welfare assistance to all persons, while also allowing individuals to opt out if they prefer to obtain subsistence from a private source. In contrast, regulation of government employment practices inherently relates to a very limited group of persons—government employees—who stand in a special relationship to the government.

Third, with respect to schooling, the state does not simply refrain from involving itself in private actors' choices and behaviors, as it might be said to do with respect to private employment.¹⁷⁴ The state affirmatively invests in parents the legal authority to determine

173. Illinois' compulsory attendance law, for example, states:

Whoever has custody or control of any child between the ages of 7 and 16 years shall cause such child to attend some public school in the district wherein the child resides the entire time it is in session during the regular school term . . . Provided, that the following children shall not be required to attend the public schools:

1. Any child attending a private or a parochial school where children are taught the branches of education taught to children of corresponding age and grade in the public schools

ILL. COMP. STAT. ANN. ch. 105, para. 5/26-1 (West Supp. 1995). See also CAL. EDUC. CODE §§ 48200, 48222 (West 1995) (setting forth compulsory education requirements and exemptions for children in private schools). As noted above, under the Supreme Court's interpretation of the Fourteenth Amendment, states must allow parents to choose private schooling for their children. See *Pierce v. Society of Sisters*, 268 U.S. 510, 533-34 (1925).

174. Whether one may ever plausibly say that the state is not involved in private market behavior is, of course, a highly debatable issue. Many writers have pointed out that the government is fundamentally involved in "private" markets, by establishing and enforcing base-line entitlements. Some commentators have regarded this fact as a reason for abandoning the state action requirement in Fourteenth Amendment adjudication. E.g., Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 367 (1963) (observing that state action "as a limitation, has substantially disappeared"). In any event, a relevant difference surely exists between the freedom adults have to choose their job and the freedom young children have to choose their school.

what schooling their children will receive.¹⁷⁵ Children themselves have no legal or practical control over the decision whether they will receive the state-proffered benefit of a public school education or will instead receive some other, possibly inferior, form of schooling. Moreover, no other private party can decide the matter; the state grants parents exclusive control.¹⁷⁶ Private employers, in contrast, enjoy no comparable state-conferred authority over their employees.

With the addition of this crucial third feature, a proper analogy to state education law would be a hypothetical law establishing a universal welfare assistance guarantee, with an individual opt-out provision, that gives some persons (say, for example, religious leaders) an exclusive legal right to decide for certain other persons (such as their followers) whether those other persons will receive the government assistance or will instead receive some private alternative that may be substantially inferior.¹⁷⁷ A basic ethical principle in our society, which undergirds numerous legal rules, holds that while competent individuals may justly suffer as a result of *their own* choices, no one should suffer avoidable harm because of circumstances beyond their control, and particularly not as a result of other people's choices.¹⁷⁸ Both this hypothetical welfare law and state

175. The term "state" as used here and in the discussion immediately following connotes federal and/or state legislatures and courts. It is a combination of the products of these institutions that makes up the present regime of plenary parental rights to control children's lives. See Dwyer, *supra* note 13, at 1379-1405.

176. See David A. Strauss, *Due Process, Government Inaction and Private Wrongs*, 1989 SUP. CT. REV. 53, 64-66:

[T]he family unit is to a significant extent the product of state action. . . . The government actively supports the family unit in countless ways. State law imposes support obligations on parents and gives them vast rights to control and direct their lives. State law bars strangers from intervening in the family except in extraordinary circumstances. Many state laws [are] designed to promote the establishment and maintenance of families. Through schools and many other media, the government promotes the family unit and reinforces the authority of the parents.

This conferral of authority is analogous to a state grant of a monopoly to a private sector supplier of some service. See Lawrence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 12 (1990) (arguing that the state should have been found responsible for the harm that the parent in *DeShaney* inflicted on his child because "it was the monopoly created by the legal structure in *DeShaney* that made the plaintiff peculiarly vulnerable").

177. Completing the analogy in the case of religious group leaders would require adding a legal provision denying followers a right to exit from the group.

178. See *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (noting "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.") (quoting *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972) (footnote omitted)).

education codes that leave some schools unregulated violate this principle. If children in religious schools receive a secular education inferior to that in the local public school, or incur harms from which public school students are protected, it is a result not of their own choice, but rather of the state empowering their parents to deny them the benefits that public school students receive.

These features that distinguish regulation of education from regulation of the internal practices of government also render the failure to regulate religious schools, under any scheme of state regulation, closely analogous to religious exemptions from compulsory immunization laws. In both cases, the state guarantees an important benefit—in one case protection from disease, in the other case a quality education in an environment free of certain harmful practices—to children generally, and stands prepared to deliver that benefit itself. Then, however, the state denies that guarantee to a certain class of children—those whose parents decide that they should not have the benefit. That state action is critically involved in both instances becomes even clearer when one recognizes that the state stands ready to prevent its own officials or private parties other than the parents from acting to secure the statutory benefit for the children who fall into this legally created class.¹⁷⁹

The overall effect of state law governing education is thus to create an absolute bar to a certain class of children receiving a quality education free from harmful practices that the state proscribes in most schools.¹⁸⁰ As such, this situation is different from those in which states, prior to 1976, left private elementary and secondary schools free to engage in racially discriminatory admissions practices, which

179. With respect to state regulations restricted in scope to public schools, this class includes more than just children of religious objectors, encompassing also children whose parents choose for other reasons to enroll them in a school not covered by the regulations.

180. Cf. *Deshaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 210 (1989) (Brennan, J., dissenting) ("Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of [his father's] violent home until such time as [the state's child protection agency] took action to remove him."); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that a state's refusal to give Medicaid for nontherapeutic abortions does not impinge upon a fundamental right because it "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion"). Strauss observes:

The fact that the state has placed someone in the custody of a private party instead of in the custody of a state employee has no bearing on whether the state has placed the person in danger or has cut off that person's sources of private aid. And it is pointless, and probably meaningless, to ask whether an infant is in a family against his or her will.

Strauss, *supra* note 176, at 66.

courts found not to constitute state action.¹⁸¹ Parents of a child denied admission to such a school readily could, and were motivated to, secure an alternative avenue for obtaining the state-guaranteed benefit at stake, which was simply an education in some school.¹⁸² In contrast, from the standpoint of a child who is *in* a school that, for example, teaches her that she is by virtue of her gender an inferior human being, the state is ultimately responsible for the fact that she is in that school rather than some other, and for the fact that she is subjected to subordination-producing socialization rather than receiving an education that treats her as an equal human being—a benefit that the state guarantees other children.¹⁸³

State non-regulation of religious schools is also similar in relevant ways to the situation the Supreme Court addressed in *Plyler v. Doe*.¹⁸⁴ That case involved Texas state laws that failed to extend the benefit of a free public education to undocumented alien children¹⁸⁵—arguably state inaction—rather than affirmatively and directly harming these children in some way. The Court held that

181. See, e.g., *Norwood v. Harrison*, 413 U.S. 455, 457-58, 469 (1973). Courts did find, however, that state aid to such schools was state action subject to challenge under the Equal Protection Clause. See *infra* notes 195-99 and accompanying text. The Supreme Court held in 1976 that racially discriminatory private school admissions policies violate federal civil rights legislation. *Runyon v. McCrary*, 427 U.S. 160, 186 (1976).

182. See *Evans v. Newton*, 382 U.S. 296, 321 (1966) (Harlan, J., dissenting) ("Like parks, there are normally alternatives for those shut out" from racially discriminatory schools). Contrast this situation with one in which the parents of a black child wished, for whatever reason, to send the child to an overtly racist private school (say, for example, if white adoptive parents of a black child converted to a religion that preaches white supremacy). By authorizing the parents to choose that form of schooling for the child, the state would effectively create an absolute obstacle to that child receiving the protection from discrimination that the state guarantees to children whose parents choose a public school education for them. The freedom of private schools to discriminate in admissions is grounded, perhaps nonsensically, in the constitutional right of free association; individuals (parents? children?) have the right to choose not to associate with any other individuals or class of individuals. See *Norwood*, 413 U.S. at 469. To suggest that a young girl in a fundamentalist or Jewish Orthodox school exercises a right of free association by attending that school, or that she freely chooses to associate on the terms of association (such as subordination of females) that characterize such a school, would be ludicrous.

183. Finding state action in this context would therefore not require finding it also whenever the state fails to apply to private provision of services or goods regulations it applies to its own provision of those benefits, since a person who is legally and practically capable of choosing between the two sources of benefits properly bears responsibility if he chooses the private source knowing that its benefits are inferior.

184. 457 U.S. 202, 206 (1982). A fuller discussion of this case appears *infra* at notes 297-302 and accompanying text.

185. Specifically, the laws prevented school districts from receiving state funds for the education of children not legally admitted into this country, and authorized school districts to deny these children enrollment in their public schools. *Plyler*, 457 U.S. at 205.

these laws violated the equal protection rights of these children.¹⁸⁶ The *Plyler* opinion does not suggest that excluding undocumented alien children from the scope of the state legislation guaranteeing children an education might be just inaction on the part of the State, and so immune from constitutional challenge. The ultimate effect of the laws was to prevent many children living in Texas from receiving any education. Likewise, a court should find that a state's limiting of protections against harmful practices such as sex discrimination and sex bias to students in public schools, or to students in schools receiving government assistance, is state action subject to judicial scrutiny under the Equal Protection Clause.

2. State Encouragement of Discriminatory Private Conduct

Anti-sexism laws written to apply only to public schools satisfy the state action requirement in an additional way. In some situations, private discrimination gives rise to a Fourteenth Amendment claim, when a state effectively encourages private parties to engage in discrimination. Encouragement of private discrimination constitutes reviewable state action because " 'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.' "¹⁸⁷ While it might seem on the surface that states are simply indifferent to the sexist practices of some religious schools, in fact they do effectively encourage gender discrimination and gender bias in private schools by excluding these schools

186. *Id.* at 230.

187. *Norwood v. Harrison*, 413 U.S. 465, 465 (1973) (citation omitted). In *Gilmore v. Montgomery*, 417 U.S. 556, 575-76 (1974) (holding that city may not give exclusive-use park permit to racially discriminatory private schools), the Court stated: "The Constitutional obligation of the State 'requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.' " *Id.* at 569 (citation omitted). For a lucid analysis of Supreme Court decisions articulating the encouragement rationale, see Snyder, *supra* note 171, at 1069-76. Also underlying the encouragement rationale may be the same understanding manifested in Establishment Clause jurisprudence—that state endorsement of private conduct or expression substantially increases the coercive effect of such conduct or expression on other individuals. When states give support to conservative religious groups, the concern arises that private citizens, including children within these groups, might perceive the state to be endorsing the views of those groups, including beliefs as to the proper worth and role of women relative to men. Cf. *Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2494 (1994) (holding that state statute creating special school district following village lines for a religious enclave incorporated as a village to exclude all but its practitioners violated the Establishment Clause of the First Amendment).

from the coverage of anti-sexism laws while at the same time providing them with various forms of state aid.

A state's failure to voice explicit support for discriminatory practices of private schools is not determinative for state action purposes.¹⁸⁸ Nor need the state intend to promote such practices,¹⁸⁹ and its assistance need not be a controlling factor in private parties' decisions to engage in such practices.¹⁹⁰ It is sufficient that the state gives assistance to these schools of a kind that is "provided only in connection with schools,"¹⁹¹ and that it "significantly aid"¹⁹² or have "a significant tendency to facilitate, reinforce, and support private discrimination."¹⁹³

What counts as assistance for purposes of the encouragement rationale is not entirely clear from Supreme Court decisions.¹⁹⁴ *Norwood v. Harrison*¹⁹⁵ held that providing textbooks to children attending schools with racially exclusive admissions policies amounts to state encouragement of such discrimination. In reaching this decision, the Court at times emphasized the tangible nature of

188. See *Gilmore*, 417 U.S. at 575-76 (White, J., concurring):

Under *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), it is perfectly clear that to violate the Equal Protection Clause the State itself need not make, advise, or authorize the private decision to discriminate that involves the State in the practice of segregation or would appear to do so in the minds of ordinary citizens.

189. See *Norwood*, 413 U.S. at 460 (invalidating a statutory scheme to supply textbooks to private schools whether or not they engage in discriminatory practices, even though "the statutory scheme was not motivated by a desire to further racial segregation").

190. *Id.* at 465.

191. *Id.* The *Norwood* Court indicated that forms of assistance provided only in connection with schooling, and available from sources other than the state, such as textbooks and tuition grants, constitute state encouragement of private school practices, while "generalized services government might provide to schools in common with others," and that are available only from the government, such as police and fire protection, do not. *Id.*

192. *Id.* at 467.

193. *Id.* at 466.

194. Cf. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance."). Clearly, though, indirect aid—that is, aid going directly to students or parents of students who attend private schools, rather than to the schools themselves—can count as state assistance for purposes of the Equal Protection Clause. *Norwood*, 413 U.S. at 464 n.7. The *Norwood* Court rejected the direct/indirect distinction operative in Establishment Clause cases, holding that state aid that is permissible under the Establishment Clause may nevertheless be impermissible under the Equal Protection Clause. *Id.*

195. 413 U.S. at 471.

monetary and material benefits.¹⁹⁶ At other times, though, the *Norwood* Court spoke more generally of "significant aid"¹⁹⁷ and "state support . . . through any arrangement" for schools engaging in invidiously discriminatory practices.¹⁹⁸ Significantly, the Court also held that state aid may constitute encouragement for equal protection purposes even though it does not constitute promotion of religion for Establishment Clause purposes, as was the case with textbook loans to students.¹⁹⁹

All states in this country provide substantial material assistance to private schools, including religious schools, in direct and indirect ways.²⁰⁰ They do so indirectly by providing aid in the form of text-

196. *E.g., id.* at 463-64 ("Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves."); *id.* at 464 ("[T]he State by tangible aid in the form of textbooks thereby gives support."); *id.* at 466 (mentioning "the type of tangible financial aid here involved"); *id.* at 469 (mentioning "material aid from the State").

197. *Id.* at 467.

198. *Id.* at 464 n.7 (quoting *Cooper v. Aaron*, 358 U.S. 1, 19 (1958)).

199. *Id.*; see *Board of Educ. v. Allen*, 392 U.S. 236, 248-49 (1968) (holding that a loan of textbooks to parochial school students does not violate Establishment Clause).

200. *Developments in the Law—Religion and the State: IV. Government Aid to Private Religious Activity*, 100 HARV. L. REV. 1675, 1675 (1987). The Supreme Court has held that the Establishment Clause prohibits states from providing religious schools with on-site instructional services; some forms of instructional materials and equipment—such as maps, charts, films, and projecting, recording, and laboratory equipment; or bus transportation for field trips. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 380 (1985); *Wolman v. Walter*, 433 U.S. 229, 255 (1977); *Meek v. Pittenger*, 421 U.S. 349, 372 (1975). States also may not provide tuition reimbursement to parents who send their children to religious schools. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780-85 (1973). States may not make direct payments to religious schools except in very limited circumstances, such as to reimburse costs incurred in providing state-mandated services. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

States are constitutionally permitted to exempt religious schools from income and property taxes, *Walz v. Tax Comm'n*, 397 U.S. 664, 679 (1970), to allow parents of religious school students tax deductions for tuition, textbook, and school transportation expenses, *Mueller v. Allen*, 463 U.S. 388, 403-04 (1983), and to provide textbooks, *Wolman*, 433 U.S. at 238, off-premises remedial instruction, *id.* at 248, on-premises diagnostic speech and hearing services, *id.* at 244, on-premises sign-language interpreter services, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 6 (1993), and bus transportation between home and school to pupils in religious schools, *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

Thus far, no court has ever held that states are constitutionally required to provide any aid whatsoever to private schools or their students, see, e.g., *Cook v. Griffin*, 364 N.Y.S.2d 632, 638 (1975), though the Supreme Court's most recent decision concerning the Establishment Clause implications of aid to religious schools arguably lays the groundwork for such a holding in the future. *Zobrest*, 509 U.S. at 6, held that state provision of a sign language interpreter for a deaf student in a Catholic school does not violate the Establishment Clause. The Court found that providing benefits to all children regardless of the nature of the school they attend constitutes state neutrality toward religion, and

books, auxiliary services, school lunches, and transportation to private school pupils, and tax deductions for educational expenses to their parents.²⁰¹ Some localities have begun distributing vouchers that

thereby implied—no doubt, without realizing it—that failing to provide to children in parochial schools some benefits provided to children in other schools would constitute impermissible government hostility to religion.

Whether a state that provides assistance to some private schools should be required to provide it to all, and whether states should be required to aid all private schools so as to ensure children in them an education equivalent to that in public schools, are legitimate and interesting questions. In the cases cited above in which the Supreme Court held that a state may not give to religious schools certain forms of aid that it might permissibly give to non-religious schools, because to do so would promote religion and/or entangle the state in a religious practice, apparently no one thought to argue that this interpretation of the Establishment Clause is inconsistent with the Equal Protection Clause, insofar as it denies a state benefit to children consigned to religious schools. Of course, avoiding state entanglement in religion is a legitimate and important state interest (a naked preference for parents who choose a secular school for their children, on the other hand, is not), but whether denial of aid to religious schools is substantially related to this interest is debatable. If a state offers aid to all private schools, that in and of itself would not amount to state endorsement of religion, at least when there are a significant number of non-religious private schools in the state. *Cf. Zobrest*, 509 U.S. at 1 (concluding that providing service to all deaf children, regardless of nature of school attended, does not constitute unconstitutional aid to religion). Such aid may simply endorse high-quality education for children, and most forms of state aid to private schools do not entangle the state in the value decisions of school administrators.

The real problem with state aid to religious schools arises when a state exempts religious schools from regulations it applies to all other schools that it aids, or exempts all private schools from regulations it applies to public schools. Then the state appears to endorse the internal practices of the schools. The only ways for the state truly to treat all children equally are (1) to make public school attendance compulsory for all children (in contravention of *Pierce*) or (2) to ensure that all children in private schools receive an education of comparable quality to that given in public schools. The latter method might in fact require that states give aid to private schools, including religious schools, and would definitely require applying to all schools, including religious schools, all regulations applicable to public schools that are necessary to ensure quality and to prevent harm to children.

201. See, e.g., IND. CODE ANN. § 20-8.1-9-9.5 (Burns 1992) (reimbursements for textbooks and workbooks); MICH. STAT. ANN. § 15.41321 (Callaghan Supp. 1995) (transportation); MINN. STAT. ANN. § 123.935 (West 1993 & Supp. 1996) (requiring school districts to provide on request free health services and guidance and counseling services to nonpublic school students); N.Y. EDUC. LAW §§ 701.3, 712 (McKinney 1988 & Supp. 1996) (imposing duty on local school district officials to loan textbooks and library materials to pupils in nonpublic schools); *Huff v. Notre Dame High Sch.*, 456 F. Supp. 1145, 1147 (D. Conn. 1978) (describing federal, state, and local aid given, in the form of money and in-kind services, to Catholic high school in Connecticut); 72 Op. Att'y Gen. 422 (Ky. 1972) (concluding that state provision of school lunches for parochial schools did not violate state constitution). In addition to forms of aid statutorily mandated, some local school boards offer to religious schools all the assistance they are constitutionally permitted to give. See O'REILLY & GREEN, *supra* note 23, at 212.

For purposes of the encouragement rationale, whether state aid is directed to parents or to the schools should not matter, since parents and private school officials act

parents can use to pay tuition at private schools,²⁰² and these too provide indirect, but quite substantial, aid to private schools. States and the federal government also subsidize religious and other private schools in several direct ways. They give money outright to schools in some instances, to reimburse them for costs of compliance with state requirements such as standardized testing of students.²⁰³ Perhaps most importantly, private schools enjoy tax-exempt status, at least so long as they do not have racially discriminatory admission policies.²⁰⁴ This status spares these schools from income, social security, and unemployment taxes, and allows private donors to take a charitable deduction on their individual income, estate, and gift tax returns for contributions to the schools.²⁰⁵ Tax-exempt status thus constitutes a substantial government subsidy for private schools.²⁰⁶

cooperatively to establish and subject children to sexist instruction. State school-related aid to parents who send their children to private schools supports and encourages discrimination in these schools as much as does aid given directly to the schools.

202. See, e.g., WIS. STAT. ANN. § 119.23 (West 1991 & Supp. 1995) (authorizing vouchers for students attending non-sectarian private schools in Milwaukee); Fox Butterfield, *Tax Rebate in New Hampshire Town Poses Test for School-Choice Issue*, N.Y. TIMES, Jan. 30, 1991, at B6 (describing local ordinance in Epsom, New Hampshire granting property tax abatement to parents who send their child to a private high school, sectarian or non-sectarian).

203. O'REILLY & GREEN, *supra* note 23, at 268-69.

204. See I.R.C. § 501(c)(3) (1994); Treas. Reg. § 1.501(c)(3)-1 (as amended in 1990); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding IRS revocation of tax-exempt status of two private schools that had racially discriminatory admissions policies). Religious organizations sponsoring schools also enjoy tax-exempt status. See I.R.C. § 501(c)(3); cf. David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 919-20 (1991) (arguing that extension of tax-exempt status to racially discriminatory private institutions may constitute sufficient state support for the discriminatory private conduct to render it violative of the Equal Protection Clause).

205. See I.R.C. §§ 170(a)(1), (c)(2) (1994) (defining donations to religious institutions as charitable deductions for income tax purposes); I.R.C. § 2055(a)(2) (1994) (defining donations to religious institutions as charitable deductions for estate tax purposes); I.R.C. § 2522(a) (defining donations to religious institutions as charitable deductions for gift tax purposes); *Allen v. Wright*, 468 U.S. 737, 739-40, 746 n.14 (1984) (holding that African-American children in public schools and their parents lacked standing to challenge tax-exempt status of racially discriminatory private schools and describing the various benefits of tax-exempt status).

206. See *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983):

Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.

Id.; see also *Allen*, 468 U.S. at 773-74 (Brennan, J., dissenting) (stating that tax-exempt status for racially discriminatory private schools constitutes a subsidizing of the schools and their discriminatory practices); *id.* at 784-88 (Stevens, J., dissenting) (same); *Green v.*

Under the *Norwood* rationale, such aid amounts to encouragement of any discriminatory practices of private schools that the states do not prohibit. Indeed the very purpose of conferring tax exempt status on an entity is to support activities that the government deems beneficial to society, that the government endorses.²⁰⁷ If state and federal governments wished not to encourage sexist practices in religious schools, therefore, they should withhold tax-exempt status, and all other state-conferred benefits, from schools that engage in such practices, just as they do with respect to racially discriminatory practices. A suit on behalf of students in religious schools that receive state aid, on the basis of the discriminatory practices at those schools, should therefore be able to rely successfully on the encouragement rationale of state action.

Many religious schools, though, refuse more overt forms of state financial assistance, such as textbook loans, even in forms permissible under the Establishment Clause, precisely because they do not wish to comply with state regulations that do apply to all schools receiving such state aid.²⁰⁸ One might argue, however, that even if a school accepted no financial assistance whatsoever, not even tax-exempt status, the encouragement rationale would still be applicable to any sexist practices it might have, because the mere *offer* of aid to private schools, without a demand that any school receiving that aid comply with anti-sexism mandates, encourages these schools to engage in sexist practices. In other words, by restricting the scope of its anti-sexism laws to public schools, while at the same time *offering* to

Kennedy, 309 F. Supp. 1127, 1134-36 (D.D.C.), (finding that tax-exempt status was critically important to the ability of racially discriminatory private schools to succeed), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

207. See *Allen*, 468 U.S. at 773 (Brennan, J., dissenting) ("[T]he existence of a federal tax exemption amounts to a federal stamp of approval which facilitates fund raising on behalf of racially segregated private schools."); *id.* at 783-84 (Stevens, J., dissenting) (describing tax-exempt status for racially discriminatory private schools as "an official policy of encouraging white children to attend nonpublic schools"); *Bob Jones Univ.*, 461 U.S. at 587 n.10 (stating that a tax exemption has the "basic goal of encouraging the development of certain organizations").

208. This is not true of all such schools, of course. There is a division among fundamentalist Christian educators now about whether to support school voucher proposals. See MENENDEZ, *supra* note 71, at 5 (noting that many fundamentalist Christian school administrators, advocates, and patrons are mounting political campaigns to get school voucher plans passed). While vouchers would certainly help the schools financially, recent experience in California suggests that voters are not likely to approve voucher plans that do not also increase state regulation of the private schools that would receive the vouchers. See Cynthia Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 174*, 31 CAL. W. L. REV. 193, 204-05 (1995).

religious and other private schools aid in the form of tax-exempt status, textbooks, bus transportation, and other services, a state encourages these schools to engage in discriminatory conduct just as much if the schools decline the aid as if they accept it. In either case, the state implicitly sends a message that it deems it acceptable for private schools to engage in such conduct. *Norwood's* rationale of encouragement should therefore mean that a state's failure to require private schools, religious or otherwise, to comply with anti-discrimination laws in order to receive tangible state aid, constitutes state action.

In addition, the encouragement rationale might be extended to apply when the state provides less obvious, but nevertheless tangible, forms of aid. For example, mere exemption from some regulations applicable to public schools, such as teacher certification or curricular requirements, creates a tangible benefit, since private schools would otherwise have to expend funds to comply with those regulations. Of course, a failure to impose costs rather than a provision of overt benefits *looks* more like state abstention from, rather than involvement in, private behavior. The distinction is only apparent, however, not real, particularly since the state imposes these costs on similar enterprises.

Religious schools also receive important non-financial, education-related benefits from the state. In particular, many receive the benefit of state approval or certification, which in some states is a *sine qua non* for operation²⁰⁹ and in other states enhances a school's public image.²¹⁰ Insofar as accreditation implies state endorsement, it not only constitutes a benefit to private schools but also, in an even more direct sense, constitutes encouragement to those schools to continue doing whatever they are doing. By approving and certifying private

209. See *supra* notes 65-66 and accompanying text; cf. *Evans v. Newton*, 382 U.S. 296, 301-02 (1966) (holding that racial discrimination by court-appointed private trustees of a public park is state action).

210. School certification is a state monopoly, and in that respect it is unlike the provision of textbooks or tuition grants. See *Norwood v. Harrison*, 413 U.S. 455, 465 (1973). How this distinction could be relevant to the supportive or encouraging quality of state action, however, is difficult to see. The *Norwood* Court's distinction between assistance "provided only in connection with schools" and "generalized services government might provide to schools in common with others," *id.*, a distinction the Court has relied upon in the Establishment Clause context as well, must be the controlling distinction. School certification is quite obviously a benefit provided only to schools. In contrast, the state's guarantee of police and fire protection to private schools does not constitute state encouragement, since it is a type of benefit the state provides to all businesses and individuals.

schools that engage in sexist practices and granting parents a right to choose to put their children in those schools, while deliberately leaving these schools outside the scope of prohibitions against sexist education, the state effectively confers its imprimatur upon these schools *and* their sexist practices, and thereby encourages these schools to continue those practices.²¹¹ The message to parents and religious leaders is that while state institutions must conform to majoritarian norms regarding gender equity, the state condones and supports private institutions' departure from these norms in educating children. If states did not wish to send this message, they should impose the majoritarian norms on private child-rearing institutions or refuse to license or give aid of any kind to private institutions that violate these norms.

States thus provide assistance to religious schools in many forms, direct and indirect, and thereby also implicitly encourage any pedagogical practices at those schools that state laws do not prohibit. On this basis, too, then, a court should conclude that a state's failure to prohibit sex discrimination in religious schools is actionable under the Equal Protection Clause.²¹² As a remedy, a court might order

211. Cf. *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (attributing private racial discrimination to a state where state constitutional provision explicitly granted property owners a right to discriminate in the sale, lease, or rental of their property because that provision would "significantly encourage and involve the State in private discriminations"); *Snyder*, *supra* note 171, at 1074-76 (arguing that state encouragement of private action by creating a legally enforceable right to undertake that action should result in state responsibility for the consequences of that action).

212. One final conceptual approach to showing state action in the case of sexist practices in religious schools would be to argue that because private schools perform a public function under authority delegated by the states, their internal practices, including any gender discrimination, are actually state actions. While this approach might be theoretically sound, it would be most unlikely to succeed in actual litigation. The Supreme Court has treated conduct by private parties as state action when it was closely related to a practice that was traditionally an exclusively state function, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-28 (1991) (holding that private litigants' use of peremptory challenge in civil trial to exclude jurors on basis of race violated equal protection rights of excluded jurors); *Smith v. Allwright*, 321 U.S. 649, 660 (1944) ("[S]tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State."), or where the private conduct took place on state property and was closely related to a state operation, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-26 (1961) (holding that private lessee of part of a publicly owned and operated parking garage was required to comply with the Fourteenth Amendment in operation of a restaurant located on the premises). Courts have rejected, however, arguments that employment, admissions, and disciplinary practices of private schools constitute state action, primarily because the state does not endeavor to regulate these aspects of private schools and because no private school has a monopoly over education. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (holding

a state to extend its regulations universally, or it might require a state to revoke its approval of, or withdraw all direct and indirect forms of financial assistance from, a school that engages in sexist practices, on the basis that granting any of these benefits to such a school in and of itself encourages the school to engage in sexist practices.²¹³

that private school's firing of teachers for expressing certain views was not state action, in part because "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters"); *Huff v. Notre Dame High Sch.*, 456 F. Supp. 1145, 1146-50 (D. Conn. 1978) (holding that Catholic high school's disciplinary expulsion of student was not state action); *Family Forum v. Archdiocese of Detroit*, 347 F. Supp. 1167, 1170-73 (E.D. Mich. 1972) (holding that Catholic high school's racially discriminatory decision regarding hiring of a principal was not state action); *Penny v. Kalamazoo Christian High Sch. Ass'n*, 210 N.W.2d 893, 896 (Mich. Ct. App. 1973) (holding that private school's refusal to enroll plaintiff's child was not state action and noting that "[d]efendant does not operate the only high school in the . . . area").

While these decisions do not analytically foreclose an argument that pedagogical practices of private schools are state action, since states do undertake to regulate these practices to some degree and since a school does have a monopoly over a child's education, from her perspective, once her parents enroll her, the notion that private schooling is outside the public domain is deeply ingrained. See, e.g., *Evans*, 382 U.S. at 302 (stating that while parks are "plainly in the public domain," schools are "in the private sector"). Justices Marshall and Brennan endorsed the view that private school internal practices could sometimes be regarded as state action, see *Rendell-Baker*, 457 U.S. at 851 (Marshall, J., dissenting) ("[A]ctions directly affecting the students could be treated as under color of state law, since the school is fulfilling the State's obligations to those children."), but none of the present members of the Court take as expansive a view of the judicial role in protecting individuals from harmful private exercises of legal power. In any event, if the state is sufficiently implicated in the practices of private schools to support a case for characterizing school officials as state actors, then the state's involvement would likely also amount to encouragement of the private discrimination, which is sufficient to satisfy the state action requirement. See *supra* notes 187-211 and accompanying text.

213. Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (finding no free exercise violation when federal government denied tax-exempt status to religious academic institution that practiced racial discrimination); *Gilmore v. City of Montgomery*, 417 U.S. 556, 566-69 (1974) (enjoining city from granting exclusive access to public recreational facilities to racially segregated private schools); *Norwood*, 413 U.S. at 463-67 (ordering state to cease providing textbooks to private schools with racially discriminatory admissions policies and noting that the Supreme Court "has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools"); *Pitts v. Department of Revenue*, 333 F. Supp. 662 (E.D. Wis. 1971) (enjoining state from granting tax exempt status to organizations with racially discriminatory membership policies on basis of encouragement rationale).

One might also challenge the tax-exempt status of religious schools that engage in gender discrimination on statutory grounds, arguing that the Internal Revenue Code requires denial of tax-exempt status to such schools. Cf. *Bob Jones Univ.*, 461 U.S. at 595-96 (holding that proper interpretation of § 501(c)(3) of the Internal Revenue Code would exclude racially discriminatory private schools, because such discrimination is contrary to public policy and such schools do not provide "beneficial and stabilizing influences in community life" nor a "public benefit within the 'charitable' concept"); *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.) (holding that private schools with racially

Reaching the conclusion that non-regulation of religious schools constitutes state action, one might object, leaves the states' entire scheme of school regulation open to constitutional challenge, and so raises the concern that it might require that states impose all the same regulations on all private schools that they impose on public schools, thereby eviscerating the distinction between public and private education in this country.²¹⁴ This concern, however, is both overstated and irrelevant. It is overstated because for an equal protection claim to succeed, plaintiffs would also have to show that children in religious schools suffer harm as a result of a state not extending some regulation universally and that the state lacks an adequate rationale for failing to do so. Therefore, states might permissibly give religious schools greater operational and instructional freedom than they give public schools, so long as doing so causes no harm to religious school pupils or so long as it serves a sufficient state purpose. As noted in Part I, there is no reason to believe that a religious school would be unable to maintain a distinctively religious character even if it were subject to all of the statutory regulations to which public schools are now subject. Moreover, this concern is also irrelevant, because if the constitutional right of children to equal protection of the laws requires that states eviscerate all significant distinctions between public and non-public schools, then *ex hypothesi* they have no sufficient reason for not doing so.

B. *Intentional Discrimination*

To constitute a violation of the Equal Protection Clause, challenged state action must involve intentional²¹⁵ discrimination between similarly situated²¹⁶ classes of persons. Laws that

discriminatory admissions policies are not entitled to tax exempt status, and that donations to such schools thus cannot qualify as charitable deductions), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971); Dean Pappas, Note, *The Independent Sector and the Tax Laws: Defining Charity in an Ideal Democracy*, 64 S. CAL. L. REV. 461, 474 (1991) (noting that "charitable organization" tax exemption presumes that exempt organizations are in fact charitable and do not engage in practices contrary to important public policies).

214. In *State v. Whisner*, 351 N.E.2d 750 (Ohio 1976), the Ohio Supreme Court emphasized this concern that extensive regulation of private schools would render them indistinguishable from public schools. *Id.* at 768.

215. See *Washington v. Davis*, 426 U.S. 229, 244-45 (1976).

216. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 447-50 (1985) (holding that a zoning ordinance requiring a special permit only for group homes for the mentally retarded is not rationally related to a legitimate state interest); *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981) (upholding military draft registration applicable to males and not females, the Court stated: "The Constitution requires that Congress treat similarly

discriminate on their face between similarly situated classes of persons clearly suffice to establish the intent element of an equal protection claim.²¹⁷ Importantly, discrimination need not be motivated by a desire to harm the disadvantaged group in order to run afoul of the Fourteenth Amendment. Certainly legislators do not affirmatively desire that certain children not receive appropriate medical care or schooling. But a government that is simply blind or indifferent to the suffering of the members of a disadvantaged group also denies equal protection,²¹⁸ and this appears to be the case with religious exemptions to child welfare and education laws.

With respect to this element, immunization laws again provide the easier case. These laws explicitly deny a particular subgroup of children—those whose parents have a particular set of religious beliefs—the benefit of compulsory immunization. By this *de jure* classification, states unquestionably discriminate purposefully (even though not maliciously) among groups of children based upon their parents' religious beliefs. Those whose parents do not have religious beliefs opposed to immunization must receive the specified vaccina-

situated persons similarly, not that it engage in gestures of superficial equality"); *Reed v. Reed*, 404 U.S. 71, 75 (1971) (invalidating law preferring males to females when two persons of opposite sex are otherwise equally entitled to be administrator of an estate but stating that "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways").

217. Disparate impact from a facially neutral law, in contrast, though not sufficient in and of itself to demonstrate a discriminatory purpose, may constitute evidence that such a purpose underlies the law. *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993) ("[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race."); *Washington*, 426 U.S. at 241. The discriminatory purpose, moreover, need not be the only purpose on which the law rests. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

218. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1516-20 (2d ed. 1988). The Supreme Court's willingness to strike down affirmative action programs on equal protection grounds makes clear that even "benign" classifications lacking malicious discriminatory intent can violate the Equal Protection Clause. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (invalidating state nursing school policy of excluding males). In *Hogan* the Court explained that a

"benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." The same searching analysis must be made, regardless of whether the State's objective is to eliminate family controversy, to achieve administrative efficiency, or to balance the burdens borne by males and females.

Id. (citations omitted).

tions.²¹⁹ Those whose parents do have religious beliefs opposed to immunizations, on the other hand, need not receive those vaccinations.

The two classes of children, furthermore, clearly are similarly situated with respect to the underlying purpose of immunization laws. All children in this country, regardless of their parents' religious beliefs, are at greater risk of contracting certain serious diseases if not vaccinated against them, and will suffer and possibly die if they do contract one of these diseases.²²⁰ In fact, children of parents whose religious objection to vaccination extends also to all other forms of medical care have an even *greater* need than other children of receiving vaccinations. They are likely to suffer to a greater extent than other children if they do contract a disease, given the likelihood that their parents would not seek palliative or curative medical treatment for them, but would instead rely exclusively on prayer.²²¹

219. Significantly, no compulsory immunization laws exempt parents who have scientific/medical beliefs opposed to vaccination, even though parents might reasonably be concerned about adverse side effects and doubt the need for certain vaccines and may believe that alternative medical approaches to preventing disease are superior. See *supra* notes 140-42, 146. States give no weight in this context to parents' views about what is best for the physical health of their children, but decisive weight to parents' beliefs about divine commands and childrens' spiritual well-being.

220. Cf. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973) (invalidating exclusion of families containing illegitimate children from state welfare program and arguing that "the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate"); *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("Government must exercise [its] powers so as not to discriminate between [its] inhabitants except upon some reasonable differentiation *fairly related to the object of regulation*." (emphasis added)). Courts typically find two classes of persons are not similarly situated when they believe the "disfavored" group may actually need special favorable treatment because of some diminished ability. See, e.g., *Cleburne*, 473 U.S. at 444-45. If children of religious objectors have a need for special treatment, it is for *greater* state supervision and control over their health care rather than less.

Some children might be somewhat less in need of vaccination than the average child if their parents, as part of their religious way of life, provide other forms of protection against disease that most children do not receive—perhaps, for example, a special, immunity-boosting diet. However, what makes these children dissimilarly situated is not the beliefs of their parents that are opposed to vaccination, but rather their parents' alternative health-promoting actions, which other parents might also perform even without a religious motivation. An exemption for parents who undertake these alternative measures might therefore be warranted, but this fact cannot support an exemption tied to religious opposition to vaccination.

221. See Rosato, *supra* note 1, at 62 n.96 (citing news report of six children in Philadelphia who died of measles-related complications because their parents refused to vaccinate them and then refused to provide medical care after the children became ill). In *State v. Miskimens*, 490 N.E.2d 931 (Ohio Ct. C.P. 1984), the court invalidated a prayer treatment exemption to Ohio's child neglect law, explaining:

Schooling laws and regulations, in contrast to immunization laws, generally do not refer directly to groups of children who are covered or not covered, but instead refer to groups of schools: public schools versus private schools, or schools that receive state funding versus those that do not, or religious schools versus all other schools.²²² Reference to groups of schools, though, is in reality an indirect reference to groups of children, since children are effectively assigned to particular schools through a cooperative exercise of power by the state and their parents. Thus, prohibitions of sexist education that apply to some types of schools but not to others discriminate among readily identifiable groups of children—those whose parents have chosen (or have been constrained to accept) one type of school versus those whose parents have chosen another type of school for them. The same basic question therefore arises in connection with this form of discrimination as arose in *Plyler v. Doe* (the decision invalidating denial of education to children of illegal immigrants)—namely, why should any child suffer an educational deprivation because of her parents' choices?

As is the case with vaccinations, the religious beliefs of a child's parents are irrelevant to her inherent need for protection from sexist treatment and instruction, as well as to her need for an education that is in other ways beneficial rather than harmful.²²³ In fact, in the educational realm, just as in connection with immunization, children of religious objectors arguably require *greater* state protection than other children. For example, with respect to anti-sexism education laws, being the daughter of parents who have a religiously grounded belief that females are morally and socially inferior to males *increases* a child's need for non-sexist schooling to correct as much as possible

From what started as a common childhood illness, from what started as a simple, easily recognizable, well-known bacterial infection which responds to the most basic of modern antibiotics, and at his home located within a few blocks of a modern, well-equipped emergency hospital, which could have, in all likelihood, saved his life, Seth Miskimens died. First came illness, then more serious illness, then suffering, and then . . . after enduring for as long as he could the tremendous pain inherent in the multiple diseases that were attacking him, and then with a raging infection in his tiny chest, he weakened, he faltered, and he died.

Id. at 938.

222. See *supra* notes 60-75 and accompanying text.

223. Cf. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (stating that the " 'benefits of education are not reserved to those whose productive utilization of them is a certainty' ") (quoting *Doe v. Plyler*, 458 F. Supp. 569, 581 n.14 (E.D. Tex. 1978)); *Johnson v. Charles City Community Sch. Bd.*, 368 N.W.2d 74, 84, 85 (Iowa) (noting that children of fundamentalist Christians, unlike Amish children, "will have to compete with well-educated children" in a complex society), *cert. denied*, 474 U.S. 1033 (1985).

the harmful effect of this aspect of the parents' religious instruction of the child. A daughter of fundamentalist Christian or Orthodox Jewish parents is just as susceptible to suffering diminished self-esteem and the agony of thwarted life prospects as a result of sexist socialization as is the daughter of any other parents.²²⁴ And because she is likely to receive overt inculcation of sexist views at home from her parents, her need for some counteractive instruction in the opposing view that men and women are inherently equal is actually greater than that of other girls.²²⁵

With respect to the intended benefit of statutory prohibitions against sexist schooling, therefore, a court would have to treat children in the two classes created by those statutes—those in the covered schools and those in schools not covered—as similarly situated.²²⁶ Likewise, regarding regulations designed to ensure that children receive an adequate secular education, children whose parents choose to send them to a religious school, in whole or in part for religious reasons, arguably stand in greater need of state supervision than children attending a school that their parents chose for them solely because they thought it provided a superior secular

224. This would be true even if the career expectations of all members of the religious community are more circumscribed than those of persons outside the community, and even if female members of the community can be expected to remain voluntarily within the community without comparing their lives to those of persons outside it, since community females would still evaluate their life prospects relative to those of community males and according to community values, which by hypothesis are male-centric.

225. See Peterson & Lach, *supra* note 54, at 194-95 (summarizing research showing the ability of non-sexist instruction to overcome ingrained gender stereotyped attitudes in children, and showing a correlation between the amount of past exposure a child has to sexism and the amount of counteractive instruction she needs to overcome her sex-stereotyped outlook).

226. Subsection II.D.2 below considers whether the religious beliefs of parents renders the situation of the two groups of children under either the vaccination or education laws different in respects other than the underlying purpose of the laws. In particular, it considers whether, because of the religious opposition of certain parents to vaccination or to state regulation of their schools, state efforts to apply the laws to the children of those parents might so disrupt family life that, on the whole, the children would be better off if the state did not do so, thereby giving the state a legitimate and important interest in creating the religious exemptions.

education.²²⁷ The former case raises greater concern than the latter that the school chosen does not provide an adequate education.

If the state action in question is encouragement of private discrimination by providing state aid to religious schools that engage in sex discrimination and sexist instruction, then intentional discrimination is easily shown.²²⁸ In that case, the discrimination would be between children based on gender, rather than based on their parents' religious beliefs. Demonstration that boys and girls in these schools are similarly situated with respect to their need for self-esteem and treatment as equal persons would also be easy. Several lower courts have held analogously that racist aspects of the public school curriculum or environment constitute violations of the Equal Protection Clause, building on a premise that children of all races are similarly situated with respect to their need for self-esteem and treatment as equal persons.²²⁹

One must bear in mind at this point that the conclusion that the classes of children created by religious exemptions are similarly

227. Of course, some parents send their children to a public school simply because they cannot afford a private school, and some parents send their children to a religious school solely because that school provides an academically superior, and perhaps safer, learning environment than the local public school. In these cases, the parents' choices obviously would not support the stronger conclusion that children in religious schools need greater state protection. It would still be the case, however, that the children in the two types of schools are similarly situated in their need for quality education. If the schools of some religious communities are actually academically superior to public schools, and do not inflict any of the harms that school laws aim to prevent, then they should have no difficulty satisfying state quality standards. If they can do this without employing certified teachers, then an exemption to teacher certification requirements that is tied to alternative measures to ensure competent teaching might be appropriate, but their success cannot support a blanket exemption tied solely to religious orientation.

228. If this approach to making out a claim is taken, and if the relief sought is a denial of state aid to certain schools rather than an injunction requiring extension of anti-sexism legislation to cover all schools, representatives for children would have to seek that relief against specific schools and would have to show discriminatory practices in each of these individual schools. Courts probably would not assume that all schools run by a particular religious denomination engage in the discriminatory conduct and issue broadly applicable injunctions. See *Norwood v. Harrison*, 413 U.S. 455, 471 (1973) ("Relief on an assumption that all private schools were discriminating, thus foreclosing individualized consideration, would not be appropriate. . . . [T]he fact that some or even most may practice discrimination does not warrant blanket condemnation.").

229. See, e.g., *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1151-55 (N.D. Miss. 1980) (holding that state education officials' choice of textbook for public schools on basis of its less favorable portrayal of blacks than available alternative text denied equal protection to black students); *Smith v. St. Tammany Parish Sch. Bd.*, 316 F. Supp. 1174, 1176-77 (E.D. La. 1970) (holding that display of Confederate flag in principal's office of recently integrated public school denied equal protection to black students), *aff'd*, 448 F.2d 414 (5th Cir. 1971).

situated with respect to the underlying purposes of the child welfare and education laws does not determine the constitutionality of the exemptions. The discussion above raises concerns about religious freedom, church-state separation, toleration of minority religious practices, and possible adverse effects on children from forcing unwilling parents to conform to majoritarian norms. These concerns might support legitimate and important state purposes for having religious exemptions. The question whether the state can justify its classifications, however, is a later part of the analysis, coming after a showing that the classifications intentionally discriminate among persons who are similarly situated with respect to the underlying purposes of the laws. The discussion below seeks to answer that question.

C. *Level of Scrutiny*

Having established that children of religious objectors suffer from intentional discriminatory state action, the next question is how rigorously a court should scrutinize that state action. Are legislative decisions entitled to substantial deference from the judicial branch in these difficult areas of conflict between mainstream and minority values? Or is the situation of the children involved, or the nature of their interests that are at stake, such that courts should be especially vigilant to protect them against unfavorable outcomes of the political process?

"Level of scrutiny" refers to the burden of justification that courts impose on the state once a plaintiff demonstrates discriminatory state action. This is the most exhaustively discussed element of equal protection jurisprudence because the degree of burden that a court imposes controls the outcome in the vast majority of cases.²³⁰ The prevailing view today recognizes roughly three

230. Some members of the Supreme Court have asserted that the Court's equal protection cases do not reveal clear-cut levels of scrutiny, but rather manifest a spectrum of degrees of intensity of review. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring); *id.* at 460 (Marshall, J., concurring in the judgment in part and dissenting in part); *see also* DARIEN A. MCWHIRTER, *EQUAL PROTECTION 8* (1995) (contending that the Court has developed a "sliding scale of analysis"). Nevertheless, most members of the Court and most legal commentators today continue to think about equal protection scrutiny in terms of levels or categories, perhaps because it is more convincing to argue in terms of clear categories, while avowedly *ad hoc* reasoning appears overly subjective and arbitrary. The discussion of this section follows the purportedly more objective mode of arguing for application of a particular level of scrutiny to the legislation at issue.

levels of scrutiny.²³¹ The most demanding, pro-plaintiff level is "strict scrutiny," which proceeds from a presumption that the challenged state action is unconstitutional and imposes on the state the burden of showing that its action is necessary to achieve a compelling state interest.²³² States almost never win when strict scrutiny applies.²³³ At the other extreme, the least demanding, most pro-state level of scrutiny is "rationality review" or "rational basis review." It proceeds from a presumption that the challenged state action is constitutional and requires a person challenging that action to show that it bears no rational relation to any conceivable, legitimate state purpose.²³⁴ Plaintiffs almost never win when rationality review applies.²³⁵

Between these two extremes lies the somewhat amorphous "intermediate scrutiny." Some Supreme Court decisions suggest the existence of two levels of intermediate scrutiny. The more demanding of the two, which has been called "heightened scrutiny," requires the state to demonstrate that its action is substantially related to a state interest that is both legitimate and "important,"²³⁶ or "substan-

231. See Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools*, 74 CORNELL L. REV. 1078, 1087-89 (1989).

232. See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626-32 (1969).

233. See WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 1225 (7th ed. 1991); MCWHIRTER, *supra* note 230, at 145.

234. See *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2642-43 (1993); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 463 (1988) (stating that "those challenging the legislative judgment must convince us 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker,' " and explaining that plaintiff bears the " 'heavy burden' of demonstrating that the challenged statute is both arbitrary and irrational"); *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) (upholding city ordinance banning pushcart food vendors in French Quarter unless they had operated there for at least eight years and stating "[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment," and that the city could rationally have decided newer businesses had less reliance interest in continued operation in certain area and that older businesses could have become part of the local culture).

235. See LOCKHART ET AL., *supra* note 233, at 1211 (citing the few exceptions to this rule); MCWHIRTER, *supra* note 230, at 145; Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 40-41 (1992) (noting that rational basis cases are commonly dismissed at the motion to dismiss or summary judgment stage); *id.* at 66 n.362 (noting that the Supreme Court has decided in favor of a plaintiff under rational basis review only once since 1985, but citing several recent pro-plaintiff lower federal court decisions).

236. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) ("[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for

tial."²³⁷ The less demanding, which the Court has referred to as "somewhat heightened review," requires the state to demonstrate that its action is substantially related to a merely legitimate state interest.²³⁸ Unfortunately, some Supreme Court decisions are unclear as to whether they are applying one of these levels of intermediate scrutiny rather than mere rationality review, and as to what factors trigger some form of heightened review.²³⁹ At times the Court has effectively applied intermediate scrutiny while claiming to apply deferential rationality review.²⁴⁰

The appropriate level of scrutiny depends on two factors: First, whether the class of persons adversely affected by discriminatory state action is a "suspect" or "quasi-suspect" class and, second, whether the state action infringes upon a constitutionally-protected fundamental right or an interest of the disadvantaged class that the Court has deemed "important." Either a suspect class or a fundamental right triggers strict scrutiny.²⁴¹ The Supreme Court has consistently applied some form of intermediate scrutiny when the class adversely affected is one it deems quasi-suspect—for example, gender or illegitimacy.²⁴² The Court has become less willing in recent years to apply heightened scrutiny when an important interest is at stake but the disadvantaged class is not one the Court has recognized as quasi-suspect,²⁴³ although it has never explicitly foreclosed the possibility that it will do so. When the affected class is neither suspect nor

the classification."); *Craig v. Boren*, 429 U.S. 190, 197-204 (1976) (invalidating state law creating different legal drinking ages for men and women).

237. See *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982).

238. See *Cleburne*, 473 U.S. at 441.

239. See *id.* at 460 (Marshall, J., concurring in the judgment in part and dissenting in part) ("[T]he Court provides no principled foundation for determining when more searching inquiry is to be invoked.").

240. See *id.* at 458 (Marshall, J., concurring in the judgment in part and dissenting in part).

241. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (stating that denial of welfare benefits to new residents burdens fundamental right to travel and so triggers strict scrutiny).

242. See *infra* note 248 and accompanying text.

243. Compare *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459-60 (1988) (declining to apply heightened scrutiny to statutory scheme of fees for school transportation) and *Lyng v. International Union, United Auto., Aerospace, & Agric. Implement Workers, UAW*, 485 U.S. 360, 370 (1988) (declining to apply heightened scrutiny to denial of food stamps to households of striking workers) with *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (applying heightened review to denial of free education to children of illegal immigrants). But cf. *Biegel*, *supra* note 231, at 1098-99 (arguing that absence of perceivable harm in *Kadrmas* likely motivated Court not to apply *Plyler's* heightened review approach).

quasi-suspect and the state action neither infringes a fundamental right nor impairs an important interest, rational review applies.²⁴⁴

1. Suspect or Quasi-suspect Class

In a suit directly challenging sex discrimination practices in religious schools, on the theory that the state encourages these practices, the class discriminated against is one based on gender. Since gender is a quasi-suspect class, heightened scrutiny would clearly apply. In a suit challenging religious exemptions to child healthcare laws or the failure of states to extend important regulations to religious schools, on the other hand, the class discriminated against would be one based on parents' religious beliefs. Whether a class of children identifiable by the religious beliefs of their parents constitutes a group deserving of special judicial protection (that is, is suspect or quasi-suspect) is an entirely novel legal question, because no one has ever brought an equal protection suit on behalf of such a group. Most likely, few, if any, people have ever considered this question outside the context of litigation either. Yet, as shown above, state and federal laws routinely discriminate in the provision of benefits on the basis of such a classification, to the detriment of these children, so it is a question that needs to be asked.

The discussion below reveals that such a classification does in fact substantially satisfy all of the criteria on which the Supreme Court has relied in the past to identify suspect and quasi-suspect classifications,²⁴⁵ a conclusion many will no doubt find surprising. Accordingly, if someone were to bring an equal protection claim on behalf of children who do not receive vaccinations because of their parents' religious objections, or on behalf of students in religious schools, the courts should conclude that these children constitute at least a quasi-suspect class and apply heightened scrutiny to laws that single them out for lesser protection.

244. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-70 (1981) (upholding statute prohibiting sale of milk in plastic containers); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-79 (1980) (upholding statutory provision denying duplicate retirement benefits for persons who were no longer active railroad workers or union members, but allowing them for those still active); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587-94 (1979) (upholding city transit regulation excluding from employment all persons receiving methadone maintenance treatment for heroin addiction).

245. For enumeration of these criteria, see *infra* notes 252-55 and accompanying text.

The Supreme Court has thus far designated as suspect only classifications based on race or national origin²⁴⁶ and has expressed reluctance to expand this designation beyond these two categories.²⁴⁷ The Court has expressly deemed quasi-suspect those classifications based on illegitimacy or gender.²⁴⁸ The courts' application of heightened scrutiny to classifications based on illegitimacy is of particular significance here, since it reflects judicial recognition of our society's unjust tendency to visit suffering on children based on conduct of their parents that society regards unfavorably—something over which the children have no control.²⁴⁹ The Court manifested

246. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule [of rationality review] gives way . . . when a statute classifies by race, alienage, or national origin. . . . [T]hese laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (invalidating state law prohibiting interracial marriage); *Oyama v. California*, 332 U.S. 633, 646-47 (1948) (invalidating state law forbidding aliens ineligible for American citizenship to acquire, own, occupy, lease, or transfer agricultural land).

247. See Matthew Poppe, Note, *Defining the Scope of the Equal Protection Clause with Respect to Welfare Waiting Periods*, 61 U. CHI. L. REV. 291, 310, 314 n.158 (1994).

248. See *Clark v. Jeter*, 486 U.S. 456, 461-65 (1988) (invalidating a state statute of limitations requiring that legal actions to establish parentage of an illegitimate child must be brought within six years of the child's birth); *Pickett v. Brown*, 462 U.S. 1, 7-18 (1983) (invalidating state law requiring paternity suits to be brought within two years of birth); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (stating that classification based on gender must be substantially related to important governmental interest); *Mills v. Habluetzel*, 456 U.S. 91, 98-99 (1982) (holding that classification based on illegitimacy must be "substantially related to a legitimate state interest"); *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objections and must be substantially related to achievement of these objectives.").

249. See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) ("State may [not] attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."); *King v. Smith*, 392 U.S. 309, 336 (1968) (Douglas, J., concurring) ("[T]he immorality of the mother has no rational connection with the need of her children under any welfare program."). In *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972), the Court stated:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing 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.

Id. at 175; see also Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992) (arguing that the principle that children should not have to suffer for the immoral or unlawful acts of their parents is embedded in the United States Constitution, and that classifications of children on the basis of such parental conduct should be subject to heightened scrutiny under the Equal Protection Clause).

this same recognition in applying heightened scrutiny in *Plyler v. Doe*²⁵⁰ to a law adversely affecting undocumented alien children, whom the Court described at one point as “children not accountable for their disabling status.”²⁵¹ A major thrust of this Article is that it is just as unjust to visit suffering on children based on their parents’ “pieties” as it is to visit suffering on them based on their parents’ “sins,” since children are in both cases wholly unaccountable for their disabling status.

The Court has reached its conclusions as to what constitutes a suspect or quasi-suspect class by considering a number of factors: (1) the likelihood that the defining characteristics could ever be relevant to a legitimate state purpose,²⁵² (2) the presence of a history of purposefully unequal treatment,²⁵³ (3) the ability of the disadvantaged group to affect the political process,²⁵⁴ and (4) whether the defining characteristic of group members is something over which they

250. 457 U.S. 202 (1982).

251. *Id.* at 223. Also note Justice Powell’s concurrence, *id.* at 238, 239 n.3, contrasting *Plyler* with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), which upheld a state financing scheme that allegedly afforded children in certain districts a poorer education, on the basis that “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.” See also *Flores v. Meese*, 942 F.2d 1352, 1362 (9th Cir. 1991) (en banc) (finding that the deference courts usually owe to federal policy regarding immigration is not appropriate when minors are involved).

252. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that race, alienage, and national origin “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others,” while gender “generally provides no sensible ground for differential treatment”); *Plyler*, 457 U.S. at 216 n.14; *Frontiero v. Richardson*, 411 U.S. 677, 686, 689 (1973) (plurality opinion) (invalidating on equal protection grounds federal statute permitting males in armed services automatic dependency allowance for wives but requiring servicewomen to prove their husbands dependent; “[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”). But see *Cleburne*, 473 U.S. at 469 (Marshall, J., concurring in judgment) (“Our heightened-scrutiny precedents belie the claim that a characteristic must virtually always be irrelevant to warrant heightened scrutiny.”); *id.* at 470 (Marshall, J., concurring in judgment):

That assertion suggests the Court would somehow have us calculate the percentage of “situations” in which a characteristic is validly and invalidly invoked before determining whether heightened scrutiny is appropriate. But heightened scrutiny has not been “triggered” in our past cases only after some undefined numerical threshold of invalid “situations” has been crossed.

253. See *Cleburne*, 473 U.S. at 441, 448; *Rodriguez*, 411 U.S. at 28.

254. See *Cleburne*, 473 U.S. at 440 (stating that discrimination based upon race, alienage, or national origin “is unlikely to be soon rectified by legislative means”); *Plyler*, 457 U.S. at 216 n.14; *Rodriguez*, 411 U.S. at 28.

have control.²⁵⁵ This Part explains how each of these factors is present in the case of children of religious objectors.

a. Likelihood of Relevance

Although the Supreme Court has never explicitly articulated the relative importance of the factors it considers, an apparently essential prerequisite for suspectness or quasi-suspectness is an extremely low likelihood that a defining characteristic is relevant to proper legislative purposes. The question whether the likelihood is high or low essentially asks how often, or in how many types of situations, the class of persons with the defining characteristic will be similarly situated to persons not in the class. If different treatment of persons with a certain characteristic will often be justifiable, because that characteristic renders them dissimilarly situated with respect to the purposes of some laws, then courts may reasonably operate on the basis of a presumption in any given case that, in treating such persons differently from others, a state has acted for proper reasons, rather than out of ill-will or indifference toward them. Primarily on the basis of this factor, the Supreme Court has declined to ascribe suspect or quasi-suspect status to groups defined by old age²⁵⁶ or mental retardation,²⁵⁷ whose members may have significantly diminished capacities that justify special legal treatment in many contexts.²⁵⁸ Lower courts have declined to treat handicapped children as a suspect class for the same reason.²⁵⁹ In contrast, race is a suspect class in part because it is almost never relevant to a proper legislative purpose.²⁶⁰

The average person's intuitive response to the question whether the religion of a child's parents is likely to be relevant to state objectives in connection with education or medical care for children

255. *Cleburne*, 473 U.S. at 441; *Plyler*, 457 U.S. at 216 n.14; *Frontiero*, 411 U.S. at 686.

256. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (upholding state law requiring uniformed state police officers to retire at age 50); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-17 (1976) (same).

257. *Cleburne*, 473 U.S. at 442, 446.

258. The Court has treated gender and illegitimacy as quasi-suspect rather than suspect primarily because it has concluded that these characteristics may correlate with "real differences" that may be relevant to proper legislative purposes in some cases. See *Poppe*, *supra* note 247, at 312.

259. See Leah Hammett, Comment, *Protecting Children With Aids Against Arbitrary Exclusion from School*, 74 CAL. L. REV. 1373, 1395 (1986).

260. See *Cleburne*, 473 U.S. at 452-53 (Stevens, J., concurring) (noting that discrimination in granting the franchise on the basis of skin color, height, or weight would be utterly irrational, since "[n]one of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right.").

might well be that it is very likely to be relevant. Parents' religious beliefs often lead them to seek a non-standard form of up-bringing for their child, in order to raise the child within their religious tradition and to dispose the child to adhere to the parents' religion later in life. It is important to recognize that this response rests on a misunderstanding of the inquiry, insofar as it focuses on the desires of parents rather than on the relationship between characteristics of the child and the purposes of child welfare legislation.²⁶¹ Just as in the case of race or illegitimacy, the focus must be on whether the defining characteristic of members of the disfavored class makes them unlike other persons with respect to their needs and innate abilities, not on whether that characteristic leads other individuals to want to deny them certain social benefits.

Like race, the religion of one's parents bears no inherent relation to one's native ability to benefit from education and to develop into a productive, self-sufficient, fulfilled adult human being. Nor does it bear any inherent relation to one's susceptibility to disease or psychological harm from demeaning treatment.²⁶² Like race, gender, illegitimacy, and the criminality of one's parents, the way society responds to this characteristic—for instance, by making it the basis for denying opportunities for education and other aspects of well-being—can effectively thwart development of one's native capacities, and so impair one's ability to benefit from further education.²⁶³ The relationship between a child's native potential and the defining characteristic, however, must be the controlling factor.²⁶⁴ Indeed,

261. Cf. *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("Government must exercise [its] powers so as not to discriminate between [its] inhabitants except upon some reasonable differentiation *fairly related to the object of regulation*." (emphasis added)).

262. See *supra* Part II.B.

263. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (describing how racial segregation in schooling impaired the development of black children and handicapped them for life).

264. Cf. *Steffan v. Aspin*, 8 F.3d 57, 69 (D.C. Cir. 1993) (rejecting as a justification for dismissal of a gay midshipman from the United States Naval Academy the claim that homosexuals are more susceptible to being blackmailed, because the policy of excluding homosexuals from the military is itself the cause of this situation, not any inherent characteristic of homosexuals). One commentator has observed that in *Brown*, the Supreme Court

seems to have recognized, without explicitly stating as much, that a discriminatory society had itself created any existing disparities in education ability. Catherine MacKinnon has similarly argued that to require that women and men be similarly situated before courts can intervene on women's behalf is to use the law to perpetuate women's socially constructed inequality

the central purpose of equal protection law is to eradicate socially constructed impediments to individuals' development and use of their native capacities.²⁶⁵

There may be a very limited set of circumstances, though, in which the religious beliefs of a child's parents place the child in a situation sufficiently different from that of other children to suggest the need for different treatment for the sake of the child, because of the unique nature of the parent-child relationship. The beliefs of one's parents do not affect one's basic needs or native abilities, but they may unavoidably affect the degree to which one's needs can be satisfied or one's abilities successfully developed within a given legal and social environment. In addition to medical care and education, children also need an intimate, nurturing relationship with their parents,²⁶⁶ and for some few children this relationship might be damaged by imposing on their parents certain state regulations because of how the parents would react. As discussed further below, in relation to possible justifications for parental religious exemptions, some parents might become somewhat alienated from their children were the children to receive medical care or instruction that the parents regard as sinful. This in turn could impair the child's psychological, emotional, intellectual, and even physical development. Like mental retardation, then, some parents' religious beliefs may render their children simply unable to benefit, on the whole, from certain child welfare mandates.

Little evidence is available to suggest for how many parents in how many situations this might be true. One would have to view parental attachment to children in general as rather weak to say that

Catherine Grevers Schmidt, Note, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597, 612 n.99 (1993).

265. See *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982):

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 of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.

See also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982) (finding that a university's policy admitting only women to nursing college "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job . . . and makes the assumption that nursing is a field for women a self-fulfilling prophecy").

266. In contrast, members of racial minorities do not have a fundamental need for intimate relations with white persons, so how their race affects other people is arguably less relevant to their own needs and abilities, and therefore not a proper consideration in determining whether they should enjoy the same social and legal benefits that others enjoy.

any of the child welfare and education laws now on the books would cause many parents to become alienated from their children if applied universally. A conclusion that this concern would rarely, if ever, arise finds support in the fact, discussed further below, that legislatures and courts never predicate their support for religious exemptions to child welfare and education laws on any concern for the developmental interests of children, but rather endorse such exemptions solely out of solicitude for the parents' religious desires. It also finds support in the fact that religious groups have in the past proven doctrinally adaptable to the legal environment in which they operate.²⁶⁷

b. History of Discrimination

The second factor in determining whether a class is suspect or quasi-suspect—a history of purposeful unequal treatment—is less obviously present in the instant situation than in the case of race or gender. Surely there is a long history of discrimination against and disrespectful treatment of children in general,²⁶⁸ but the class under discussion here is not children generally but rather a subgroup of children defined by their parents' non-mainstream religious views. By some accounts, in previous centuries of our nation's history, parents did not enjoy great freedom to depart from community norms regarding child-rearing when they disagreed with those norms on religious (or any other) grounds.²⁶⁹ Accordingly, children of

267. See *infra* note 416 and accompanying text.

268. See, e.g., LOIS G. FORER, *UNEQUAL PROTECTION: WOMEN, CHILDREN AND THE ELDERLY IN COURT* 176 (1991) (noting that under the common law children "simply did not have the right not to be abused"); *id.* at 195 (noting that exclusion of children from legal rights reflects the status of children since the earliest period of recorded history); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1036-50 (1992) (describing how legal treatment of children as property has persisted in this century); Christina Dugger Sommer, Note, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200, 1204 (1994) (citing authority for the proposition that "[e]arly American courts adopted the English common law view that children possessed virtually no legal rights and were comparable to chattel or prized possessions of their fathers").

269. See, e.g., STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 125-26 (1992) ("[T]he private, autonomous family of mythical tradition was, paradoxically, largely a creation of judicial activism in the nineteenth century and state regulation in the twentieth."); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1223 (1980) (noting that, in the nineteenth century, American society regarded parents' custody of children as a delegation of the State's responsibility for the well-being of children, and the "presumption of parental custody was based upon the extent to which the parent successfully served the state's interest in promoting the child's welfare").

religious dissenters received the same (very minimal) protection from harmful parental choices as did children of adherents to the majority faith.

This situation changed dramatically in this century, however, as the Supreme Court discovered in the Constitution a requirement that states accommodate religious dissenter parents to some degree, and as legislatures began including religious exemptions in child welfare statutes. The Supreme Court's pro-accommodation stance originated in the 1920s with *Pierce v. Society of Sisters*,²⁷⁰ which struck down a state statute requiring all children to attend public schools, when operators of Catholic schools challenged the law.²⁷¹ It came into full force in 1972 with *Wisconsin v. Yoder*,²⁷² which held that the Free Exercise Clause requires states to allow isolated, traditional religious

270. 268 U.S. 510 (1925).

271. *Id.* at 534-35. The Court did not actually base its decision in *Pierce* on the parents' religious beliefs, but rather on the school operators' liberty interests and on parents' more generalized interest in being free to direct the upbringing of their children as they see fit. *Id.* This decision thus established that states must defer to some degree to the choices of parents, whatever their basis, with respect to whether their children will receive certain state-provided benefits.

272. 406 U.S. 205 (1972); see COONTZ, *supra* note 269, at 141-43 (noting that beginning in the late 1960s, lower courts constricted states' control over families).

Between 1925 and 1972, the Court rendered two decisions declining to find in the Free Exercise Clause a requirement that states exempt religious groups from child health and safety rules. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court upheld a state law prohibiting guardians from allowing their children to distribute literature in the streets at night, against the religious objection of one child's guardian, who was a member of a minority religion, the Jehovah's Witnesses. Early in its opinion, the Court endorsed the general proposition that parents' or guardians' religious beliefs were not a permissible basis on which to deny certain children the protection of child welfare laws, stating: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.* at 170. Before closing, however, the Court backed away from this statement somewhat, by suggesting that in some circumstances the state should accord special deference to parents' choices when they are religiously motivated: "We neither lay the foundation 'for any [that is, every] state intervention in the indoctrination and participation of children in religion' which may be done 'in the name of their health and welfare' nor give warrant for 'every limitation on their religious training and activities.'" *Id.* at 171 (alteration in original). Twenty-four years later, the Court affirmed a state court decision that was based on a principle like that enunciated in *Prince*—that is, that parents' religious beliefs do not entitle them to make martyrs of their children. In *King County Hosp. v. Jehovah's Witnesses*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (mem.), the state court had upheld a juvenile court order of blood transfusions for children of Jehovah's Witnesses when necessary to save the life of the children. The *Prince* and *King County* decisions thus amount to a qualified judicial rejection of the notion that some classes of children need not receive the protection of child welfare laws simply because their welfare interests conflict with the religious preferences of their parents.

groups like the Amish to keep their children out of secondary school.²⁷³ Since then, lower courts have frequently invoked *Yoder*, in contexts not involving the Amish or any similar group, to find that states must exempt parents with religious objections from some child-protective mandates.²⁷⁴ As discussed in Part I, legislatures in recent decades have gone well beyond these court decisions to accommodate the religious beliefs of parents and, correspondingly, to deny religious objectors' children the benefits of many child welfare and education laws.²⁷⁵

The history of discrimination against children of religious objectors in this country thus may not be particularly long, at least in comparison to the history of discrimination against racial minorities and women. However, such discrimination has some history and, just as importantly, it has a very strong present and, it seems, an even stronger future. The fact that states are becoming increasingly discriminatory against children of religious objectors, rather than less, itself provides a reason for special judicial scrutiny of such discrimination. For the courts to wait until this discrimination has gone on for a couple of centuries before taking special notice of the phenomenon and carefully examining justifications for it surely makes no sense,²⁷⁶ particularly in light of the fact, discussed below, that the

273. *Yoder*, 406 U.S. at 218-19. The Court found that the Amish religion requires its adherents to cloister their children once they reach an age at which they might begin to be influenced by mainstream culture and the religious beliefs of non-Amish persons. *Id.* at 210-12.

274. See *State v. Whisner*, 351 N.E.2d 750, 771 (Ohio 1976) (invalidating school regulations as applied to fundamentalist Christian schools); *In re Green*, 292 A.2d 387, 390-91 (Pa. 1972) (refusing to order surgery for child of Jehovah's Witness). They have done so even though the Supreme Court emphasized the special circumstances of the Amish, whose children, in the Court's view, could be expected to remain within the Amish community (some obvious circularity here) and so need not receive such education as would prepare them for full participation in mainstream American social and political culture. *Yoder*, 406 U.S. at 235-36; Dwyer, *supra* note 13, at 1389-1402.

275. See *supra* notes 60-75, 110-19, 146-60 and accompanying text. Most of the spiritual treatment exemptions to neglect laws in place today were first enacted in the 1970s in response to the federal government's directive to states, in the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101-5107 (1988 & Supp. IV 1992), to create such an exemption. Rosato, *supra* note 1, at 58-59. In the mid-1980s, over half the states in this country enacted new legislation permitting parents to choose home schooling as an alternative to public school attendance. Kara T. Burgess, Comment, *The Constitutionality of Home Education Statutes*, 55 UMKC L. REV. 69, 69 (1986). Twenty-three states repealed teacher certification requirements in the 1980s. Devins, *supra* note 9, at 819.

276. At least one judge has recognized the problem in its most general form. See FORER, *supra* note 268, at 41:

The most alarming trend in the decade of the 1980s has been the tendency of the courts to give the interests of society and the family precedence over the rights

political process is unlikely to correct this trend. Girls in fundamentalist Christian and Jewish Orthodox schools today are already on their way to joining their mothers as members of a social and political underclass, and they deserve the state's protection now to ensure that this does not occur.

In this regard, we should consider why a history of discrimination elicits special judicial concern. Such a history appears to be relevant because it reveals ingrained hostility and prejudice or a habit of indifference to the interests of the disfavored group, which may have the consequence of consigning this group to permanent second class status.²⁷⁷ With respect to children of religious objectors, state indifference to their interests is obvious from the reading of judicial opinions deciding disputes between religious objector parents and the states over the care and education of the children. Judges, reflecting the nature of arguments put forward by state officials and parents, consistently reason about these disputes as if the state (that is, the rest of society) and the parents were the only parties with an interest in the dispute, manifesting little or no recognition of the separate personhood and distinct interests of children *vis-a-vis* their parents and the primacy of the child's stake in the outcome of the dispute.²⁷⁸

of women, children, and the elderly. This is a regressive movement. In the Middle Ages the rights and obligations of the individual were subsumed in those of the family.

Judge Forer makes no mention, however, of the particular manifestation of this problem in the form of religious exemptions to child welfare and education laws. Judge Forer argues that children should receive judicial recognition as a suspect class. *Id.* at 43.

277. Justice Stevens suggested that a history of discriminatory treatment is relevant because it indicates a greater likelihood that a legislature used a particular classification without pausing to consider its justification: "Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white." *Matthews v. Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting); see also *TRIBE*, *supra* note 218, at 1516-19:

The goal of the equal protection clause is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all. [Beyond] the purposeful, affirmative adoption or use of rules that disadvantage [them], minorities can also be injured when the government is "only" indifferent to their suffering or "merely" blind to how prior official discrimination contributed to it and how current official acts will perpetuate it.

278. See, e.g., *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987) (describing a religious exemption to New York's vaccination law as reflecting "a highly praiseworthy urge to minimize imposition of the state's inoculation program upon adherents of religious belief systems whose teachings are at odds with" immunization); *Dalli v. Board of Educ.*, 267 N.E.2d 219, 223 (Mass. 1971) (striking down a narrow religious exemption to a state's compulsory vaccination law on Establishment Clause and equal protection (for parents) grounds, describing the exemption as "an

Furthermore, although children of religious objectors have not incurred the same hostility that racial minorities have, judicial opinions addressing parental religious exemptions do display a kind of prejudice regarding these children. In many cases judges, and undoubtedly legislators as well, appear to assume that children, no matter how young, are already or will necessarily become adherents of their parents' religion, and so attribute to the children the same values, preferences, and choices that their parents articulate. For example, the Supreme Court in *Yoder* unreflectively assumed that all children of Amish parents would become members of the Amish faith and want to remain within the Amish community.²⁷⁹ Historically, children have tended to adopt the religious views and lifestyle of their parents, but this tendency appears to be declining and, in any event, a prediction on this score cannot permissibly be determinative of a child's entitlement to equal opportunity. As the Supreme Court stated in *Plyler v Doe*, the "benefits of education are not reserved to those whose productive utilization of them is a certainty."²⁸⁰

Indeed, such a prediction, particularly in deciding matters of educational opportunity, suffers from being self-fulfilling. The likelihood of children coming to adopt the views of their parents—such as the belief that females are inferior to males—itself depends to a significant degree on whether the state ensures them an education that broadens their opportunities and their awareness of alternative views and fosters in them the capacity for independent thought. In presuming that certain children will not need the same education most other children receive, the state effectively prevents the former from entering the world in which that education is necessary. Clearly the

appropriate mark of deference to the sincere religious beliefs of the few which at the same time created a minimal hazard to the health of the many," and urging the plaintiffs to seek a broader exemption from the legislature). Such indifference is also characteristic of much scholarly commentary on the subject of religious exemptions to child welfare and education laws. See Dwyer, *supra* note 13, at 1399 n.104, 1410 n.162 (citing examples in the academic literature).

279. *Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972); see also *Moody v. Cronin*, 484 F. Supp. 270, 276 (C.D. Ill. 1979) (sustaining a parental free exercise objection to co-ed physical education, the court stated that "daily exposure of the children to worldly influences in terms of attitudes and values of dress contrary to their religious beliefs . . . interferes with the religious development of the Pentecostal children and their integration into the . . . Pentecostal . . . community at the crucial adolescent stage of development"); *Dalli*, 267 N.E.2d at 222-23 (holding that a religious exemption to child immunization laws violated the equal protection rights of parents not included within the exemption, and giving no consideration to the health interests of these parents' children).

280. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (quoting *Doe v. Plyler*, 458 F. Supp. 569, 581 n.14 (E.D. Tex. 1978)).

state may not discriminate by gender in the provision of benefits such as education to children, based on an assumption that many or most women are content being housewives who do not pursue careers outside the home.²⁸¹ Similarly, an assumption about the future religious preferences of children, based on the religious preferences of their parents, is an inappropriate basis on which to create legislative classifications.²⁸²

c. Political Power

The third factor in the determination of suspect or quasi-suspect status—ability to influence the political process in one's favor—has its origins in the Supreme Court's earliest statement of the need for heightened equal protection scrutiny in some circumstances, the famous *Carolene Products* footnote.²⁸³ This suggests that this factor is especially important to the determination of the appropriate level of scrutiny.²⁸⁴ So too does basic common sense; those members of our society who require the greatest judicial protection from the political process are precisely those who are least able to ensure that that process adequately accounts for their interests. As Justice Marshall expressed it, a group's political powerlessness is a critical consideration because it points to "a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs."²⁸⁵ By affording such a group

281. Cf. *Califano v. Westcott*, 443 U.S. 76, 88 (1979) (finding that discrimination based on gender in provision of aid to families was based on traditional but illegitimate presupposition that the father rather than the mother is the primary breadwinner in any given family).

282. One might also argue that no matter what belief system individuals adopt as adults, they may benefit, or at least not suffer, from having received the full range of child welfare and education benefits before they reached the age of majority.

283. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (dictum) (stating that exacting judicial scrutiny may be appropriate when legislation reflects prejudice against "discrete and insular minorities," because such prejudice "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

284. In concluding that homosexuals do not constitute a suspect or quasi-suspect class, courts have emphasized their ability to participate in the political process and to attract the attention of legislators. E.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990); *Dahl v. Secretary of the Navy*, 830 F. Supp. 1319, 1324 (E.D. Cal. 1993) (invalidating discharge of homosexual man from Navy).

285. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 (1985) (Marshall, J., concurring in the judgment). Adult members of conservative religious groups in this country generally make a deliberate effort to isolate themselves and their children from the rest of society to a greater degree than do other persons. In *LeDoux v. LeDoux*, 452 N.W.2d 1, 3 (Neb. 1990), for instance, the court wrote:

heightened protection, courts seek to ensure that a state's laws reflect a regard for the interests of members of the group that is equal to that given the interests of more powerful constituencies, and thereby to secure for members of the group the standing as equal citizens to which they are morally and constitutionally entitled and that they would otherwise lack.²⁸⁶

Of course, this factor counts in favor of children of religious objectors at least as heavily as it does in favor of any other suspect or quasi-suspect group. This factor is perhaps least supportive of suspectness for race or gender, since today persons of all races and both genders have equal formal rights to vote and run for political office.²⁸⁷ While the effective political power of women and minorities may not be in full proportion to their numbers, it is nevertheless quite considerable. Persons who cannot even vote, on the other hand, such as aliens and illegitimate children, are obviously less able to capture political power themselves. These groups thus properly receive special solicitude when the outcome of the political process is unfavorable to them.

Significantly though, it is likely that even aliens and illegitimate children will have *some* representation in the political process, albeit indirectly. In the case of aliens, there may be citizen relatives, employers, and/or immigrants' rights groups who can and are motivated to vote and advocate in other ways for their interests. In the case of illegitimate children, as with children generally, there is usually at

Members of the Jehovah's Witnesses religion are counseled strongly against allowing their children to participate in sports activities with people outside their congregation, and the children are discouraged from participation in organizations such as Cub Scouts or Boy Scouts. Parents would be strongly counseled about the dangers involved in being in those kinds of organizations.

See also ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 231 (1985) (noting that the evangelical Christian church "separates its members off from attachment to the wider society").

286. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 628 (stating that the "presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people").

287. Poppe notes that "the political power of some traditionally suspect classes has increased greatly in the past few decades without any effect on their status under the Equal Protection Clause." Poppe, *supra* note 247, at 314. But see *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) ("It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils.").

least one parent who has an interest in advocating on their behalf against the state.²⁸⁸

In contrast, not only are children of religious objectors unable themselves to participate in the political process, but in addition, the persons who ordinarily would indirectly represent their temporal interests in the public sphere—their parents—cannot be expected to do so in this specific context. In fact, their parents can be expected to *oppose* their temporal interests in the political process in connection with those child welfare and education laws to which they have a religious objection. In such cases, the parents' own preferences are in conflict with those particular interests of the children that the laws in question are designed to protect.²⁸⁹ Accordingly, the political power of these children with respect to these interests is not simply nil; it could actually be characterized as effectively negative in value, since there are identifiable persons who can be expected always to advocate *against* those interests, while there is no one who can be depended upon to advocate *for* their interests.²⁹⁰

288. See *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in the judgment): Statutes discriminating against the young have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.

But see Stier, *supra* note 249, at 737 (pointing out that statutes punishing children for the conduct of their parents are typically aimed at parents who are themselves relatively politically powerless—such as aliens, unwed parents, and welfare recipients—or who have interests in conflict with those of their children, such as noncustodial parents).

289. This is not to suggest any hostility or ill will toward children on the part of these parents. The problem is that parents put their own views of their child's spiritual interests, or about the will of God, before the temporal interests of their children. Witness the comments of one man in New York in 1980 after being acquitted of manslaughter for allowing his child to die for lack of medical treatment: The father stated that his son was "a pioneer whose purpose was to establish the right of parents to make these decisions for their children and to keep Governor Carey and his faceless bureaucrats out of the family." Walter H. Waggoner, *Boy, 10, in Laetrile Case Dies*, N.Y. TIMES, July 18, 1980, at D13. See note 163 *supra* for an explanation of the distinction between temporal interests and spiritual interests.

290. The situation of these children would thus be somewhat analogous to that of women, if they were unable to vote, with respect to spousal abuse legislation. The archaic assumption that the husband represents the interests of a married couple in the public sphere would obviously be perverse in that context. An assumption of parental representation of "family interests" in connection with exemptions to child welfare mandates is even more perverse, since children have even less of a voice than adults who cannot vote, being generally unable even to understand and articulate a view contrary to that of their parents.

This discussion, one might object, begs the question of what the interests of religious objectors' children are. Religious objectors themselves would no doubt assert that they are protecting children's spiritual interests. In considering the moral propriety and constitutionality of a state's decision to exclude certain children from the ambit of protective legislation, however, one must adopt the perspective of the state, which is charged with the responsibility of identifying and protecting the fundamental interests of individuals—particularly incompetent individuals. In carrying out this responsibility, the state may not assume that children, or any other persons, have spiritual interests. To do so would require the state to take a position on an essentially religious issue, which the Establishment Clause, as interpreted by the Supreme Court, prohibits it from doing.²⁹¹ Moreover, the state may not simply defer to the judgment of parents that their children have spiritual interests of a certain nature and that those interests outweigh the children's material needs, any more than it could permissibly defer to the judgment of one group of adults as to the spiritual interests of another group of adults.²⁹² The state itself must determine what children's fundamental interests are and, in doing so, may only consider children's temporal well-being.

Parents are not the only source of indirect political representation in our society. Unlike persons who are mentally retarded, however, children of religious objectors have no large and vocal third-party constituency advocating for their interests.²⁹³ Significantly, no one has ever filed a law suit challenging discrimination against them, and no legislature has ever enacted a law specifically prohibiting discrimination against them.²⁹⁴ State education and social services

291. See *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) (holding that religious displays on government property are impermissible because "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (plurality opinion) (striking down a tax exemption benefiting only religious publications because "the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally").

292. For example, if members of a religious group were to claim that, by setting fire to abortion clinics, they were serving the spiritual interests of doctors who perform abortions, the state could not accept this claim as true and make it the basis for granting the group an exemption from arson laws.

293. One small, little known group in Massachusetts that does so is CHILD (Children's Healthcare Is a Legal Duty), founded by Rita Swan, a former Christian Scientist.

294. In *Cleburne*, the Court noted the increasing efforts of state and federal legislators to outlaw unjustifiable discrimination against persons who are mentally retarded, as a basis for deciding that they do not constitute a suspect class. *City of Cleburne v. Cleburne*

officials and legislators who once looked out for them to some degree are increasingly giving up on these children, wearied by confrontations with militant groups of religious parents.²⁹⁵ Some medical organizations have in the past lobbied to eliminate religious objector exemptions to child welfare laws, but their efforts also appear to have waned, their attention turned to other concerns. Feminist scholars and women's advocates have been conspicuously silent about the sexist practices of conservative religious schools, as if oblivious to the fact that the girls in these schools are incurring harm that is unquestionably worse than that incurred by girls in the average public school or by women in many of the employment situations that they rightly and vehemently condemn. As to this third factor, then, children of religious objectors stand above all other groups in their need for "extraordinary protection from the majoritarian political process."²⁹⁶

d. Control Over Defining Characteristic

With respect to groups of children in particular, the Supreme Court has relied on the lack of control factor in finding the existence of a quasi-suspect class. In *Plyler v. Doe*,²⁹⁷ the Court contrasted the situation of the undocumented alien children with that of their parents. The parents had *chosen* to enter the country illegally, and so were properly subject to punishment for their actions.²⁹⁸ The children, on the other hand, had not chosen to enter the country. They were being punished "on the basis of a legal characteristic over which children can have little control."²⁹⁹ Children " 'can affect neither their parents' conduct nor their own status.' "³⁰⁰ The Court thus held that imposing a burden on the children because of the conduct of their parents "does not comport with fundamental

Living Ctr., 473 U.S. 432, 443 (1985) ("[L]awmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice."). The Court found that the passage of numerous laws guaranteeing these persons equal rights or special benefits demonstrated substantial public support for their interests. *Id.* at 445; *cf.* *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding military draft registration applicable to males and not females, and finding that wide-ranging debate on the issue belies suggestion that the discrimination was just the result of traditional, stereotyped ways of thinking about women).

295. See Devins, *supra* note 9, at 825-34; Rosato, *supra* note 1, at 59, 61 (noting the successful lobbying efforts of Christian Scientists).

296. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

297. 457 U.S. 202 (1982).

298. *Id.* at 220.

299. *Id.*

300. *Id.* (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

conceptions of justice.”³⁰¹ In particular, doing so would be inconsistent with “ ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.’ ”³⁰²

301. *Id.*

302. *Id.* (quoting *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972)); see also *Aguayo v. Christopher*, 865 F. Supp. 479, 491 (N.D. Ill. 1994) (striking down as irrational federal law discriminating in grant of citizenship against “disfavored class, whose only misfortune under the statute was to be born of citizen mothers instead of citizen fathers”); *Sonya C. ex rel. Olivas v. A.S.D.B.*, 743 F. Supp. 700, 713 (D. Ariz. 1990) (holding that denial of special educational services and social security payments to citizen child unable to enter country because parents are not citizens violates the Equal Protection Clause because it “in effect would penalize her for her parents’ status”). *MCWHIRTER*, *supra* note 230, at 106, writes:

Scholars have argued that the Equal Protection Clause should be interpreted to mean, at a minimum, that, unless it has a very good reason for doing so, a government should not make distinctions between groups of people based on characteristics that people are born with and cannot do anything about.

Chief Justice Burger’s dissent in *Plyler*, which current Chief Justice Rehnquist and Justice O’Connor, as well as former Justice White, joined, challenged the majority’s reliance on this factor. It stated that “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.’ ” *Plyler*, 457 U.S. at 245 (Burger, C.J., dissenting). It then alluded to mental health, mental illness, and country of residence as examples of factors that may be a proper basis for legislative classifications and yet over which persons have no control. *Id.* (Burger, C.J., dissenting). The first two examples, however, are characteristics that may be a proper basis for classification only because they are often correlated with special needs and abilities, the first factor considered above. The dissenters seem mistakenly to imply that lack of control is the only factor that the majority considered. As to the third example, adults who are residents of other countries are able to avoid entering the United States, so their choosing to do so illegally may be a proper basis for a legislative classification. Discrimination among adult or minor residents of different countries for immigration purposes is also permissible, because non-citizen persons who are not in this country do not enjoy the protection of the Fourteenth Amendment. Children who are residents of another country but are in the United States illegally generally have not chosen to be here, and this does make problematic a classification among children based on their country of lawful residence. The dissenters’ suggestion that “a state legislature is not barred from considering . . . relevant differences between . . . the residents of different counties,” *id.* at 245 (Burger, C.J., dissenting), simply begs the question at issue in *Plyler*—whether there are relevant differences between children who are lawful residents of the U.S. and those who are not, in light of the fact that the members of neither group choose to be where they are.

The dissenters also pointed to *Rodriguez*, in which the Court found no quasi-suspect class even though the children had no control over the school district in which they lived. *Id.* at 245 n.5 (Burger, C.J., dissenting) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)). As the dissenters noted, however, “[t]here 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,” *id.* (Burger, C.J., dissenting), so the Court never addressed that issue. Moreover, the Court on a later occasion indicated an important distinction between classifications based on personal characteristics or status and those based on political or geographical area. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462 (1988). The former type of classification is clearly more likely to reflect invidious

These principles clearly apply to children of religious objectors as well; they have no control over their parents' religious beliefs. To ever predicate denial of statutory benefits to them on their parents' religious beliefs thus plainly raises concerns about fundamental fairness.

The lack of control factor is sometimes characterized in terms of the immutability of the defining characteristic.³⁰³ Race and gender, for example, are for the most part immutable traits. Being the minor child of persons with particular religious views is not an immutable trait in the sense that persons who have it will always have it, since most such children will eventually become adults. However, the relevance of immutability to judicial review analysis appears to lie in its relation to the moral concern just discussed—that it is unfair to punish people for traits over which they have no control,³⁰⁴ which does pertain to these children, as well as to a practical or political concern that also applies to these children. The latter concern is that political majorities are most likely to discriminate against a group to which they never have belonged and never will belong.³⁰⁵ The

discrimination and to be less susceptible to political correction than the latter. In *Rodriguez*, the Court stated:

[A]ppellees' 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. 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.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). The *Plyler* dissenters also charged that the State was not thrusting any disabilities on the children "due to their 'status of birth,' " but rather due to their illegal presence in the country. *Plyler*, 457 U.S. at 246 (Burger, C.J., dissenting). The dissenters' position ultimately rests on the premise that states " 'may take into account the character of the relationship between the alien and this country,' " *Id.* (Burger, C.J., dissenting) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976))—in particular, that an alien does not legally belong in this country. *Id.* at 246, 250 (Burger, C.J., dissenting). This premise does not apply to the case of discrimination among groups of citizen children residing within the same political and geographical area based solely on the religious beliefs and choices of their parents.

303. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990).

304. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities . . . would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.' ") (citation omitted).

305. *Poppe*, *supra* note 247, at 314; cf. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) ("But even old age does not define a 'discrete and insular' group

majority can heap disabilities on such a group without concern that they will ever have to suffer those disabilities themselves, and is also unlikely to be checked by empathy.

Of course, no adult need fear that she will become a member of the disadvantaged class under discussion here. On the other hand, all adults have been children at one time and so can empathize with the plight of children up to a point. For most adults, though, that point, however far it might reach in relation to children in general, is not likely to reach the experience of children of members of the religious minorities under discussion here. Most Americans probably have little idea what it is like to grow up in a Christian Science household, or to be raised by Hassidic Jews, fundamentalist Christians, or conservative Catholics and receive schooling only in a church school,³⁰⁶ let alone what growing up in a reclusive religious cult such as that of the Waco, Texas Branch Davidians is like. Those who had such an upbringing themselves, moreover, are probably more likely to identify with the religious views of parents rather than with the secular interests of the children.

In addition, probably very few federal or state legislators were once children of religious parents who wanted to deny them medical care or a mainstream education (which is itself indicative of the relative educational deprivation that children in these communities suffer).³⁰⁷ They can thus blithely legislate away benefits for children who are in such families today without fear and without pangs of empathetic suffering, perhaps even believing that they are doing a good thing because they are succoring the parents, with whom they may empathize to a substantial degree simply because they are also parents. This point is related, clearly, to that made above regarding

in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span.") (citation omitted).

306. Roughly one tenth of children enrolled in American schools attend religious schools. See UNITED STATES DEPARTMENT OF EDUCATION, NAT'L CTR. FOR EDUC. STATISTICS, MINI-DIGEST OF EDUCATION STATISTICS 1994, at 8-9 (1994) (showing that approximately 11% of the 48.8 million children enrolled in grades K-12 in school year 1993-94 were in private schools); 1 COMPARING PUBLIC AND PRIVATE SCHOOLS 33 (Edward H. Haertel ed., 1987) (showing that roughly nine-tenths of private school enrollment was in religious schools in the last year for which separate figures for religious schools were available).

307. Cf. Stier, *supra* note 249, at 737 ("All adults, however, were not punished as children for their parents' behavior. Few legislators are likely to have had experiences while growing up that would enable them to be sensitive to the concerns of these children.").

the absence of any substantial voice for the interests of these children in the political sphere today. We in mainstream American society so easily abandon and forget these children and never come to know their suffering.

In sum, children of religious objectors satisfy all of the criteria for designation as a suspect or quasi-suspect class. Their defining characteristic is rarely if ever relevant to their need for and ability to benefit from child welfare and education regulations. They have a history, albeit not particularly long, of discrimination against them vis-à-vis other children in our society. They arguably have less representation in the political process than any other group in this country and they have no control over their disabling characteristic. The only significant element of suspect class analysis lacking in their case is hostility toward them on the part of the majority. We in the mainstream do not feel ill-will toward children unimmunized because of the religious beliefs of their parents, or toward children who attend fundamentalist schools (though we might when they are adults and have acquired traits we try to prevent our own children from developing). We do, however, manifest substantial indifference to them, and we feel no force pressing on us to change our disposition toward them, other than whatever altruistic concern we can muster, while their parents' often militant opposition to state efforts to protect them constitutes a powerful force in favor of maintaining our indifference. Surely children of religious objectors have at least as great a need for, and moral claim to, special judicial protection as do women and illegitimate children. They should enjoy at least quasi-suspect status, and legislation that denies them benefits accorded other children should be subject to exacting judicial scrutiny.

2. Fundamental Right or Important Interest

The Supreme Court has identified a number of fundamental rights that trigger strict scrutiny under the Fourteenth Amendment, including rights that are not explicitly set forth in the Constitution but which the Court has found to be either implicit in the enumerated constitutional rights³⁰⁸ or a necessary precondition to the exercise of

308. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (right to travel), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974). But see *Poppe*, *supra* note 247, at 303-04 (noting that "[t]oday, the right to travel doctrine is vulnerable to severe limitation, if not to outright reversal").

constitutional rights.³⁰⁹ The Court has not decided whether there is an implicit constitutional right to medical care. It is extremely doubtful that the Court would find it to be so, since it has held that there is no implied constitutional right to welfare benefits, even though welfare support "involves the most basic economic needs of impoverished human beings,"³¹⁰ nor to adequate shelter and peaceful possession of one's home.³¹¹

The Court has, however, deemed medical care "a basic necessity of life"³¹² and a vital government benefit for persons who cannot afford to pay for it.³¹³ Medical care would therefore appear to be a good candidate for the category of interests important enough to trigger intermediate scrutiny. In the due process context, the Court has held that stricter constitutional standards apply when legislation deprives individuals of benefits, even 'gratuitous' benefits, that are necessary to sustain life.³¹⁴

309. See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (applying strict scrutiny to invalidate state law imposing durational residency requirement for registration to vote); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (right to vote).

310. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); see also *Bowen v. Gilliard*, 483 U.S. 587, 597 (1987) (holding that state welfare programs are subject only to rationality review unless discriminating against suspect or quasi-suspect class).

311. *Lindsey v. Normet*, 405 U.S. 56 (1972) (upholding under rational basis due process review state law permitting landlord to bring expedited eviction proceedings under certain circumstances). The Court has also held that no fundamental right to serve as a judge exists. See *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Justice Marshall once offered this explanation for the fundamental rights criterion for strict scrutiny:

Potentially discriminatory classifications exist only where some constitutional basis can be found for presuming that equal rights are required. Discrimination, in the Fourteenth Amendment sense, connotes a substantive constitutional judgment that two individuals or groups are entitled to be treated equally with respect to something. With regard to economic and commercial matters, no basis for such a conclusion exists, for . . . the Fourteenth Amendment was not 'intended to embody a particular economic theory . . .'. As a matter of substantive policy, therefore, government is free to move in any direction, or to change directions, in the economic and commercial sphere. The structure of economic and commercial life is a matter of political compromise, not constitutional principle . . .

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 470-71 (1985) (Marshall, J., concurring) (footnotes omitted) (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

312. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974) (invalidating state law imposing durational residency requirement for receipt of non-emergency medical care at county expense).

313. *Id.* at 261.

314. See *Dandridge*, 397 U.S. at 522 nn.17-18 (Marshall, J., dissenting) (citing decisions). But see *Weinberger v. Salfi*, 422 U.S. 749, 768 (1975) (upholding provision of federal law denying death benefits to wives married to decedents less than nine months) ("[W]hen we deal with a withholding of a noncontractual benefit under a social welfare program . . .

Regarding education, the Supreme Court expressly declared in *San Antonio Independent School District v. Rodriguez*³¹⁵ that equality of educational opportunity is not a fundamental right protected by the Constitution.³¹⁶ The Court left open the possibility, though, "that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of" constitutional rights such as free speech and voting, and so is itself a fundamental right triggering heightened equal protection review.³¹⁷ In *Rodriguez*, the Court suggested that this "identifiable quantum of education" includes "an opportunity to acquire the basic minimum

the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." (citation omitted).

315. 411 U.S. 1 (1973).

316. *Id.* at 35; see also *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (finding law requiring parents in certain school districts to pay user fee for child's transportation to school not violative of Equal Protection Clause); *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982). The Court apparently applied rationality review in both *Rodriguez* and *Kadmas* partly because the legislation at issue was economic in nature, rather than addressed to substantive educational policy. In *Rodriguez*, for example, the state's system of taxation and school finance was under attack, and the Court explained that " 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' . . . 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 entitled to respect." 411 U.S. at 41-42 (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940) and *Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972)). In contrast, administration of a state taxation or complex appropriations scheme is not at issue with respect to the religious exemptions under discussion in this Article. The question of whether all children are entitled to vaccinations and a non-sexist education is not a complex bureaucratic matter that must be left to legislative expertise.

317. *Rodriguez*, 411 U.S. at 36; cf. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[E]ducation is necessary to prepare citizens to participate effectively and intelligently in our open political system."); *Kentucky State Bd. for Elementary and Secondary Educ. v. Rudasill*, 589 S.W.2d 877, 883 (1979) (noting that Kentucky state constitutional delegates "perceived that universal education might be required in order to prepare children of the Commonwealth to intelligently participate as citizens in a democracy"), *cert. denied*, 446 U.S. 438 (1980). The *Rodriguez* Court did not have to decide this issue because it found "no indication that the present levels of educational expenditures in Texas provide an education that falls short" of this standard. 411 U.S. at 36-37; see also *Kadmas*, 487 U.S. at 466 n.1 (Marshall, J., dissenting) (asserting that the Court's decision "does not address the question whether a State constitutionally could deny a child access to a minimally adequate education"); *Papasan v. Allain*, 478 U.S. 265, 284-85, 288-89 (1986) (holding that disparities in amounts of state funding given to different school districts may violate equal protection if not rationally related to a legitimate state purpose).

skills necessary for the enjoyment of the rights of speech and of full participation in the political process."³¹⁸

An argument that the failure of states to regulate religious schools more rigorously effects a complete denial of education to children in those schools would be implausible. Even girls in fundamentalist Christian and Orthodox Jewish schools who are subjected to sexist teaching can still develop basic skills such as reading, writing, and the ability to do arithmetic. One might plausibly argue, however, that systematic training for subordination effectively deprives these girls of the opportunity to develop capacities such as self-expression, and elements of psychological well-being such as self-esteem, that are necessary for enjoyment of free speech and full participation in the political process. The fact that one rarely if ever sees women raised in either the fundamentalist Christian tradition or the Jewish Orthodox tradition speak out on public affairs or run for political office suggests that this is indeed the case.³¹⁹ A court might therefore reasonably find that denial of protection against sexist

318. 411 U.S. at 37. There is no indication that the Court intended this to be an exhaustive explication of what a minimum level of education includes. In *Papasan*, the Court suggested that a minimal education would include being taught to read and write and receiving instruction in "the educational basics," but did not explain what those basics might be. 478 U.S. at 286.

319. An episode in New York two years ago illustrates this point. A female member of an Orthodox Jewish community spoke out against the curtailed segregation of women in a publicly-funded bus that regularly carries Orthodox Jews to and from work. She did so after an incident one day in which the men on the bus needed to expand the section they used for prayer and ordered her to give up her seat, resorting to threats when she refused. Her community, and the rest of the world, were shocked that a woman in their community would dare to speak out publicly. See Marianne Means, *The Claim of a Jewish Rosa Parks: Orthodox Woman Holds Her Ground Against Sex Bias*, L.A. DAILY J., Oct. 7, 1994, at 6, col. 6.

Within the fundamentalist Christian ranks is a large women's organization, called Concerned Women for America, that exerts behind-the-scenes political pressure and supports litigation to further fundamentalist goals. The fundamentalist belief that women should not assert themselves in the public realm, however, prevents even this group from assuming a leading, or even visible, role in the political campaigns of the religious right. See, e.g., STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* 64, 102-07 (1993). Bates documents the events leading up to the *Mozert* litigation in Tennessee, and reveals that while objections to the public school curriculum and policies first arose among a small group of fundamentalist Christian mothers, these women and the rest of the local Christian community believed that the women themselves should not lead the efforts to change school policy, and so they recruited a man, Mr. Mozert, to lead their political and publicity efforts and a male lawyer to bring their claims to court. *Id.* at 66-68.

education to a certain group of children does implicate a fundamental right.³²⁰

It warrants mention here that the rationality of the Court's constitutional rights standard for strict scrutiny is questionable. While this standard may offer somewhat greater objectivity than a standard based on the judiciary's judgment of the relative importance of various interests, it results in the triggering of strict scrutiny to protect interests that are arguably not really fundamental, since not everything that the Supreme Court has deemed constitutionally protected is of fundamental importance. At the same time, it also leads the Court to eschew heightened scrutiny when some extremely important interests are at stake.³²¹ This is especially evident in the context of child-rearing. The Court has declared, for example, that some parents have a fundamental constitutional right to deny their children a secondary school education.³²² There is something terribly ironic, albeit not inconsistent, about deciding that a parent's desire to deny his children a mainstream education gives rise to a fundamental right, while also deciding that a child's need to receive an education does not. Clearly a person's need to receive an education is more important than anyone's desire to prevent someone else from receiving an education. Significantly, a number of state courts have declared that under their particular state's constitution, education is a fundamental right.³²³

Even if a court addressing a challenge to exemption of religious schools from basic education regulations were not to find that a fundamental right is at stake, it should find that a very important interest is at stake. In *Plyler*, the Court applied heightened scrutiny in part because of the importance of the children's educational interest that the Texas law impacted, stating that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."³²⁴ For the Court, the impor-

320. See also Stier, *supra* note 249, at 735-36 (arguing that children have an implicit constitutional right not to be punished for their parents' conduct that should trigger heightened scrutiny).

321. See FORER, *supra* note 268, at 209-10 (observing that fundamental rights in equal protection jurisprudence "have been judicially declared without reference to precedent, societal conditions, or popular perceptions and beliefs as to which rights the public considers fundamental").

322. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

323. E.g., *Serrano v. Priest*, 487 P.2d 1241, 1263 (Cal. 1971); *Salazar v. Honig*, 246 Cal. Rptr. 837, 842 (Cal. Ct. App. 1988) (holding that school transportation is a fundamental right).

324. 457 U.S. 202, 221 (1982).

tance of education for equal protection purposes lay in its necessity for "advancement on the basis of individual merit"³²⁵ and for an individual "to participate effectively and intelligently in our open political system."³²⁶ Education is, in fact, the principal means by which a traditionally subordinate group "might raise the level of esteem in which it is held by the majority."³²⁷ As such, a law denying a quality education to a discrete class of children tends to create an underclass of persons unable to participate in and contribute to society, and thereby runs directly counter to the central purpose of the Equal Protection Clause.³²⁸ When the *Plyler* Court considered the importance of education in conjunction with the fact that the legislation before it, which extended the guarantee of an education to some children but not to others, effectively imposed "a lifetime hardship on a discrete class of children not accountable for their disabling status,"³²⁹ it concluded that it should subject such legislation to heightened scrutiny and that the state must offer a substantial justification for its discriminatory law.³³⁰

325. *Id.* at 221-22.

326. *Id.* at 221 (quoting *Yoder*, 406 U.S. at 221). Justice Brennan's opinion also emphasized the benefits to society as a whole of ensuring that every individual is able to lead an economically productive, self-sufficient life, and acquires our shared democratic values. *Id.* at 221-23. The dissenting Justices pointed out, perhaps correctly, that the state legislature, and not the Court, is the proper body to address these collective interests. *Id.* at 248, 253 (Burger, C.J., dissenting).

327. *Id.* at 222.

328. The *Plyler* Court wrote:

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.

Id.; see also Biegel, *supra* note 231, at 1089-95 (arguing that the Supreme Court has also used heightened scrutiny in reviewing state action restricting educational rights under the Due Process Clause and under the Education for all Handicapped Children Act, and citing *Board of Educ. v. Rowley*, 458 U.S. 176 (1982)).

329. 457 U.S. at 223.

330. Justice Blackmun, who took a relatively restrained approach to employing heightened Fourteenth Amendment scrutiny, see *Plyler*, 457 U.S. at 231-34 (Blackmun, J., concurring), concurred in this conclusion, because of education's unique importance.

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 . . . 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. . . . 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 disad-

On numerous other occasions as well, the Supreme Court has affirmed the importance of education and the integral connection between education and the primary purpose of the Equal Protection Clause—to eliminate inequalities of opportunity in our society. In condemning racial segregation in schools in *Brown v. Board of Education*,³³¹ for example, the Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in 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.³³²

vantage.

Id. at 234 (Blackmun, J., concurring). Justice Blackmun appeared to rely, however, on the fact that the law challenged in *Plyler* worked a "complete denial" of an education, and not merely some diminution of educational quality. He distinguished *Rodriguez*, in which he had sided with the majority in finding that deferential review was appropriate. *Id.* at 234-35 (Blackmun, J., concurring). The *Plyler* majority, however, did not state that intermediate scrutiny is appropriate only when a challenged law effects a complete denial of an education. One might read the opinion as stating that any impairment to the educational interests of a discrete class of children triggers heightened review.

331. 347 U.S. 483 (1954).

332. *Id.* at 493; see also *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 470 (1988) (Marshall, J., dissenting) ("By denying equal opportunity to exactly those who need it most, the law not only militates against the ability of each poor child to advance herself or himself, but also increases the likelihood of the creation of a discrete and permanent underclass."); *Martinez v. Bynum*, 461 U.S. 321, 329 (1983) (reiterating the Court's view that education "is one of the most important functions of local government"). In *Kadrmas*, the Court declined to apply heightened scrutiny to a state law permitting some districts but not others to charge parents a fee for transporting their children to school. 487 U.S. at 459-60. The educational interests of the child were actually not at stake, however, since the parents were able to afford the fee and, after refusing to pay it, arranged an alternative means of transportation, as they were legally required to do. *Id.* at 455, 461. The only interest at issue was that of the parents in not having to pay the \$97 annual bus fee. *Id.* at 454-55.

Kadrmas is significant, however, because in it the Court expressed an intention to limit the holding of *Plyler* to its unique circumstances. *Id.* at 459. The Court hinted at what the salient aspects of the *Plyler* circumstances were by pointing out that the child in *Kadrmas* had "not been penalized by the government for illegal conduct by her parents," as was the case in *Plyler*. *Id.* The Court also noted that the \$97 bus user fee was not

The conservative dissenters in *Plyler* did not dispute that education is of vital importance for children in our society, but objected that the majority “points to no meaningful way to distinguish between education and other governmental benefits” such as food, shelter, or medical care.³³³ This complaint, however, is both question-begging and inaccurate. First, these other goods are in fact also quite important, and if states undertake to guarantee a minimum of them for all persons, but exclude a discrete subclass from the guarantee, demanding a strong justification from the state for discriminating in this fashion may well be appropriate. Simply reciting this list of important goods does not begin to answer the question whether they too should trigger intermediate scrutiny. Second, the *Plyler* majority did in fact suggest a way to distinguish between goods that are important enough to trigger heightened scrutiny and government benefits that are not. The way it suggested connects the adoption of heightened scrutiny with the core concern of the Equal Protection Clause—whether denying a particular good to an identifiable group is likely to result in the creation of a discrete subclass of persons relegated to second-class status in our society.³³⁴ The majority

likely to promote “ ‘the creation and perpetuation of a subclass of illiterates within our boundaries.’ ” *Id.* (quoting *Plyler*, 457 U.S. at 230). As noted above, *Plyler* and *Kadrmas* are also dissimilar in that the statute challenged in the former discriminated among groups of individuals, while the statute challenged in the latter—and in *Rodriguez*—discriminated among local political units within a state and did not lead to any discrimination between groups of individuals within any local jurisdiction. *Id.* at 462.

Children whose parents claim religious exemptions are effectively punished for the conduct of their parents, conduct that is not illegal but that would be illegal but for the statutory exemption. And the imposition of sexist doctrines on the daughters of fundamentalist Christians and Orthodox Jews, as well as other repressive features of some religious schools, do effect a denial of an important benefit and do promote the creation and perpetuation of a subordinate class of persons in our society. See *infra* notes 337-38 and accompanying text. In addition, the religious exemptions do discriminate among groups of children within the same jurisdiction, rather than denying a benefit to all children within some given area. These exemptions are thus much more like the statute in *Plyler* than that in *Kadrmas*. Cf. Biegel, *supra* note 231, at 1096 (stating that *Plyler* “cannot simply be dismissed as a unique confluence of theories when other decisions have employed techniques of heightened review triggered at least in part by an express or implied denial of equal educational opportunity”).

333. 457 U.S. at 247-48 (Burger, C.J., dissenting). The dissent cited past decisions of the Court holding that welfare benefits and housing are not fundamental rights, decisions that preceded the Court’s establishment of intermediate scrutiny and of the distinction between important rights and mere government benefits. *Id.* at 247 (Burger, C.J., dissenting); see *infra* note 335.

334. *Plyler*, 457 U.S. at 221-22. The dissent never addressed this connection between education and the underlying purposes of the Equal Protection Clause. Instead, it blithely asserted that the political process, at the federal level, would ultimately, “albeit with some

sensibly found that this is the case with respect to children's education. The Court might also sensibly reach this conclusion with respect to food, shelter, and medical care, at least in the case of children who are unable to fend for themselves.³³⁵

A child in any state of this country today unquestionably can fail to receive a minimally adequate education while attending a church school, given the absence of meaningful state regulation of such schools. As discussed in Part I, substantial evidence suggests that this is in fact occurring.³³⁶ Female students in conservative religious schools appear to suffer the greatest educational deprivation. Arguably they need, more than any other children, an education that emphasizes their equal personhood and makes a special effort to prepare them for and urge them toward self-sufficient and self-fulfilling lives, in order to counter the subordinating influences in their world outside of school. Yet instead they receive schooling that intensifies the subordinating process, increasing the likelihood that they will come to form a discrete and permanent underclass of persons substantially less able to participate in and contribute to

delay," yield the correct policy outcome and provide children who were not deported with an education. *Id.* at 254 (Burger, C.J., dissenting). The dissent offers no basis for this happy prediction. Perhaps Chief Justice Burger was thinking that Congress would be more likely to protect these children than the state government because Congress has primary authority over and responsibility for immigration, and because the federal government can more easily bear the cost of educating these children. This seems a slender basis for his prediction. Recent action by the House of Representatives—passage of a bill that would authorize states to deny an education to illegal immigrant children—in fact seems to prove that prediction wrong. See William Branigan & John E. Yang, *House Makes a Stand at the Schoolhouse Door*, WASH. POST, March 21, 1996, at A6; Eric Schmitt, *Bids to Cut Legal Immigration Are Dropped From House Bill*, N.Y. TIMES, March 22, 1996, at A23. In any event, that Congress might act within a decade or two is small comfort for a child who is denied an education today, and the very purpose of the Equal Protection Clause is to serve as a protection for vulnerable, powerless individuals against the vagaries and shortcomings of the political process.

335. The *Plyler* dissent also contended that "the importance of a governmental service does not elevate it to the status of a 'fundamental right' for purposes of equal protection analysis." *Id.* at 247 (Burger, C.J., dissenting). This contention was, however, misplaced. The *Plyler* majority did not conclude that education is a fundamental right, a strict scrutiny trigger. It explicitly rejected this conclusion. *Id.* at 223. Instead the majority concluded that education is an important interest that should trigger intermediate scrutiny. *Id.* at 221, 225. The dissent's language and the cases it cited in support (*Rodriguez* and *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972)), harken back to a time before the Court established an intermediate level of scrutiny (the Court first introduced a third level of review in *Craig v. Boren*, 429 U.S. 190 (1976) (see SALOMONE, *supra* note 42, at 117-18)), and so were simply inapt.

336. See *supra* note 71 and accompanying text.

society, relegated to second-class social status.³³⁷ Their schooling is in its effects thus much more like the complete denial of education in *Plyler* than the lesser funding of schools at issue in *Rodriguez*.³³⁸

Indeed, it is difficult to imagine a state even attempting to argue that the sexist practices in which many religious schools engage do not impair a critical developmental interest of the girls subjected to those practices.³³⁹ The "inestimable toll" on the "social, economic, intellectual, and psychological well-being"³⁴⁰ of these girls should be

337. See *supra* notes 76-85 and accompanying text. One should also note that sexist socialization of both boys and girls in fundamentalist Christian and Jewish Orthodox schools also perpetuates the existence of a minority of persons within our society that hold values antithetical to core principles of our liberal democracy.

338. The harm that girls in some religious schools suffer is actually quite similar to the harm African-American children have suffered in segregated public school systems, which was the basis for the Court's condemnation of school segregation in *Brown*. In rejecting the notion that these children could receive an adequate education in a separate, blacks-only school, the Court emphasized the psychological harm that resulted simply from implicit stigmatization as inferior persons. 347 U.S. 483, 494 (1954). In both *Brown* and *Plyler*, the Court drew a connection between diminished self-esteem and a lesser chance for success. *Plyler*, 457 U.S. at 222; *Brown*, 347 U.S. at 494 (noting that a sense of inferiority diminishes a child's motivation to learn and thereby retards educational and mental development and puts those who suffer it at a permanent disadvantage). See also James P. Raffini, *Student Apathy: A Motivational Dilemma*, 44 EDUC. LEADERSHIP, Sept. 1986, at 53 (describing effects of competitive evaluation procedures in schools: "most students conclude early . . . that once below average, always below average.").

Likewise, girls subjected to sexist treatment and teaching are very likely to develop an inferior self-image that undermines their will to succeed and to pursue their own self-fulfilling projects. See PEGGY ORENSTEIN, *SCHOOL GIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE CONFIDENCE GAP* (1994):

Girls with healthy self-esteem have an appropriate sense of their potential, their competence, and their innate value as individuals. They feel a sense of entitlement: license to take up space in the world, a right to be heard and to express the full spectrum of human emotions. . . . We live in a culture that is ambivalent toward female achievement, proficiency, independence, and right to a full and equal life. . . . Too often we [females] deride our own abilities. We denigrate our work and discount success. We don't feel we have the right to our dreams, or, if we achieve them, we feel undeserving. Small failures may confirm our own sense of inevitable failure, making us unable to take necessary risks.

Id. at xix; see also *supra* notes 53-58 and accompanying text (discussing the harmful impact of sexist education).

339. One could characterize this as an interest in receiving an education of a certain quality and/or as an interest in being treated as an equal person—an interest whose importance is reflected in the Equal Protection Clause itself. Girls in these schools suffer discrimination at two levels: the state discriminates against them in their regulatory schemes *vis-a-vis* girls whose parents have different religious beliefs, and their schools discriminate against them *vis-a-vis* boys. See also *infra* notes 447-64 and accompanying text (suggesting a third level of discrimination, insofar as there may be unique and insurmountable procedural obstacles to prosecuting the constitutional rights of children whose interests conflict with the religious beliefs of their parents).

340. *Plyler*, 457 U.S. at 222.

obvious to anyone aware of the role that self-esteem plays in child development and education. One need not rely on one's own opinions or personal distaste for sexism, nor on the abundant social scientific evidence of its harmfulness,³⁴¹ however, in order to challenge the failure of a state or the federal government to prohibit such practices in religious schools. Where the state has enacted special provisions prohibiting sex discrimination and sex bias in public schools, or in all schools other than religious schools, it has itself already decided that sexist schooling is harmful to girls.³⁴² As such, it would not be in a position to contend credibly that such schooling is actually not particularly harmful.

In sum, the case is extremely strong for applying heightened scrutiny to the classifications among children based on the religious beliefs of their parents that appear in child welfare and education laws. These children clearly constitute a discrete and insular minority whom the political process protects less than perhaps any other group in our society. The interests at stake—protection from serious illness and the guarantee of an adequate elementary and secondary education—are indisputably of the highest importance, occupying a fundamental position in the structure of human needs and bearing an obvious relation to the central purpose of the Equal Protection Clause: to ensure a rough equality of life chances for equally able persons in our society. Legislatures are manifesting less and less willingness to guard the interests of these children, thereby increasing the likelihood that many of them will fail to flourish and instead become members of a discrete underclass, and thereby also weakening the case for judicial deference to legislatures in these areas.

The next section demonstrates that religious exemptions to child welfare and education laws cannot survive heightened scrutiny, and therefore should be invalidated. Since the Supreme Court has become increasingly reluctant to find new categories of cases in which it must apply strict or heightened scrutiny, however, the next section also considers whether these exemptions would survive even the more deferential rationality review.³⁴³ It concludes that they would not.

341. See *supra* notes 54-58 and accompanying text.

342. See *supra* note 53 and accompanying text.

343. If a court declined to apply heightened scrutiny to these exemptions, it should at least apply the so-called 'active' rational basis review that the Court applied to a classification based on mental retardation in *Cleburne* and that some lower courts have applied to classifications based on homosexuality. See *State Dep't of Health v. Cox*, 627 So. 2d 1210, 1219 (Fla. Dist. Ct. App. 1993) (applying standard rationality review to law prohibiting adoption by homosexual couples) (citing cases), *modified*, 656 So. 2d 902 (Fla.

D. Applying Intermediate Scrutiny to Religious Exemptions

For religious exemptions from child welfare and education laws to survive heightened scrutiny, a state would have to offer relatively strong justification for discriminating against children of religious objectors in this way. Specifically, it would have to show that those exemptions are substantially related to a legitimate and important state interest or purpose.³⁴⁴ The legitimacy criterion is the first screen through which asserted state purposes must pass. Since this is also an element of rational basis scrutiny, if a purported purpose cannot pass through this screen, then it also could not form a basis for upholding a religious exemption under that more deferential form of judicial review.

1. Legitimacy of State Purposes

One might think that several legitimate reasons justify religious exemptions to child welfare and education laws, and that the real question is how important those reasons are, relative to the potential for harm to the children. The legislatures that created these exemptions, according to this view, may not have made the best choice in all cases, but they did not act on the basis of improper motives or inappropriate considerations. They had to strike a balance between competing considerations and did the best they could. In actuality, though, some of the purposes one might imagine support these exemptions turn out to be constitutionally illegitimate. We must consider, then, precisely which of the purposes that legislatures sought, or could have sought, to accomplish by creating these exemptions are legitimate.

Intermediate scrutiny requires evidence that an allegedly legitimating state purpose was an actual aim of the legislature that passed a law containing a challenged classification.³⁴⁵ Under rational-basis

1995). This form of rational basis review places an evidentiary burden on the state to prove a rational relation between a legislative classification and a legitimate state purpose, rather than creating a presumption in favor of the classification that the plaintiff must adduce evidence to overcome. *Id.*

344. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Plyler*, 457 U.S. at 224.

345. *See Hogan*, 458 U.S. at 730 (rejecting a rationale asserted by the state in litigation because the state had not shown that it was the actual purpose for the discriminatory admissions policy); *Plyler*, 457 U.S. at 227-30 (considering only asserted state interests in excluding undocumented alien children from free public education); *Califano v. Westcott*,

review, on the other hand, courts do not require the state to demonstrate that a legitimate purpose actually motivated the legislature; courts are willing to hypothesize purposes that could have motivated the legislature.³⁴⁶ The party challenging a classification under rational basis review instead bears the nearly insuperable burden " 'to negative every conceivable basis which might support it.' " ³⁴⁷ This Part considers first the actual purpose of religious exemptions, and then conceivable, unarticulated bases for these exemptions.

The Supreme Court "has not systematically articulated the criteria that distinguish permissible from impermissible legislative purposes," but it has "suggested a framework for analysis."³⁴⁸ As

443 U.S. 76, 86-88 (1979) (finding no evidence that purpose for legislative classification that the State asserted was the actual purpose); *McGinnis v. Royster*, 410 U.S. 263, 270 (1973).

346. See *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-02 (1993) ("On rational-basis review, . . . because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."); *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2642 (1993) ("[A] legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.' ") (citation omitted); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (stating that under rationality review, "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification"); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.") (citation omitted).

347. *Heller*, 113 S. Ct. at 2643 (citation omitted). The Court has, however, struck down legislative classifications on rare occasions while purporting to apply rationality review, after finding a classification so poorly fit to the conceivable legitimate purposes as to suggest it is actually based only on illegitimate prejudice against some class. See *Cleburne*, 473 U.S. at 450; *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (invalidating federal law denying welfare assistance to individuals living with other, unrelated persons); cf. *Heller*, 113 S. Ct. at 2651 (Souter, J., dissenting) (indicating conclusion of Justices Souter, Blackmun, Stevens, and O'Connor that the legislation at issue, which discriminated between mentally retarded persons and mentally ill persons in according procedural protections prior to institutionalization, should fail rational basis scrutiny).

348. Farrell, *supra* note 235, at 43. The Court has also identified a number of specific state purposes that are legitimate. See *Nordlinger*, 505 U.S. at 17 (neighborhood stability and protection of property owners' reliance interests); *Plyler*, 457 U.S. at 227 (fiscal concerns, though this not sufficient standing alone); *Califano v. Jobst*, 434 U.S. 47, 53 (1977) (reliance on general rules as an administrative convenience); *Craig v. Boren*, 429 U.S. 190, 199-200 (1976) (enhancing traffic safety); *Matthews v. Lucas*, 427 U.S. 495, 509 (1976) (administrative convenience) (upholding Railroad Social Security Act provision basing right to benefits on dependency and according legitimate children and subclass of illegitimate children presumption of dependency, in part because use of illegitimacy as indicia of dependency was an acceptable administrative convenience); *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970) (creating incentive to seek gainful employment,

a basic prerequisite, a statutory classification must satisfy a test of legislative impartiality; it must have a purpose other than simply a naked preference for one group over another.³⁴⁹ A central aim of the Equal Protection Clause is to root out legislative decisionmaking on the basis of just such preferences.³⁵⁰

The actual legislative purpose for religious exemptions to child welfare and education laws is readily apparent. Adult members of minority religious groups lobby government officials demanding as a matter of parental authority and religious freedom that they not be required to comply with one or another statutory obligation that they find objectionable. Legislators acquiesce to this political pressure,³⁵¹ and justify their actions, if at all, as appropriate deference to the religious interests and rights of parents.³⁵² They make no pretense

avoiding discrimination between welfare families and families of the working poor, and conserving scarce state resources); *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969) (preventing welfare fraud), *overruled in part* by *Edelman v. Jordan*, 415 U.S. 651 (1974).

349. See *Fritz*, 449 U.S. at 180-81 (Stevens, J., concurring) (stating that a legitimate purpose is one that, at a minimum, the court "may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred.") (emphasis added); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Moreno*, 413 U.S. at 534 ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); see also *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring) ("Thus, the word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.").

350. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1693-94 (1984).

351. Cf. *Americans United for Separation of Church & State v. School Dist.*, 718 F.2d 1389, 1406 (6th Cir. 1983) ("Legislatures in many states are notoriously vulnerable to pressures from religious constituencies."), *aff'd sub nom.* *School Dist. of Grand Rapids v. Ball*, 474 U.S. 373 (1985).

352. See Devins, *supra* note 9, at 826, 831; see also *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94 (E.D.N.Y. 1987) (noting that religious exemption to state vaccination law "seems to be designed specifically to advance the interests of individuals who oppose vaccination on theological grounds. Such treatment of religious interests can justifiably be seen as a reasonable accommodation of the consideration more directly addressed by the free exercise clause of the First Amendment."); *Lybarger v. People*, 807 P.2d 570, 578 (Colo. 1991) (en banc) ("The 'treatment by spiritual means' defense, which is part of the statutory scheme, is intended to accommodate the religious beliefs of those parents who rely on prayer in lieu of medical care in treating a sick child."); *Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill*, 589 S.W.2d 877, 881 (Ky. 1979) (noting that state constitutional provision protecting parental right to choose nonpublic education for children "represented the position that . . . the rights of conscience of those who desired education of their children in private and parochial schools should be protected"); *Davis v. State*, 451 A.2d 107, 110 (Md. 1982) (noting that state asserted purpose of religious exemption was to accommodate

that their decision furthers any interests of the children involved.³⁵³ No doubt most adult members of the public would likewise rationalize these exemptions as appropriate marks of deference to parental religious interests, perhaps invoking the value of religious toleration as well, were they ever to consider why these exemptions exist.

The belief that protecting parents' religious liberty is an adequate reason for the religious exemptions under discussion here, however, is not as unproblematic as it might seem. Careful reflection on this point may reveal that this legislative purpose is in fact illegitimate. To determine if this is the case, it is useful to break down the religious interests of parents into two parts, according to whether past judicial decisions have deemed those interests constitutionally protected.³⁵⁴ If parents can claim, based on past judicial decisions,

the "religious concerns of Maryland's citizens"); *id.* at 112 ("In creating this exemption, the legislature presumably saw fit to respect the religious beliefs of certain of its citizens but not others."); *Dalli v. Board of Educ.*, 267 N.E.2d 219, 223 (Mass. 1971) (noting that state legislature in adding religious exemption to vaccination law "recognized that it was an appropriate mark of deference to the sincere religious beliefs of the few").

353. Indeed, from a child-welfare perspective, it is ironic that parents' secular beliefs about what is best for the physical health of their child, or about what educational approach is most conducive to their child's intellectual growth, carries little or no legal weight, while parents' beliefs about what is necessary for their own salvation may be determinative of their authority to control their children's lives. *See, e.g., In re Christine M.*, 595 N.Y.S.2d 606, 612, 615-16 (N.Y. Fam. Ct. 1992) (holding that a state's child vaccination law is not susceptible to challenge on the basis of scientific evidence as to the efficacy and necessity of a required vaccine; the plaintiff must show that his opposition stems from sincerely held religious belief).

354. Part I found that parents enjoy no constitutional right to prevent their children from receiving vaccinations. *See supra* notes 150-55 and accompanying text. On the other hand, the prevailing judicial view is that parents whose religious beliefs oppose conventional medical care do have a constitutional right to prevent their children from receiving medical treatment for illnesses and injuries that are not likely to result in death or permanent and severe impairment. *See supra* notes 134-39 and accompanying text.

Part I also found that all parents have a constitutional right to send their children to private school, but apart from the Amish and similarly insular religious communities, parents have no constitutional right to home school. *See supra* note 111. The Supreme Court has yet to speak to the permissible scope of state control over the pedagogical practices of religious schools, but it has indicated that it would uphold "reasonable" state regulations. *See supra* notes 101-04 and accompanying text. Presumably a regulation designed to prevent significant harms to children is a reasonable one, so it is conceivable that the Court would uphold a law prohibiting sex discrimination and sex bias that applied to all schools, even though such a prohibition would conflict with religious belief about as directly as any school regulation possibly could. (Importantly, though, it would not involve the state in deciding religious questions, and so should not be deemed inconsistent with the Establishment Clause. A statutory prohibition of sexism in education, though preventing some groups from teaching one of their religious tenets to children in their schools, would do so on the basis of a legislative judgment as to the temporal consequences of sexism, not on the basis of theological disagreement with those groups. Analogous-

a constitutional right to an exemption, then one might characterize the state purpose for a religious exemption as compliance with the federal Constitution. If, on the other hand, parents have no constitutional authority for demanding an exemption, then the state's purpose is simply to give a gratuitous benefit to the parents, by satisfying their religiously grounded preferences.

a. Parents' Constitutional Rights

When the purpose of a statutory religious exemption is to satisfy constitutional requirements, that purpose would seem unquestionably to be legitimate.³⁵⁵ The state should be able to assert as a complete defense to a challenge to such an exemption that it had no choice legally but to grant it. The locus of the responsibility for the discrimination in that case would shift to the federal judiciary that has interpreted the Constitution to require such an exemption for parents who have religious objections to a law.³⁵⁶ This does not mean, however, that these exemptions are unassailable, or that the children who receive lesser medical care or education as a result of a judicially mandated exemption have no recourse, for the court decisions themselves are vulnerable to challenge as denials of equal protection.³⁵⁷ To secure equal treatment for these children, an advocate

ly, a court should not find an Establishment Clause violation when a law prohibits involvement of children in ritual snake-handling, based on the potential for harm to children's temporal interests rather than on a legislative judgment that snake-handling is contrary to the will of God. Prevailing interpretation of the Establishment Clause might, however, limit the means a state could adopt to try to enforce an anti-sexism mandate in religious schools. The most intrusive means might constitute an impermissible entanglement of the state with religious matters. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).).

In addition, lower courts have held that states need not exempt religious schools from licensing, teacher certification, reporting, and core subject requirements. *See supra* notes 88-91 and accompanying text. Moreover, state financial assistance to private schools is clearly not, in the Supreme Court's view, constitutionally mandated. *See Norwood v. Harrison*, 413 U.S. 455, 462 (1973). On the other hand, courts might very well decide that a law prescribing specific textbooks and other curricular materials for use in religious schools, as many states now do for public schools, goes too far and violates the constitutional rights of parents. *See supra* notes 86-107 and accompanying text.

355. *Papasan v. Alkin*, 478 U.S. 265, 289 (1986) (noting that "if the federal law is valid and the State is bound by it, then it provides a rational reason" for the challenged discriminatory state action).

356. *Id.* ("If, as a matter of federal law, the State has no choice in the matter, whether the complaint states an equal protection claim depends on whether the federal policy is itself violative of the Clause.").

357. *Id.* (stating that if federal policy mandating certain state action is itself violative of equal protection, then courts may enjoin the state from implementing the policy); *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948) (holding that judicial action is state action for

on their behalf could seek a reversal of decisions that have created for some parents—those with particular religious beliefs—greater rights to harm or withhold benefits from their children than other parents possess.

Such a challenge to judicial interpretation of the First Amendment Free Exercise Clause would find support in the Supreme Court's interpretation of the Fourteenth Amendment. The Court has held in the latter context that courts should not interpret constitutional rights so as to create legal inequalities among classes of similarly situated persons, suggesting that equality is the most fundamental principle in our constitutional order.³⁵⁸ For example, in finding that judicial enforcement of a racially restrictive covenant in a private contract for sale of property violated the equal protection rights of African-Americans, the Supreme Court stated that "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."³⁵⁹ Thus, although protection of property rights is a fundamental principle in our constitutional scheme, it is trumped by the constitutional principle that no branch of government should support arbitrary social inequalities. The Equal Protection Clause operates as a higher-order constraint on judges, and provides a means for challenging interpretations of other constitutional provisions that generate inequalities.

This same principle that judicial interpretation of constitutional rights is subject to an equality constraint appears to have motivated the Supreme Court's landmark Free Exercise decision in *Employment Division v. Smith*.³⁶⁰ In that case, the Court set forth as a general proposition that the First Amendment should not be interpreted to grant any individuals exemptions from facially neutral and generally applicable laws simply because of their religious beliefs. To do otherwise would " 'permit every citizen to become a law unto himself,' " rather than all being subject equally to the laws of a jurisdiction.³⁶¹ Unfortunately, and without plausible explanation, the *Smith* opinion in dictum singled out as an exception to this general

purposes of the Equal Protection Clause).

358. See *Shelley*, 334 U.S. at 22.

359. *Id.*

360. 494 U.S. 872 (1990).

361. *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)). See Al McConnell, Note, *Abolishing "Separate but (Un)Equal" Status for Religious Universities*, 77 VA. L. REV. 1231, 1254-55 (1991) (citing authorities for view that close relation exists between equal protection and the religion clauses of the First Amendment).

rule the claims of parents whose religious beliefs conflict with child welfare laws.³⁶² The Court failed to perceive the terrible irony of this caveat. While denying that anyone should enjoy special license to harm themselves (the law at issue in *Smith* prohibited use of certain drugs), the Court adopted a position that would in effect grant some persons a special license to harm their children despite the unequal burden this places on the children of those persons.³⁶³ Yet clearly the strength of the equality constraint on construction of constitutional rights should be greater in the latter case. The *Smith* Court simply failed to recognize the conflict between its special solicitude for religious objector parents and the Equal Protection Clause.

The analysis here thus generates the startling conclusion that the entire body of judicial decisions upholding parental free exercise rights is illegitimate and cannot support legislative parental religious exemptions. That an important doctrine of constitutional rights could develop and persist for decades, all the while being in direct conflict with an over-arching principle of constitutional interpretation seems remarkable. As noted in Part II.C above, however, courts have typically arrived at these parental free exercise rights decisions with little or no consideration of the implications for children. This is partly because the affected children have not been parties to the litigation and also partly because apparently no one involved in these cases thought to raise the issue of equal protection for children. Were the federal judiciary ever squarely to confront the conflict between its parents' rights doctrine and the equal protection rights of children, it should find itself constrained, at a minimum, to impose severe limitations on the former—for example, by holding that courts may find a parental right to control some aspect of a child's upbringing only when doing so is consistent with the temporal interests of the child.

b. Parents' Religious Preferences

If parental religious interests that courts have deemed strong enough to give rise to a constitutional right ultimately cannot support

362. *Smith*, 494 U.S. at 881.

363. Justice Scalia's majority opinion actually cites only *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in connection with this caveat. *Smith*, 494 U.S. at 881. The Supreme Court might obviate the insidious implications of the caveat by finding in an appropriate case that parents enjoy a constitutional right to exemption from neutral child welfare laws only when this would not result in any harm to their children.

a denial of equal protection to religious objectors' children, then surely parental religious interests that courts have deemed *not* sufficiently strong to generate a constitutional right also cannot support such a denial. Since it is uncertain, however, how courts would resolve a conflict between traditionally recognized parental free exercise rights and novel equal protection claims on behalf of children, we should consider independently whether a state purpose to accommodate in gratuitous ways parents' religious preferences is legitimate for equal protection purposes.

The answer to this question is clearly "no." The first principle of equal protection jurisprudence is that the state may not base a discriminatory legislative classification on a naked preference for the interests of one group of persons over the interests of another group.³⁶⁴ Usually the 'naked preference' at issue in an equal protection case is between persons within a legislatively designated class and persons not within that class. However, the same principle should apply when the naked preference is between persons receiving a special legislative benefit and persons who incur a corresponding burden as a result of the others having that benefit. Thus, for example, an exemption from rape laws for husbands who rape their wives cannot permissibly be based on a legislative favoring of the interests of husbands over the interests of wives. Similarly, an exemption from child welfare laws for parents with certain religious beliefs cannot permissibly be grounded simply in a naked preference for the interests of these parents over the interests of their children.³⁶⁵

364. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 446-47 (1985) ("[S]ome objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests.") (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). A naked preference for one group's interests over another's is different from a judgment that one group's interests are more important after giving equal consideration to both and balancing them. Rather, it is a failure to give equal consideration to the interests of all affected persons, and instead deciding to serve the interests of one group even though they conflict with interests of another group that are equally or more important, whether out of indifference to the latter group or simple favoritism for the former. The discussion here assumes that courts and legislatures have not given appropriate consideration to the distinct interests of children in creating special rights and privileges for religious objector parents, and that children's fundamental interests in medical care and education outweigh parents' desires to conform their children's lives to religious precepts. For a fuller discussion of parents' religious interests, see Dwyer, *supra* note 13, at 1439-42. The discussion below also considers whether it would be appropriate to balance parents' and children's interests in these contexts.

365. Cf. *Lipscomb v. Simmons*, 962 F.2d 1374, 1388-89 (9th Cir. 1992) (Kozinsky, J., dissenting) ("Each child is entitled to have key decisions as to its care made in light of his

Another way to understand this restriction on permissible state purposes is to view a naked preference for one group of persons over another as effectively rendering the motives and actions of the former group motives and actions of the state.³⁶⁶ Thus, if a state denied only to homosexuals certain statutory protections against harmful conduct by others, such as physical assaults, based on a legislative choice to favor persons who want to assault homosexuals over persons who are homosexual, the private motive for any assaults would cease to be solely a private motive and would become also a governmental motive. Similarly, denying equal protection to children whose parents have particular religiously grounded child-rearing preferences, based on a legislative choice to favor the interests of these parents over the interests of their children, in effect makes the parents' preferences the preferences of the state. Clearly, however, as a matter of Establishment Clause jurisprudence, the state may not have religiously grounded preferences of any kind regarding the upbringing of children, let alone religiously grounded preferences to give some children lesser protection from harm to their temporal interests than other children receive.³⁶⁷ The actual state purpose behind religious exemptions to child welfare and education laws, which is also the rationale most people would invoke in defense of these exemptions—namely, to accommodate the religious wishes of parents—is thus clearly not a legitimate purpose, regardless of whether these interests are understood as parents' constitutional rights or simply as parents' desire to control their children's lives.

own best interests, rather than to serve some collateral purpose."); *Felton v. Felton*, 418 N.E.2d 606, 608 (Mass. 1981) ("The critical literature warns against perverting a quest for the child's best interests into one for the psychic comfort of the parents—a warning against overvaluing the parents' constitutional liberties.").

366. See *Cleburne*, 473 U.S. at 448 ("It is plain that the electorate as a whole . . . could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.") (citation omitted); *Snyder*, *supra* note 171, at 1086 ("The lesson of *Shelley*, reaffirmed in *Palmore*, is simply that a private party is not entitled to have its wishes enforced by the government when such enforcement would be unconstitutional. The private motivation in such a case ceases to be private when it becomes the basis for governmental action.").

367. See *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) (holding that religious displays on government property are impermissible because "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief"); *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (striking down on Establishment Clause grounds a statute that forbade the teaching of evolution in public schools where creationism was not also taught because the statute endorsed a particular religious doctrine).

Importantly, even if parents' religious interests were but one consideration in legislative and judicial decisionmaking, and equal consideration were given to the interests of children and then the two sets of interests balanced, serving the parents' religious interests would still be an inappropriate state purpose in the special context of equal protection.³⁶⁸ It is no more appropriate to deny equal protection of the laws to religious objectors' children based on a balancing of the children's interests against the religious preference of other persons (even though they are the children's parents) than it would be in the case of any group of adults. If, for example, a certain minority religion encouraged husbands to beat their wives if they engage in unorthodox behavior, a religious exemption to domestic abuse laws based on a balancing of the religious interests of men in this religious community against the health and safety interests of women in the community would clearly be inappropriate.³⁶⁹ To satisfy equal protection strictures, a law that discriminates between two similarly situated groups of persons must further aims *of the state*, not merely the interests of some third group of persons.

368. Of course, legislatures regularly balance the interests of different groups in fashioning legal rules, including important social legislation. This is permissible insofar as all similarly situated persons receive equal treatment. When laws create discriminatory classifications in the imposition of substantial burdens or the conferral of important benefits, however, the state must have some purpose for doing so that is tied to the characteristics of the disfavored class and an interest of the state. It cannot attempt to justify discrimination between similarly situated persons by pointing to the interests of third parties. Thus, for example, in fashioning rules for the sale of property, a legislature may fairly balance the interests of buyers as a class against the interests of sellers as a class. It may not, however, create rules giving minority buyers fewer rights than white buyers based on a purpose of protecting the financial interests of property owners (sellers and potential sellers) in all-white neighborhoods. Such a purpose would be illegitimate in an equal protection context. In contrast, a purpose of avoiding lost revenue from property taxes should property values in fact fall might be a legitimate purpose, because it addresses an interest of the state rather than an interest of a particular constituency, though it would certainly not be a sufficiently compelling purpose to justify such racial discrimination. The discussion below considers whether religious exemptions to child welfare and education laws serve analogous aims of the state.

369. Likewise, if a religious group believed it had a moral obligation to seize homeless persons from the streets and brainwash them into becoming adherents to their faith, a legislature could not carve out an exemption to kidnapping or assault laws to cover such cases for the purpose of accommodating the religious interests of that group. Because that is an illegitimate purpose in an equal protection context, it would be an improper factor to balance against the interests of homeless persons.

For a similar reason, notions of toleration are misplaced in the context of religious child-rearing. Religious toleration means allowing individuals to govern their own lives by their own lights, even if these are unpopular. It is closely tied to the value of *self-determination*. Religious toleration does not mean allowing individuals, in accordance with their religious beliefs, to depart from norms regarding treatment of *other* persons.

Since the actual purpose of the religious exemptions is an impermissible one, courts applying heightened scrutiny need proceed no further in their analysis in order to conclude that these exemptions violate the equal protection rights of the children of religious objectors and are therefore constitutionally invalid. Courts should therefore strike down all parental religious exemptions, thereby requiring that states extend all important child welfare and education laws universally or eliminate them entirely (if they could do so consistently with the Due Process Clause). One result of such judicial action would likely be to bring to the forefront of public attention the situation of groups of children that have previously been largely ignored, and thereby to generate open public discussion of the needs and interests of these children and their claims to the protections of the larger society. This particular result should be salutary not only for these children, but also for their parents and for our society as a whole.

Other consequences of eliminating parental religious exemptions, however, might not be so salutary. The remainder of Part II considers whether possible adverse consequences of extending child protective laws universally might constitute conceivable, legitimate justifications for states' failure to do so. Such justifications might allow the religious exemptions to survive rational basis scrutiny if a court, despite compelling arguments against doing so, were to apply this more deferential form of review rather than heightened scrutiny. As stated above, under rational basis review a court may speculate in this way about conceivable alternative bases for discriminatory classifications.³⁷⁰

c. Alternative State Purposes

In speculating about alternative state purposes for religious exemptions to child welfare and education laws, one must keep in mind that the exemptions are tied to religious belief, rather than more generally to parental choice. Indeed, if the latter were the case—that is, if parents were exempt from a legal responsibility whenever they

370. One might argue that, at least when hostility to a disfavored class of persons does not appear to have motivated discriminatory legislation, courts should be willing to consider any conceivable justifications that are tied to the interests of the "disfavored" class regardless of the level of scrutiny it is applying. If the ultimate concern is the protection of the children, then invalidating legislation that on the whole is beneficial to them, simply because the legislature's actual purpose in singling them out for different treatment was not to serve their best interests, would seem irrational.

chose not to fulfill it, the laws would be vacuous. Any hypothesized purpose for these exemptions must therefore relate in some way to religious belief.³⁷¹

i. Promoting Family Relationships

The state purpose that a court would be most likely to hypothesize, or that a state defendant would be most likely to offer as a post-hoc rationalization, in support of parental religious exemptions is the aim of promoting close family relationships.³⁷² As a general matter, supporting family ties is indisputably a legitimate state purpose, in light of the importance of these relationships to the temporal well-being of all persons and to the functioning of our society. This purpose might bear some relation to religious exemptions to child welfare and education laws. Specifically, parents' ability to act on the basis of their religious beliefs might promote peaceful stability within the family. Parents thwarted in their religious preferences might, for instance, become very upset and react in a way that disturbs the tranquility of the home and the bond between parent and child. Avoiding this outcome might appear to be a legitimate state purpose because it protects interests of the children and interests that the children share with the parents, rather than interests of parents that are at odds with those of the children.³⁷³

Along these same lines, a state might assert as a justification the purpose of avoiding the substantial enforcement costs that would arise were it to extend child welfare and education laws universally. No doubt many parents would vehemently and violently resist such extension of the laws. Although not a stated actual purpose for existing exemptions, enforcement problems no doubt played an important causal role in the creation of many of them, particularly in the education context.

While the general aims of promoting close family relationships and conserving state resources are legitimate ones, however, the more specific aim at work here—that of avoiding adverse parental reactions to ensuring children equal protection of child welfare and education

371. Subsection II.D.3 *infra* considers whether the religious beliefs of parents bear a rational or substantial relation to the hypothetical alternative purposes posited here.

372. The Supreme Court recognized "promoting family life" as a legitimate state interest in *Labine v. Vincent*, 401 U.S. 532, 536 n.6 (1971) (upholding intestate succession law that gave collateral relatives priority over illegitimate children).

373. *Cf. In re R.M.G.*, 454 A.2d 776, 800 (D.C. 1982) (Newman, C.J., dissenting) (noting that purpose of racial matching provision in adoption statutes is not to advance interests of adult blacks "but simply to protect the best interests of the child").

laws—is not legitimate. The Supreme Court has held on numerous occasions that states may not consider, in determining whether to implement and enforce the constitutional rights of some class of persons, the possibility that private parties will have negative reactions to or resist such state action. *Palmore v. Sidoti*³⁷⁴ is instructive in this regard. In that case, the Supreme Court unanimously invalidated a state court award of child custody to a father because the award was based solely on the fact that the Caucasian mother had remarried an African-American man. The Court duly noted the “risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.”³⁷⁵ The Court held unanimously, however, that this was an impermissible basis for denying custody rights to the mother even under a ‘best interest of the child’ analysis:

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.³⁷⁶

Palmore upheld the parental right of the mother despite the potential for harm to her child. In other cases, the Court has upheld the constitutional rights of persons despite the likelihood of harm to *themselves* as a result of public resistance to enforcement of those rights. For example, in *City of Cleburne v. Cleburne Living Center*,³⁷⁷ the Court considered the potential for neighborhood resentment toward the mentally retarded inhabitants of a proposed group home, and concluded:

[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are

374. 466 U.S. 429 (1984).

375. *Id.* at 433.

376. *Id.* The *Palmore* holding is “not generally considered controversial.” Snyder, *supra* note 171, at 1086. Similarly, courts have determined that protecting a child from community prejudice is not a proper justification for laws prohibiting cross-racial adoption or adoption by homosexual couples. *R.M.G.*, 454 A.2d at 789-90 (cross-racial adoption); *State Dep’t of Health v. Cox*, 627 So. 2d 1210, 1220 n.10 (Fla. Dist. Ct. App. 1993) (adoption by homosexual couples), *modified*, 656 So. 2d 902 (Fla. 1995).

377. 473 U.S. 432 (1985).

not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole . . . could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.³⁷⁸

The Court likewise dismissed concerns about private resistance to school desegregation in the 1950s³⁷⁹ and to desegregation of other areas of social life such as public parks³⁸⁰ and restaurants³⁸¹ in the 1960s, when the harm from resistance would have fallen primarily on the individuals whose equal protection rights were at stake, and secondarily on the government agencies that would have to enforce the laws.³⁸²

378. *Id.* at 448 (citation omitted).

379. In *Cooper v. Aaron*, 358 U.S. 1 (1958) (reversing district court order suspending desegregation efforts in public schools of Little Rock, Arkansas), the Court stated:

The constitutional rights of [the children] are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. . . . "[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." . . . [difficulties with implementation] can also be brought under control by state action.

Id. at 16 (citation omitted); *see also* *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) ("But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.").

380. *See* *Watson v. Memphis*, 373 U.S. 526, 535 (1963) (rejecting the claim of a city's officials that desegregation of the city's parks should proceed slowly to "prevent interracial disturbances, violence, riots, and community confusion and turmoil," and stating that "constitutional rights may not be denied simply because of hostility to their assertion or exercise").

381. *See* *Wright v. Georgia*, 373 U.S. 284, 293 (1963) (reversing conviction of African-American men for "disturbing the peace" by peacefully playing basketball in a public park, the Court stated that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present"); *see also* *Buchanan v. Warley*, 245 U.S. 60, 81 (1917) (invalidating a state law forbidding African-Americans from buying homes in Caucasian neighborhoods, and stating that the aim of preventing race conflicts and thereby promoting public peace "cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution").

382. *See also* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); *Steffan v. Aspin*, 8 F.3d 57, 68 (D.C. Cir. 1993) (invalidating dismissal of midshipman from Naval Academy because of his homosexuality, the court stated that "a cardinal principle of equal protection law holds that government cannot discriminate against a class in order to give effect to the prejudice of others"); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1334 (E.D. Cal. 1993) (stating that a court may not

Consistent with these long-standing precedents, a court would have to hold that states may not exclude some children from the protection of immunization and anti-sexism laws merely because the children's parents might be very upset about and resist application of the laws to them, even though these reactions may have adverse effects upon the children.³⁸³ These precedents appear to rest on certain implicit and quite plausible assumptions: that securing for individuals, even especially vulnerable ones, their constitutional rights is more important than protecting them from social friction, that states have alternative means available for protecting individuals from the adverse reactions of private parties to state enforcement of their rights,³⁸⁴ and, perhaps most convincingly, that states would create perverse incentives if they backed down in the face of resistance to the enforcement of constitutional rights.³⁸⁵

give effect to "illegitimate fears and biases reflected in government policy").

In a very different context, a federal appellate court has held that concern about what a parent might do to a child in reaction to a denial of welfare benefits is not a permissible basis for granting the parent greater due process rights in relation to those benefits. *P.O.P.S. v. Gardner*, 998 F.2d 764, 768 (9th Cir. 1993) ("The fact that some parents take their financial frustrations out on their children does not afford them extra protection under the Due Process Clause.").

383. It bears mention that courts have dealt with numerous cases of parents who were adamantly opposed to vaccination but were not covered by a legislative religious exemption. *E.g.*, *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94 (E.D.N.Y. 1987) ("[A]lthough the Sherrs are clearly genuinely opposed to immunization, the heart of their opposition does not in fact lie in theological considerations."). None of the published opinions arising out of these cases contains any discussion of possible harm to the child, as a result of parental opposition, if vaccination were ordered.

384. Somewhat analogous in this regard are cases in which the Court has disapproved of states denying benefits to children in order to influence the behavior of their parents, because of the unfairness of punishing children for the conduct of their parents, and in which the Court has pointed out that states have alternative means for influencing the parents' behavior. *See, e.g.*, *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (invalidating state law that limited worker's compensation death benefits to legitimate and recognized illegitimate children).

This rationale may be least applicable in the case of intra-family interactions, since state control of parents' behavior toward their children would be extremely difficult. The difference between this situation and, for example, *Cleburne* is, however, one of degree. States also cannot control very easily how neighbors treat one another, and in both cases the state may be able to pursue various strategies to minimize any negative impact—public education programs to encourage new attitudes, fora for the disgruntled to air their views and receive a compassionate response, and counseling for the vulnerable groups to help them understand the reactions of others, to name just a few possibilities.

385. *See, e.g.*, *Steffan*, 8 F.3d at 68 ("Even if the government does not itself act out of prejudice, it cannot discriminate in an effort to avoid the effects of others' prejudice. Such discrimination plays directly into the hands of the bigots; it ratifies and encourages their prejudice."). In addition, although preservation of public resources is a general matter

An additional concern regarding family relations, though, is more difficult to dismiss. A court might find that some parents would unavoidably become alienated from their children, viewing their children as different or separate from them, or as morally tainted or impure, as a result of the state ordering treatment and education of the children in ways antithetical to the parents' religious world view and self-conception. For example, Christian Science parents whose children receive immunizations might perceive and feel about their children differently than they would if the children remained spiritually "pure" from the perspective of the parents' religion. As a consequence, parents might become less attached to their children and less nurturing.³⁸⁶

With respect to this concern, as in the case of parental resistance, religious exemptions may further the shared interests of parents and children. In this context, too, the specific aim is to avoid a particular reaction on the part of parents, but here the feared reaction and a state aim to avoid it do not appear as objectionable. A court wishing to distinguish this aim from that addressed in *Palmore*, *Cleburne* and the desegregation cases might argue that opposition to enforcement of the legal rights of others is, in a sense, beyond the constitutional pale; a willingness to abide by the law and to respect others as equal citizens is a basic condition for membership in our democratic community, so states simply should not brook such opposition. In contrast, the court might contend, emotional attachment to another person, including one's child, does not have this political dimension. It is not something the state can presume to exist or demand as a prerequisite of citizenship.³⁸⁷ As such, it may be appropriate for the

a legitimate state interest, in the context of securing individuals' constitutional rights, avoiding high enforcement costs is clearly not a legitimate reason for failing to do so. That a state may have to expend additional resources monitoring parental compliance and intervening to force compliance by recalcitrant parents in and of itself is no proper basis for denying equal protection to the children of these parents.

386. See O'REILLY & GREEN, *supra* note 23, at 51 (noting that in an Arkansas state court case involving religious objections to vaccination "there was doubt whether the [plaintiffs'] children would be welcomed back into the household after the vaccination because the purity of the body had been violated").

387. The state might presume such attachment to exist when adults first agree to serve as primary care-takers for a child, and might reasonably demand a strong emotional commitment as a condition for enjoying the privilege of serving in this capacity. However, once a parent-child bond is formed, the state cannot end it without substantial cost to the child, so for the child's sake the state must be cognizant of how its actions might undermine parental commitment.

state to take cognizance of and attempt to avoid discouraging such attachment.

If this reasoning is sound, a state purpose of avoiding parental alienation from children might be a legitimate hypothetical purpose for some parental religious exemptions. If so, examination of whether it is a sufficiently important purpose and sufficiently related to the legislative classification is necessary. Subsection III.C below undertakes this examination. One should note, though, that lower courts addressing the federal government's ban on gays in the military have uniformly deemed illegitimate the analogous rationale that the presence of a person who is homosexual in a military unit can destroy the bond among members of the unit that is essential to its proper functioning.³⁸⁸ In that context, as well as in the one under discussion here, concerns arise about indulging less-than-admirable attitudes and creating an incentive for persons to manifest such attitudes.

ii. Promoting Children's Religious Interests

Another post-hoc rationalization that a state might offer for parental religious exemptions is that they protect children's religious interests. Before assessing the legitimacy of this hypothetical purpose, we must identify clearly what the nature of those interests might be, if any such interests in fact exist. One might understand them to include a need to grow up within a religious belief system, following the rules and joining in the practices of a religious community. However, the state may not assume that children have religious needs of this sort; to do so the state would have to assume the truth of particular religious beliefs, which the Establishment Clause prohibits it from doing.³⁸⁹

388. *E.g.*, *Steffan v. Aspin*, 8 F.3d 57, 67-68 (D.C. Cir. 1993); *Dahl v. Secretary of the U.S. Navy*, 830 F. Supp. 1319, 1331-32 (E.D. Cal. 1993) (observing that even if homosexuals threaten "unit cohesion," this can only be because of "(1) heterosexual dislike of homosexuals for moral or other reasons; (2) heterosexuals' apparent fear that they will be victimized, threatened, or harassed by homosexuals; and/or (3) the notion that homosexuals are uniquely incapable of controlling their sexual desires," all of which amount to "illegitimate prejudice" that cannot be used to justify government action). Presumably conflict within a unit would adversely affect the homosexual members as well as the heterosexual members, though concern for the well-being of the homosexual members was probably not a motivating concern for those who created the ban.

389. *See Zucco v. Garrett*, 501 N.E.2d 875 (Ill. App. Ct. 1986):

To award custody of Shawn to respondent under these circumstances is to conclude that providing a religious environment is per se beneficial to a child's welfare. We believe, however, that the intrinsic benefits, if any, of an "upbringing in religion" are beyond the power of a civil court to comprehend. It is for this very reason that religion, in and of itself, must play no role in judicial

One might instead understand children's religious interests not as a need for a religious up-bringing, but rather as an interest in religious liberty. Individual religious liberty is an interest that the First Amendment protects, so a state purpose to protect it through legislation is, as a general matter, clearly a legitimate one.³⁹⁰ Moreover, a purpose to secure the religious liberty of religious objectors' children would not present the same problems that a purpose to secure the religious liberty of parents presents,³⁹¹ since the children's religious interest would be a characteristic that renders them not similarly situated to other children. It would not be a third-party's interest.

Religious exemptions to child welfare and education laws, however, are in almost all cases tied to the religious beliefs of parents, not children, so an argument that they are intended to protect children's religious liberty would be implausible. On the contrary, these exemptions, particularly in the area of education, may effectively prevent many children from developing capacities that would

determinations as to child custody.

Id. at 880. Courts are prohibited even from considering whether religious practice and belief generates secular benefits for a child, since basing a decision on a judgment that it does would advance religion, in contravention of the Establishment Clause. *See Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990):

[T]he prohibition on preferring some religion to none, may not be avoided by suggesting that religion or religious stability is only being considered because of the *secular* rather than *spiritual* benefits expected to arise from protecting the stability of a child's religious beliefs. We are aware of the wide body of research which suggests that religiosity may be linked to various physical, intellectual, emotional, and moral benefits. . . . [But] the First Amendment as construed by the United States Supreme Court nonetheless precludes a preference for some religion over none, regardless of the secular benefits presumed to be at stake. The exclusion of the benefits of stability in religious inculcation and of religiosity in general are apparently part of the price which must be paid for religious freedom

Id. at 1151-52 (citing *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)). One might reasonably question the fairness or coherence of precluding judges from considering the secular benefits of religion, while allowing them to take into account the secular harms some religious instruction or practice might occasion. *See supra* note 105 and accompanying text. The last sentence of the just-quoted passage suggests that the reason for this incongruity may be a concern that legislators and judges would be more likely to favor religion under the guise of finding secular benefits than they would be to disfavor religion under the guise of finding secular harms.

390. Under *Employment Div. v. Smith*, 494 U.S. 872 (1990), a child's interest in religious liberty would not require the state to exclude him from the coverage of facially neutral and generally applicable child welfare and education laws. It might, however, provide a legitimate basis for the state voluntarily doing so, depending on one's interpretation of the Establishment Clause.

391. *See supra* notes 364-69 and accompanying text.

allow them to think freely and independently about religious matters, since they enable parents to enroll their children in schools that stifle intellectual autonomy and critical thinking and shield children from knowledge of alternative belief systems.³⁹² Moreover, even if the exemptions were tied to children's beliefs, or even if one could assume that parents' beliefs are always an adequate proxy for their children's beliefs, this supposed purpose could not salvage the exemptions.

Courts have wisely determined that attributing an interest in religious liberty to children who have not reached a stage of development at which they are capable of exercising independent judgment regarding religion is inappropriate,³⁹³ particularly when the expressed preferences of children in relation to some religious matter are contrary to their temporal developmental interests. The principal reasons why an individual benefits from enjoying substantial personal freedom are that she is generally the best judge of her own unique interests or, if not, will best develop as a person if left to make mistakes and learn thereby, and that frustration of a person's deeply-embedded commitments causes her great suffering.³⁹⁴ These reasons are largely absent in the case of young children, who lack the cognitive abilities, knowledge, psychological and emotional independence, and self-control necessary for successful life-planning and autonomous development, and who have not yet made a conscious

392. See *supra* note 71 and accompanying text.

393. See *Zummo*, 574 A.2d at 1149. In invalidating a lower court order prohibiting a non-custodial father from taking to Catholic services children aged three, four, and eight who were being raised in the Jewish faith by their mother, the court stated:

Commonly, parents and religious leaders define a child's religious identity under the rules of the religion they practice. Often such rules impose a presumed religious identity upon a child without requiring the child's consent or understanding, on the basis of the parent's religion. . . . The First Amendment forbids civil courts to . . . give any weight or consideration to religious rules or customs in such matters. . . . In order to avoid arrogating to itself unconstitutional authority to declare orthodoxy in determining religious identity, courts only recognize a *legally* cognizable religious identity when such an identity is asserted by the child itself, and then only if the child has reached sufficient maturity and intellectual development to understand the significance of such an assertion. Though no uniform age of discretion is set, children twelve or older are generally considered mature enough to assert a religious identity, while children eight and under are not. With those ranges as a starting point, judges exercise broad discretion on a case by case basis in determining whether a child has sufficient capacity to assert for itself a personal religious identity.

Id. at 1148-49.

394. See, e.g., JOHN STUART MILL, ON LIBERTY 54-56 (1859) (Elizabeth Rapaport ed. 1978).

commitment to a belief system or way of life.³⁹⁵ Moreover, placing on children the burden of making momentous decisions regarding their medical care and education could be quite traumatic for them, and would no doubt induce parents to take coercive measures to ensure that their children made the 'right' choice.³⁹⁶ Surely it would not serve the interests of young children to place them in the position of declaring to state officials whether they want to attend a school employing teachers who are not certified, or a school that professes sexist religious views.

Children at an age when immunizations are generally given—birth to age six—are clearly below the stage of development at which independent judgment regarding religious belief and practice is possible.³⁹⁷ Children in the first few grades of elementary school

395. Cf. Alison M. Brumley, Comment, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 352 (1991) ("Psychiatrists have identified five key elements of the ability to give fully informed consent: access to relevant information, capacity to understand, actual understanding (including ability to anticipate possible outcomes and consequences of the decision), freedom to choose, and ability to make a reasoned choice and express it clearly."). Other reasons would be present in this case—for example, the danger of putting too much power in the hands of the state and skepticism regarding the state's ability to determine what is best for individuals. The alternative in the case of children, however, is different than in the case of adults. Ascribing religious liberty *vis-a-vis* the state to young children would not in practice leave them to govern their own lives. Rather, it would effectively leave parents to control their children's lives; young children's religious liberty would just be a proxy for parental religious liberty. And there is at least as much reason to be suspicious of parental tyranny and incompetence as there is to be wary of state tyranny and incompetence. These arguments for liberty are thus severely weakened in the case of children.

396. Cf. *In re Sampson*, 317 N.Y.S.2d 641, 655-58 (N.Y. Fam. Ct. 1970) (declining to leave the decision whether to have surgery to a fifteen year-old boy when his mother had religious objection to blood transfusion because continued psychological harm to the boy was too great to risk further delay of surgery to correct a facial disfigurement).

397. See ALLEN BUCHANAN & DAN W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING* 220-23 (1989) (discussing research showing that children below age 12 are likely to see the locus of control regarding significant decisions as external to themselves, even when they are asked to make the decision, because they lack the skills necessary to view themselves as having a position independent from authority figures). A few states have 'mature minor' legislation that explicitly authorizes unemancipated minors to *consent* to medical treatment if they are of sufficient maturity and intelligence to understand and appreciate the consequences of the treatment. Walter Wadlington, *Medical Decision Making For and By Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 323 (citing ARK. CODE ANN. § 20-9-602(7) (Michie 1987); MISS. CODE ANN. § 41-41-3(h) (1993)). In addition, the courts have developed a mature minor doctrine that makes a minor's interest in or desire for treatment controlling in certain highly sensitive areas, such as substance abuse, sexually transmitted diseases, birth control, and abortion. *Id.* at 323-24.

With respect to medical care, one might argue that compelling immunization or treatment for illness may conflict with the religious views the child will have when he

are below this level as well. Courts have treated children between ages eight and thirteen as falling within a grey area in which some children may have moved to the higher developmental stage while others may not have.³⁹⁸ Children who grow up in a conservative, authoritarian religious household, though, are decidedly more likely to be among the children in this age group who have not yet reached the relevant stage. Research has demonstrated that such an upbringing retards development.³⁹⁹

A court should therefore conclude that, at least with respect to elementary school children, protection of children's interest in religious liberty is not a legitimate state purpose that could justify parental religious exemptions. From the state's perspective, no such interest exists, and furtherance of an interest that does not exist cannot be a legitimate state purpose. Moreover, since what is at stake in the context of education is a child's development toward intellectual independence, it would be particularly improper for a court to find that children have a religious interest that conflicts with regulations designed to further their intellectual growth. To make a child's expressed preference to forgo a statutory benefit controlling would be perverse if that preference is itself a reflection of the very developmental deprivation that the statute aims to avoid.

Rather than liberty in the present, though, one might interpret children's religious interest to mean their interest in the future, when they do commit themselves as adults to a religious belief system, in not having gone through experiences as children that are inconsistent with that belief system. For example, a state might assert that, even if an infant child of Christian Science parents does not have an interest in present religious liberty, he has an interest in not receiving medical care inconsistent with the faith he will likely adopt as an adult. Wholly apart from doubts about the coherence of the notion that a person can be harmed by medical care or instruction inconsis-

becomes an adult. This argument would have to rest on speculation about an individual's future that no court is in a position reasonably to undertake (although the Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), did precisely that), and also on a claim that compulsion to act now in ways that will be contrary to religious views later in life conflicts with an individual's religious liberty, a claim that is simply incoherent.

398. *Zummo v. Zummo*, 574 A.2d 1130, 1149 (Pa. Super. Ct. 1990).

399. See Gary B. Melton, *Decision Making by Children: Psychological Risks and Benefits*, in *CHILDREN'S COMPETENCE TO CONSENT* 21, 27 (Gary B. Melton et al. eds., 1983); June Louin Tapp & Gary B. Melton, *Preparing Children for Decision Making: Implications of Legal Socialization Research*, in *CHILDREN'S COMPETENCE TO CONSENT*, *supra*, at 225-26.

tent with his future beliefs, this argument would be undercut by the problem of justifying assumptions about a person's beliefs in the distant future. The *Plyler v. Doe*⁴⁰⁰ Court wisely looked with disfavor on state speculation as to the likelihood that certain children would in the future have no need for or make no use of benefits denied to them in the present.⁴⁰¹ No court should accept such speculation as a legitimate state rationale for denying medical or educational benefits to children.

Finally, one might understand a child's religious interests to mean an interest in avoiding confusion or disorientation as a result of witnessing a clash of values and authority between her parents and the larger society, or as a result of being forced to receive medical care or instruction that is in conflict with the religious beliefs her parents have taught her. This is another aspect of the problem considered in the preceding subsection regarding how state coercion affects the family, the focus now being on the child's reaction rather than the parent's.

Certainly, potential for emotional harm to children is a permissible state consideration. However, courts have consistently rejected contentions that exposure to competing belief systems is harmful to children.⁴⁰² In fact, such exposure may be a valuable learning

400. 457 U.S. 202 (1982).

401. The *Plyler* Court rejected the state's argument that denying an education to undocumented alien children would allow it to conserve its resources, by efficiently spending money on education only for those children likely to become permanent members of the local community:

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.

Id. at 230; *see also id.* at 222 n.20 (" '[B]enefits of education are not reserved to those whose productive utilization of them is a certainty.' ") (quoting *Doe v. Plyler*, 458 F. Supp. 569, 581 (E.D. Tex. 1978)).

402. Such contentions frequently surface in disputes between divorced parents over parenting practices and in parental challenges to elements of instruction in public schools. The Pennsylvania court in *Zummo*, a post-divorce dispute between parents, considered this argument at some length. It concluded that

"exposing a child to more than one religion . . . does not, by itself, cause [the child] emotional stress or identity confusion. . . ." What little empirical evidence exists regarding the generalized trauma or "marginality" of children of intermarriage presumed to result from their exposure to conflicting religions

experience for children.⁴⁰³ Confronting the more liberal values of the larger society may also be for a child a salutary antidote to repressive and subordinating treatment incurred at home. Although a court may consider hypothetical state purposes under rational basis review, it may not accept entirely fanciful purposes, such as avoiding a harm that does not exist. A state purpose of preventing children from being exposed to conflicting beliefs about medicine or about the status and role of women in society therefore would not be legitimate.

At the same time, the proposition that forcing a child to do something that he believes will cause him to spend eternity in hell can be emotionally harmful to the child is indisputable. No court has ever held the contrary. It is difficult to imagine how some education regulations—for example, requiring certified teachers and prohibiting sexist teaching—could ever have this result if imposed on religious schools, unless parents went to extraordinary lengths to make these changes appear frightening to the children (at which point the

and/or conflicting value systems suggests an absence of generalized trauma and/or "marginality."

574 A.2d at 1156 (quoting JUDY PETSONK & JIM REMSEN, *THE INTERMARRIAGE HANDBOOK: A GUIDE FOR JEWS AND CHRISTIANS* 298 (1988)). Accordingly, in custody disputes in which parents have divergent religious beliefs,

courts have rejected speculation by parents and by experts as to potential future emotional harm to a particular child based upon the assumption that such exposure is generally harmful. Likewise, parental attributions of current child disturbances or distress as the result of a religious conflict, rather than the divorce generally or other causes, have similarly been rejected.

Id. at 1155 (citations omitted).

The *Zummo* court granted that "exposure to parents' conflicting values, lifestyles, and religious beliefs may indeed cause doubts and stress. However, stress is not always harmful, nor is it always to be avoided and protected against. The key, is not whether the child experiences stress, but whether the stress experienced is unproductively severe." *Id.* And contrary to one prominent, but unsupported view that children must see their parents as "omniscient and all-powerful," JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 9 (1979), the *Zummo* court concluded from a review of child development literature that "[t]he process of a child's maturation requires that they view and evaluate their parents in the bright light of reality. Children who learn their parents' weaknesses and strengths may be able better to shape life-long relationships with them." 574 A.2d at 1155 (quoting *Fatemi v. Fatemi*, 489 A.2d 798, 801 (Pa. Super. Ct. 1985)). In sum, the court concluded,

[R]esearch reveals there is no objective basis to support either parental or expert predictions of future harm to a particular child based upon an assumption that such exposure is generally harmful. The caselaw, commentaries, and empirical studies all suggest, if not compel, an opposite conclusion—that while some may suffer emotional distress from exposure to contradictory religions, most do not.

Id. at 1157.

403. See *Zummo*, 574 A.2d at 1155 n.45 ("Some courts have explicitly stated that bi-cultural/bi-religious exposure would be beneficial.").

discussion of parental resistance above would become relevant). These regulations do not require children to do anything; they only constrain the behavior of teachers and school administrators. State prescription of the textbooks to be used in church schools might present a different case, at least with respect to any selected books that promote views inconsistent with parents' religious beliefs. Children are likely to become aware of parental beliefs that certain school books contain sinful views and should not be read, and so to experience great anxiety about having to read those books. Here too, though, the possibility of creating a perverse incentive should give courts pause before they find that this is a legitimate basis for an exemption.

With respect to medical care, this concern would not arise in relation to any child too young to understand the idea of religious commandments, so it would not generate a legitimate state purpose for exemptions to compulsory infant immunization and medical care. With respect to medical care for children aged five or older, however, avoiding emotional harm from forced treatment may very well be a legitimate state purpose. If so, then it is appropriate to assess the importance of this purpose and how closely it is served by a classification of children according to the religious beliefs of their parents.

iii. Promoting Cultural Diversity

Consistent with the Establishment Clause, states may not intentionally promote religion, so that aim cannot serve to justify parental religious exemptions. States, may, however, promote cultural diversity, or at least foster conditions in which a variety of cultural communities and belief systems can thrive free of government impediment.⁴⁰⁴ Doing so makes possible what John Stuart Mill termed "experiments in living," which can lead to the discovery of better ways of life for many individuals or whole societies.⁴⁰⁵ It may also better enable individuals to find a social environment well-suited to their individual character, values, and tastes. These are secular goods shared by all, so if pursued in a manner neutral as to religion

404. The Supreme Court recognized promotion of social diversity as a legitimate state interest in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566 (1990).

405. MILL, *supra* note 394, at 54. The Supreme Court's *Yoder* decision was motivated in part by a solicitude for threatened minority communities, whose extinction would constitute a diminution of cultural diversity in our country. See *Wisconsin v. Yoder*, 406 U.S. 205, 218, 223, 234 n.22 (1972).

no problem of establishing religion or preferring one group over another arises.⁴⁰⁶

Fostering diversity thus constitutes an additional conceivable legitimate state purpose for some religious exemptions. While only a very strained argument could show that denying vaccinations or other medical care to children promotes cultural diversity, permitting parents to choose non-mainstream forms of education for their children would appear to be conducive to an increased variety of cultural communities in our society.

To summarize the conclusions of this subsection: The actual legislative purpose for parental religious exemptions—deference to the religious interests of parents—is not a legitimate state purpose. These exemptions therefore cannot survive heightened scrutiny. Were a court to subject these exemptions only to rational basis review, however, it might find several conceivable legitimate purposes for such exemptions. These include (1) promoting parental attachment to children, (2) sparing children from the trauma of having to undergo treatment or instruction that they believe to be contrary to the will of God and their parents, and (3) promoting cultural diversity. With respect to anti-sexism school regulations, the third of these purposes is a facially plausible rationale for a religious exemption, while all three might apply to a regulation prescribing textbooks or courses that affirmatively promote gender equality. With respect to immunization and other medical care, the first is a facially plausible rationale for exemptions regardless of the age of a child, and the second is a facially plausible rationale with respect to children old enough to understand what it means to violate a religious rule, while the third is not even facially plausible regardless of the age of the children.

Other purposes that a state might assert, on the other hand, are not legitimate: avoiding parental resistance to enforcement of child welfare and education laws, satisfying children's "need for religion" or (at least in the case of children under fourteen) interest in religious liberty, sparing a child from exposure to beliefs inconsistent with those of his parents, and promoting minority religions. The next two subsections evaluate the importance of the legitimate purposes identified and the closeness of the relation between them and classifications among children based on the religious beliefs of parents.

406. Subsection II.D.3 below addresses the problem that exemptions tied to religious belief, *ipso facto*, are not neutral as between religious and other forms of cultural diversity.

2. Importance of Interests

Under rational basis review, courts do not review the importance of the interests underlying a legitimate state purpose, but instead leave judgments of importance to the legislative branch.⁴⁰⁷ This Part nevertheless briefly addresses the importance of the legitimate state purposes just identified, because a court might, based on some slender evidence, hold that one of them was an actual purpose for a particular parental religious exemption. In such a case, a court applying heightened review would have to proceed to consideration of the importance of that purpose, as well as the closeness of its relation to the legislative classification.

As with legitimacy, the Supreme Court has not set forth clear criteria for evaluating the importance of state interests or purposes.⁴⁰⁸ Some members of the Court have recommended a balancing test, under which the state goal purportedly justifying imposition of a legislative burden on a particular group must be a "public purpose that transcends the harm to the members of the disadvantaged class."⁴⁰⁹ Where the legislative purpose is to protect the interests of a class of persons unable to do so themselves, one member of the court has suggested a type of substituted judgment approach, whereby judges would assess whether members of the vulnerable class, if able rationally to assess their situation, would

407. They must, however, find a rational relation between the purpose and the classification. See *infra* notes 437-44 and accompanying text.

408. Cf. *Craig v. Boren*, 429 U.S. 190 (1976):

How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement?

Both of the phrases are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation

Id. at 220-21 (Rehnquist, J., dissenting). The Court has rendered judgments as to the relative importance of several particular state purposes, none of which are directly relevant here. *E.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151-52 (1980) (refusing to find administrative convenience to be an important state purpose under intermediate scrutiny); *Craig*, 429 U.S. at 198 ("Decisions following [*Reed v. Reed*, 404 U.S. 71 (1971)] similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications."); *Shapiro v. Thompson*, 394 U.S. 618, 634, 642 (1968) (holding that administrative objectives of facilitating planning of welfare budget, simplifying criteria, minimizing fraud, and encouraging work are not compelling interests that would satisfy strict scrutiny).

409. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

approve of the legislative choice made on their behalf.⁴¹⁰ In other words, courts would balance the costs and benefits running to the same persons as a result of the legislative classification.

The harm to children from not receiving vaccinations can be quite severe.⁴¹¹ The state purpose for exemptions to compulsory immunization laws should therefore be extremely important to outweigh the potential for harm to children.⁴¹² The harms children incur as a result of receiving an inferior education, as may occur when teachers are not qualified or repress intellectual independence, or as a result of sexist teaching, may not be as obvious as, for example, a case of whooping cough, but they are nevertheless severe. These harms include diminished self-esteem, lesser chances for success in careers, frustration of ambitions, and lesser self-fulfillment.⁴¹³ These consequences are substantial and long-term. Accordingly, a state purpose that justifies these harms must likewise be extremely important.

The purpose of fostering cultural diversity is easily dismissed. One has difficulty imagining a state arguing, or a court accepting, that it may impose the costs of educational deprivation on children in order to pursue such a diffuse and intangible public benefit.⁴¹⁴

410. Justice Stevens suggested this standard in *Cleburne* when he wrote: "I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case." *Id.* at 455 (Stevens, J., concurring); see also Brumley, *supra* note 395, at 354 (noting that in cases adjudicating an unemancipated minor's right to have an abortion, when the minor is found not to be sufficiently mature to make the abortion decision herself, "courts apply the doctrine of substituted judgment").

411. See *supra* note 143.

412. This conclusion is borne out by the numerous judicial decisions finding that a parental interest in religious freedom, which courts treat as a fundamental interest, is not sufficiently important to outweigh children's need for immunization. See, e.g., *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (protecting school children against the horrors of crippling and death "is the obvious overriding and compelling public purpose of [the compulsory immunization law]. To the extent that it may conflict with the religious beliefs of a parent, however sincerely entertained, the interests of the school children must prevail."), *cert. denied*, 449 U.S. 887 (1980).

413. See *supra* notes 53-58 and accompanying text.

414. Of course the Supreme Court in effect did just that in *Yoder*, in approving the Amish parents' request to keep their adolescent children out of school, motivated in large part by a fear that the Amish culture might disappear if the children in the community received a mainstream education. However, the Court refused to acknowledge that the children would be harmed in any way, and its special solicitude for threatened minority cultures was ostensibly just a subtext to a decision based on the constitutionally protected religious interests of parents. 406 U.S. 205, 229-30 (1972).

According to the standard interpretation of classical utilitarianism, that theory would sanction the sacrifice of the fundamental interests of a group of children if the attendant

Whatever gain might flow from the richness of our social environment as a result of parental religious exemptions to education laws, it certainly cannot be sufficiently important to outweigh the attendant harms to unconsenting, innocent children. The Supreme Court has in several contexts, including the context of child welfare, indicated an appropriate hostility to legislation that treats politically less powerful persons instrumentally as means to serve collateral social ends.⁴¹⁵

It is also worth noting that greater standardization of schools in this country would hardly threaten cultural diversity. For the past several decades roughly nine-tenths of all children have attended public schools, yet one could hardly maintain that whatever cultural diversity exists in this country resides principally among the one-tenth of the population that attended non-public schools. In fact, the effect of conservative religious schooling is generally to standardize children within a given religious community, and to deny them access to a

benefits from cultural diversity, though small on a per-person basis, reached such a great number of people as to produce a net gain in aggregate utility. See R.G. Frey, *Introduction: Utilitarianism and Persons*, in *UTILITY AND RIGHTS* 3, 6-7 (R.G. Frey ed., 1984). Making such calculations in practice is notoriously difficult. It seems unlikely, however, that this country has enough people to enjoy the purported benefit of the marginal increase in cultural diversity arising from the educational deprivation of several million children, such that the aggregate effect on utility would be a net gain. Many contemporary utilitarians, and most non-utilitarians, on the other hand, endorse a notion of individual rights that precludes such a trade-off between the fundamental interests of individuals and diffuse social benefits. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xii (1977); JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 166-67 (1990). The Supreme Court has manifested such a philosophy itself in its fundamental rights jurisprudence. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 634, 642 (1969) (holding that social interests in minimizing welfare fraud and in encouraging work cannot justify burdening individuals' fundamental right of interstate travel).

415. E.g., *Plyler v. Doe*, 457 U.S. 202 (1982):

[E]ven 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 229 n.25 (quoting *Doe v. Plyler*, 458 F. Supp. 569, 589 (E.D. Tex. 1978)); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (concluding that a state may not single out "those least well represented in the political process to bear the brunt of a benign program."); *Dandridge v. Williams*, 397 U.S. 471, 525 (1970) (Marshall, J., dissenting):

The State's position is thus that the State may deprive certain needy children of assistance to which they would otherwise be entitled in order to provide an arguable work incentive for their parents. But the State may not wield its economic whip in this fashion when the effect is to cause a deprivation to needy dependent children in order to correct an arguable fault of their parents.

diversity of cultural practices and belief systems, with the result that they have less opportunity to find a social environment and belief system best suited to their individual dispositions than do children who receive a mainstream, liberal education. Therefore, since cultural diversity was the only one of the three conceivable legitimate purposes identified above that might support most of the religious exemptions to school regulations, including exemptions from prohibitions of sexist teaching and instructional materials, these exemptions would fail heightened review even if a court found that fostering cultural diversity was an actual purpose of these exemptions.

Whether we deem the two other state purposes identified above—preserving parental attachment and protecting children from anxiety—important ones may depend on the level of generality at which we define them. Both involve protecting developmental interests of children, and as an abstract matter such a purpose is not only important, but is in fact compelling. If one defines these hypothetical state purposes in a manner more closely related to the actual effects of the exemptions, however, they do not seem so important.

With respect to the parent-child relationship, any diminution in parental attachment to children as a result of compulsory medical care or exposure to liberal views would surely be only modest. Religious objector parents would not leave their children by the roadside if the children were to receive immunizations or blood transfusions, or if the children were to learn in school that most people think women are morally and politically the equal of men. Significantly, religious minorities such as the Jehovah's Witnesses whom courts have ordered to do certain things inconsistent with their beliefs have manifested a doctrinal adaptability to the legal environment in which they live, deeming even adult members of the sect absolved of moral responsibility for receiving blood transfusions when under a court order to do so.⁴¹⁶ Furthermore, a court might reasonably question the value for a child of a continued relationship with any parent who would care less for the child because of a belief that the child had become spiritually impure. Finally, one might also speculate that a modest psychological detachment of parent from child would actually be a good thing in these cases. The children involved in these disputes might be better off if their parents came to see them to a greater

416. See, e.g., *In re President and Directors of Georgetown College*, 331 F.2d 1000, 1007 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964); *In re E.G.*, 515 N.E.2d 286, 288-89 (Ill. App. Ct. 1987).

extent as distinct persons, rather than as appendages, reproductions, or property of the parents. With this revised perspective, parents might feel less inclined or less entitled to sacrifice the children's temporal developmental interests for the sake of religious principles.

These considerations suggest that concern regarding the parent-child bond is not sufficiently substantial to give rise to an important state purpose that could justify any parental religious exemptions. The child's need for protection from disease and from subordinating schooling must certainly outweigh this insubstantial concern.

A prediction that some children will experience anxiety as a result of receiving medical treatment or instruction contrary to their parents' beliefs is less speculative. Indeed, one problem associated with some forms of religious upbringing, from a secular perspective, is that they set children up to experience excessive anxiety, by predicting divine punishment for violation of moral strictures that may be difficult to satisfy.⁴¹⁷ Such anxiety in the medical context may be particularly acute in some cases, at least when compounded with the anxiety children experience simply from receiving shots, entering hospitals, and being subjected to invasive medical procedures. One might expect, though, that any decent parent would attempt to mitigate this problem in a medical or educational context by telling the child he is not responsible for things that the state compels.⁴¹⁸ Moreover, a child who does not receive immunization, or medical care when ill or injured, is likely to experience great anxiety from the prospect of future suffering, illness, and death. With respect to education, female students in conservative religious schools might very well experience some relief from anxiety as a result of learning that the larger society espouses the view that women and men are equal and that women should be able to pursue whatever career suits them. In short, for children of persons who oppose medical care or gender equality on religious grounds, anxiety is probably inevitable regardless of what the state does. By intervening, the state may create new anxiety but may also alleviate existing anxiety.

417. See, e.g., MEEHL, *supra* note 58, at 42-44, 77, 85 (relating testimonies by former Catholic school students); PESHKIN, *supra* note 71, at 120 (relating instruction by fundamentalist school teacher about a man "whose refusal to heed God's call to the mission field led to his young wife's death, his girlfriend's rape, and his own brains being blown out"), 152, 181, 208-09, 219, 229, 231 (relating story by student in fundamentalist school about a close friend whom God killed because he had sexual relations with his girlfriend), 246, 286; ROSE, *supra* note 71, at 101.

418. As noted above, cases involving Jehovah's Witness parents have revealed a parental inclination to do this. See *supra* note 416.

Even if a parental religious exemption results in a net reduction in anxiety for children in some cases, however, this does not in and of itself establish that the exemption serves an important state purpose in those instances. As noted above,⁴¹⁹ a court applying heightened scrutiny should balance such benefits against other costs of the religious exemption, to determine whether the exemption furthers children's temporal interests on the whole. A judge might approach this determination as a substituted judgment for the child, a judgment about what a child in the situation under review might rationally prefer as the outcome for her medical care or education, if fully informed and capable of making a considered, independent choice.

The cost for children, in terms of physical suffering and the potential for lasting impairment or death as a result of not receiving immunizations and other medical care, as already noted, can be quite severe, and would by itself appear to outweigh any net increase in anxiety on the part of the child in almost all instances. It is significant in this regard that courts that have considered constitutional challenges to compulsory vaccination laws have not even mentioned a possibility of psychological trauma to the children involved. This suggests that neither the courts nor the parents involved in these cases perceived this to be an important consideration, relative to the physical health of the child and the parents' interest in religious freedom. The balance of considerations thus points in favor of making compulsory immunization universal and ordering medically advisable care except in truly minor cases.

With respect to education, as discussed above, unregulated church schooling may substantially impair a child's cognitive development and may inflict severe psychological harm. While these harms may not be as obvious or intense as a serious illness, they are real and well-documented⁴²⁰ and should weigh heavily in the balance. On the other side of the equation, a child's anxiety about reading books condemned by her parents or hearing things her parents say are blasphemous might be substantial, but is unlikely to be as intense as the anxiety that a religiously proscribed medical intervention like surgery or vaccination can cause. This judgment rests partly on assumptions that parents of religious school pupils have a positive attitude toward the schools their children attend (in contrast to

419. See *supra* note 410 and accompanying text.

420. See *supra* notes 71, 76-84, and accompanying text; see also MENENDEZ, *supra* note 71, at 4 (arguing that fundamentalist Christian schools use textbooks that "create a permanent ghetto of the mind for their students").

hospitals where they might be ordered to bring their children) and that the children have a well-established relationship with their teachers (in contrast to surgeons or medical personnel who give vaccinations) that is, on the whole, positive and nurturing.⁴²¹ These factors would surely blunt the effects of any conflict between state mandates and parents' religious beliefs. A "best interest of the child" or "substituted judgment" analysis in the context of laws governing the content of instruction, including those requiring sex equity in textbooks and instruction, should therefore also yield the conclusion that sparing children from anxiety is not a sufficiently important state interest to justify a denial of the statutory benefit to any child.

In sum, then, none of the hypothesized legitimate state purposes for religious exemptions to child welfare and education laws are important in an equal protection sense. None are sufficient to outweigh the harms that children now suffer or are at risk of suffering as a result of the statutory exemptions. Thus, even if a court were to deem one or more of them to be the actual purpose for the exemptions, the exemptions should not survive heightened scrutiny. The only way a court might uphold one or more of these exemptions would be if it determined that only rational basis review should be applied to them.

3. Substantial Relation to Interests

This final subsection considers the closeness of the connection between a legislative classification among children based on the religious beliefs of their parents and the legitimate state purposes identified above. Although the analysis above shows that none of these purposes is an actual purpose for the exemptions and that, in any event, none are important purposes, this subsection considers whether these purposes are substantially related to the classification, in order to 'cover all the bases.' It also considers whether the legitimate purposes are rationally related to the classification, to determine what the outcome should be if a court applied only rational basis review.

The Supreme Court has explained the substantial relation element of heightened scrutiny as follows:

If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relation-

421. In education contexts, as in medical contexts, we can reasonably expect that parents will seek to minimize their children's sense of responsibility for doing things that are legally mandated.

ship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions⁴²²

To ensure that a legislature's analysis is sound, courts applying heightened scrutiny require the state to supply factual evidence of a close relationship between classification and purpose.⁴²³ They then "evaluate the rationality of the legislative judgment with reference to well-established constitutional principles" that rise "above the level of the pragmatic political judgments of a particular time and place."⁴²⁴ In other words, a state cannot satisfy intermediate scrutiny by simply asserting that a legislative classification reflects the best judgment of the legislature as to the benefits likely to flow from the disparate treatment of the classes it created.⁴²⁵ The classification must actually reflect a sound, well-supported judgment that it will closely serve the state's objective. Plaintiffs may dispute the substantiality of the relation between a statutory classification and a legislative purpose by showing that the classification is either overbroad⁴²⁶ or under-inclusive.⁴²⁷ In doing so, "the party challenging

422. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982).

423. See *Plyler v. Doe*, 457 U.S. 202, 228-30 (1982) (finding lack of evidence to support any of state's purported justifications; unsubstantiated speculation that illegal immigrants are drawn to the U.S. by the possibility of a free education for their children is not sufficient); *Califano v. Westcott*, 443 U.S. 76, 88 (1979) (finding no evidence that discrimination in aid to families based on gender of unemployed parent served the purported legislative purpose of discouraging paternal desertion); *Craig v. Boren*, 429 U.S. 190, 199 (1976) (requiring state to supply factual support for policy decision underlying classification). Courts may also have to allow the party challenging a classification to submit rebuttal evidence. See *Frontiero v. Richardson*, 411 U.S. 677, 683-84 (1973).

424. *Plyler*, 457 U.S. at 218 n.16 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)).

425. Cf. *Craig*, 429 U.S. at 198-99:

[I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" [have been] rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislature choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported to fact.

426. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (invalidating law requiring parental consent to adoption from unwed mothers but not from unwed fathers, because it was based on overbroad presumption that unwed fathers are more difficult to locate); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 650 (1974) (invalidating school board policy requiring pregnant schoolteachers to take unpaid leave beginning five months before

the constitutionality of the particular line [the legislature] has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some [persons] from others."⁴²⁸

With respect to cultural diversity and unregulated private education, a state would be hard-pressed to demonstrate the requisite substantial relationship. It would have to provide evidence that allowing a minority of the school children within its border to receive an education in unlicensed schools from unqualified teachers, or an education that inculcates sexist attitudes, is conducive to a richer, more heterogeneous social environment. Apart from the mind-boggling difficulty of identifying and gathering evidence for such a proposition, the proposition is to a great extent counter-intuitive.

Requiring that all private schools be licensed, hire only certified teachers, and comply with standards of educational quality would admittedly raise the costs of operating a religious school to a level beyond the means of some that now operate. The likely result would be fewer sectarian schools in operation. It is unlikely, though, that all schools of any particular religious denomination would go out of business. More to the point, though, children schooled by inferior teachers, particularly teachers who impose an ideology that is repressive of independent thought and/or that reinforces the subordination of half the student body, are surely less likely to contribute

expected due date because based on overbroad presumption about physical abilities during pregnancy). The Court's hostility to irrebuttable presumptions in the due process context is analogous and related to the overbreadth doctrine in the equal protection context. See *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989) (upholding state law establishing irrebuttable presumption that child born to a married woman living with her husband is child of the marriage) ("[O]ur 'irrebuttable presumption' cases must ultimately be analyzed as calling into question not the adequacy of procedures but . . . the adequacy of the 'fit' between the classification and the policy that the classification serves."); *LaFleur*, 414 U.S. at 650 (invalidating school board rule requiring that pregnant teachers take unpaid leave beginning five months before expected date of birth because it created conclusive presumption that every such teacher is physically incapable of teaching); *United States Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (striking down provision of federal statute excluding from food stamp program any household including member of majority age claimed as dependent, because it created irrebuttable presumption that such households are not needy); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (striking down state's irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children).

427. See *Plyler*, 457 U.S. at 227 (noting that in durational residency requirement cases, states have asserted a legitimate interest in conserving state funds, but have lost because they were unable to provide explanation why new residents were singled out to bear the cost of serving this purpose).

428. *Matthews v. Diaz*, 426 U.S. 67, 82 (1976).

positively to our cultural fabric than children who receive a high quality education that encourages creative and critical thinking and that treats all children as equals.

Alternatively, in challenging the failure of the federal and state governments to extend their school regulations to religious schools, one might argue that the law's classification is under-inclusive with respect to the purpose of fostering cultural diversity. If allowing schools greater freedom to operate in whatever manner they like does in fact promote cultural diversity, then why not leave all private *and* public schools unregulated? Many local communities would like to experiment with different educational approaches in their public schools. Why are children in religious schools singled out to incur the risk of an inferior, subordination-producing "education" in order to promote the supposed public good of increased diversity?⁴²⁹

The relation between religious exemptions to child medical care or education laws and parental attachment is also highly speculative; a state could not likely produce any evidence to support a prediction of parental alienation should it eliminate all religious exemptions to such laws.⁴³⁰ Unsurprisingly, the reported court decisions in these two areas mention no claims by parents that they would no longer accept, love, or nurture their children if the children were to receive medical care or instruction that the parents opposed on religious grounds. In fact, scaling back parents' rights over their children might actually have a very salutary effect on parent-child relations; a bond between parents and child based on the parents' perception of the

429. Cf. *Plyler*:

[E]ven 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.

457 U.S. at 229; *see also* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (concluding that a state may not single out "those least well represented in the political process to bear the brunt of a benign program"); *supra* notes 171-86 and accompanying text (arguing against the relevance of a public/private distinction in the context of children's education).

430. It may well be that parents' enjoyment of decisionmaking authority with respect to the health care and education of their children enhances their commitment to and assistance with children's health and learning. Even so, this would not support a conclusion that partially restricting the scope in which parental authority operates would substantially undermine parental commitment. Children of religious objectors, moreover, might actually be better off on the whole if their parents became somewhat less involved in their health care and education, since the parents' involvement has negative as well as positive consequences.

child as an object of their rights (that is, as their property or appendage) may not be best for the child or the parents,⁴³¹ while inducing parents to see their child as a person in his or her own right might clear the way for formation of a different, more mutually rewarding bond.

Moreover, even if some religious objector parents would become alienated to a substantial degree from their children if the latter received medical care or instruction contrary to the parents' religious beliefs, such parents are certainly very few in number. A court would therefore have to deem religious exemptions from child medical care mandates or school regulations grossly over-broad in relation to a state purpose of avoiding such alienation. At the same time, individualized determinations would clearly be inappropriate, if for no other reason than the fact that such an approach would create an incentive for religious objector parents to demonstrate a willingness to abandon their children. States have at their disposal alternative means, both punitive and assistive, to deal with those few parents who might be inclined to abandon or otherwise neglect their children simply because the children received medical care or disapproved forms of instruction, and they should use those means rather than sacrificing the well-being of millions of children.⁴³²

The relationship between religious exemptions from child medical care laws and avoiding trauma to children aged five and older is significantly stronger. When parents believe that medical care violates divine law and their children are old enough to understand the concept of violating a religious command, the children are likely to have the same belief, and so the potential for anxiety is undeniably increased. In this area, though, both over-breadth and under-inclusiveness problems arise. As discussed in the previous subsection, only rarely will a child whose parents object on religious grounds to

431. See Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 162-63 (1988) (arguing that the courts' emphasis on parents' rights may encourage parents to be self-concerned, rather than concerned about the well-being of their children: "Thinking in terms of rights encourages us to ask what we may do to free ourselves, not to bind ourselves. It encourages us to think about what constrains us from doing what we want, not what obligates us to do what we ought."); see also FORER, *supra* note 268, at 188 ("The belief that a man's wife and children are his possessions to do with as he pleases is embedded in the common law.").

432. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969) (noting that preventing welfare fraud is a legitimate purpose, but procedures other than a one-year waiting period are available for dealing with fraud). As indicated *supra* note 306, nearly five million school-aged children in this country attend religious schools. For figures on parents claiming a religious exemption to vaccination laws, see *supra* note 147.

immunization or medical treatment suffer so much anxiety about the religious implications for them of receiving the care as to outweigh the harm that would result from not receiving the care. Individualized determinations are necessary in an area such as this, in which the danger of physical harm is so real and in which the persons who will be harmed are themselves relatively unable to make a fully informed, rational evaluation of their situation and to form independent preferences.⁴³³ In such proceedings, hearing officials should take care to avoid creating an incentive or opportunity for parents to manipulate their child in order to enhance the showing of anxiety.

At the same time, exemptions limited to religious objectors, or even more narrowly to members of particular religious denominations, are also under-inclusive with respect to this purpose, insofar as children of parents who object to immunization or medical care but are not covered by a particular state's exemption probably also experience anxiety when compelled to receive certain care. Equal protection challenges to immunization laws that such parents have brought reveal that parental opposition can be quite strong even when not motivated by what are generally considered religious beliefs.⁴³⁴ It bears repeating, though, that none of the relevant cases suggest that this is a real concern with respect to any children, and that this could never be a plausible concern in the context of immunization of infants.

Similar reasons militate against finding a close relationship between the purpose of avoiding anxiety in children and religious school exemptions to regulations prescribing use of particular textbooks or teaching of particular values such as gender equality and critical thinking. Such exemptions are over-broad with respect to this purpose because the concern regarding children's anxiety would probably not be significant in the case of the majority of religious schools. Half of religious school enrollment in this country is in Catholic schools, and these schools are much more mainstream in their orientation than the fundamentalist Christian schools that have

433. Cf. *Reed v. Reed*, 404 U.S. 71, 76 (1971) ("[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 . . .").

434. See, e.g., *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94-97 (E.D.N.Y. 1987); *Hanzel v. Arter*, 625 F. Supp. 1259, 1265-66 (S.D. Ohio 1985); *Kleid v. Board of Educ. of Fulton*, 406 F. Supp. 902, 904 (W.D. Ky. 1976); *Davis v. State*, 451 A.2d 107, 109-10 (Md. 1982); *In re Christine M.*, 595 N.Y.S.2d 606, 611 (N.Y. Fam. Ct. 1992).

fought vehemently against state regulation in recent years.⁴³⁵ These exemptions are also under-inclusive, since there are many children attending public schools in this country whose parents are strongly opposed on religious or other grounds to their children reading books that promote mainstream values.⁴³⁶ General parental opt-out provisions for public schools would cure the under-inclusiveness problem, but might exacerbate the over-breadth problem (and cause chaos in the schools as well).

Finally, we must consider whether any of the hypothesized legitimate state purposes could survive rational basis review—that is, whether classifications among children based on the religious beliefs of their parents bears a rational relation to any of these conceivable state purposes. Though children of religious objectors satisfy all of the criteria for heightened scrutiny, the notion that they are a suspect class is an entirely novel one, and courts may be resistant to concluding that laws designed to accommodate the beliefs of minority religious groups pose a threat to important interests of children. Many of these laws, however, should fail even the most deferential form of review.

Under rational basis review a state generally need not place in the record any evidence to show the rationality of its statutory classification—that is, the connection between the legitimate ends of the legislation and the classifications that the state has drawn in such a way as to achieve that end.⁴³⁷ Rather, a party challenging those choices “must convince the court that the legislative facts on which the classification is apparently based could not reasonably be

435. See NCEA\GANLEY'S CATHOLIC SCHOOLS IN AMERICA 13 (Mary Mahar, ed., 22d ed. 1994). A recent national conference of Catholic School educators produced a “directional statement” to the effect that “Catholic education works toward the elimination of sexism . . . in its own structures and curricula, in the Church and in society.” GRANT, *supra* note 85, at 238-39. Fundamentalist Christian schools are second in enrollment, Lutheran schools (which are also much more mainstream in orientation than fundamentalist schools) are third, and Jewish schools fourth. JAMES & LEVIN, *supra* note 306, at 33.

436. See, e.g., BATES, *supra* note 319 (describing fundamentalist Christian parents' crusade to keep their children from reading certain textbooks in public school).

437. See *Heller v. Doe by Doe*, 113 S. Ct. 2637, 2642-43 (1993) (“[A] classification ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’ ”) (quoting *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993)); *Beach Communications*, 113 S. Ct. at 2098 (concluding that legislature may base its choices “on rational speculation unsupported by evidence or empirical data”). But see *Heller*, 113 S. Ct. at 2652 (Souter, J., dissenting) (contending that under *Cleburne*, classification based on mental disability must be supported by state-proffered rationale and evidence).

conceived to be true by the governmental decision-maker."⁴³⁸ That the hypothetical factual basis is actually untrue does not itself render legislative reliance on it unreasonable.⁴³⁹ Moreover, the fit between legislative means and ends need not be a close one.⁴⁴⁰ Under rationality review, courts do not review legislative choices for their " 'wisdom, fairness, or logic.' "⁴⁴¹ Even under rationality review, however, a court "must find some footing in the realities of the subject addressed by the legislation" to justify the classification the legislature chose.⁴⁴² The classification may not be "wholly arbitrary"

438. *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

439. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981); *Vance*, 440 U.S. at 111.

440. See *Heller*, 113 S. Ct. at 2643 ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (stating that under rationality review courts must accord states "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"); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."); see also *Dandridge v. Williams*, 397 U.S. 471 (1970):

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

Id. at 485 (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

441. *Heller*, 113 S. Ct. at 2642 (citation omitted); see also *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975):

Under [rationality review] standards, the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.

442. *Heller*, 113 S. Ct. at 2643. A statutory classification will fail rationality review if it "rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 2645 (citations omitted). Whether the classification serves a legitimate purpose must at least be "debatable." *Id.* at 2646. In *Cleburne*, one of the few decisions to strike down legislation under this deferential form of review, the Supreme Court held the zoning ordinance prohibiting group homes for the mentally retarded unconstitutional because the statutory classification appeared entirely arbitrary and based solely on prejudice. City of

or based solely upon irrational prejudices.⁴⁴³ "Otherwise, rationality review would be tantamount to no review at all—a result manifestly inconsistent with Supreme Court precedent."⁴⁴⁴

With the greatest of deference to state legislatures, a court might find some footing in reality, however meager and speculative, on which to conclude that a legislative judgment that religious exemptions to child immunization and medical neglect laws serve the purposes of parental attachment and diminished childhood anxiety is not wholly arbitrary or irrational.⁴⁴⁵ That this judgment is wrong or

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 449-50 (1985); see also *New York State Ass'n for Retarded Children v. Carey*, 466 F. Supp. 479, 486 (E.D.N.Y. 1978) (finding no rational relation between mental retardation and need to detect which school children carry hepatitis-B virus), *aff'd on other grounds*, 612 F.2d 644 (2d Cir. 1979). The *Cleburne* Court suggested that a bad fit between legislative means and purported ends should raise a suspicion that some other purpose or prejudice that is illegitimate actually underlies the law. *Cleburne*, 473 U.S. at 450; see also Farrell, *supra* note 235, at 37 (stating that when a state "is unable to explain why a particular group has been singled out to bear the entire burden of a law, a suspicion arises that the purpose of the law may bear some relation to the group singled out").

443. *Steffan v. Aspin*, 8 F.3d 57, 63 (1993).

444. *Id.*

445. Under rational basis review, courts have also sanctioned a one-step-at-a-time approach to dealing with social problems, excusing states for imposing costs on or distributing benefits to some persons but not others who are similarly situated when limited resources constrain the legislature to proceed incrementally, or when a state is experimenting with new programs. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("Legislatures may implement their program step by step in . . . economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations."); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39 (1973) ("Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish."); *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) ("[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). This excuse would not be available in the case of religious exemptions to child welfare and education laws, since states would not incur significant direct costs as a result of eliminating these exemptions. It costs the state nothing formally to extend its child welfare mandates universally. Cf. *Plyler v. Doe*, 457 U.S. 202, 229 n.25 (1980) ("Nor does the record support the claim that the educational resources of the State are so directly limited that some form of 'educational triage' might be deemed a reasonable (assuming that it were a permissible) response to the State's problems."). The cost of enforcing these mandates is a different matter, and one that should not affect a determination as to *de jure* discrimination. Other, indirect costs would arise from having to provide some mandated services (e.g., vaccinations for families who cannot afford them, increased enrollment in public schools if some private schools are forced to close).

Moreover, rather than reflecting a series of affirmative steps to address more and more of a problem, parental religious exemptions, which in most cases were enacted after the basic child welfare law was already in place, actually mark a retreat rather than an

greatly outweighed by competing considerations would be irrelevant under rational basis review. Were a court to apply "active" rationality review, and require a state to proffer evidence supporting such a judgment, however, these exemptions might well fail the test. These supposed justifications do not appear readily susceptible to convincing evidentiary demonstration one way or the other, so the outcome would likely depend on where the initial presumption lay.

On the other hand, for any court applying even standard rational basis review to uphold a legislative excusal of sexist teaching in religious schools because a legislature could rationally conclude that this promotes cultural diversity and healthy parent-child relationships or reduces children's anxiety would be shocking. Exemptions from some other school regulations, such as one prescribing use of textbooks and other curricular materials that explicitly promote gender equality or critical thinking on moral issues, may not be quite so difficult to tie to the aims of diversity, parental attachment, and avoiding anxiety in children. A court would stand on firmer ground, however, in holding that all existing exemptions in state school codes are arbitrary means of pursuing those aims.

4. Conclusion

Applying the heightened scrutiny test to religious objector exemptions has yielded the following conclusions: The actual purpose of all these exemptions—satisfying the religious preferences of parents—is an illegitimate one. All the exemptions therefore fail this test. Even if a court were to find that one or more of the three best candidates for a legitimate state purpose for these exemptions was an actual purpose in a given case, it would have to find that none of

advance in addressing the needs of children. See, e.g., *Davis v. State*, 451 A.2d 107, 115 (Md. 1982) (noting that Maryland's immunization law was first enacted in 1872, and a religious exemption was added in 1969); *Dalli v. Board of Educ.*, 267 N.E.2d 219, 223 (Mass. 1971) (noting that a religious exemption was added to Massachusetts' compulsory vaccination law in 1967). Cf. *Rodriguez*, 411 U.S. at 39 (endorsing the step-by-step rationale but emphasizing that "every step leading to the establishment of the system Texas utilizes today . . . was implemented in an effort to *extend* public education and to improve its quality," and that "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"). In addition, these exemptions do not reflect an effort to address the most acute phases of a problem first, leaving the less urgent for later. As noted in Part II.B, the children left unprotected by the immunization laws and anti-sexism laws are actually the children who stand *most* in need of the laws' protection. Nor are any of the child welfare and education laws discussed in this Article experimental in nature, such that a state might be said to be trying them out to see if they are beneficial before extending them to all children.

them is an important purpose—at least not sufficiently important to outweigh the harm to children that the exemptions allow. Finally, even if a court were to find that one or more of these hypothetical legitimate state purposes was an actual purpose and an important purpose, it should find that the legislative classification on the basis of parents' religious beliefs is not substantially related to that purpose.

In the case of two of these purposes—promoting cultural diversity and avoiding some modicum of parental detachment—the relationship is highly speculative and, in any event, not a close one. With respect to the third supposed purpose—avoiding anxiety in children—the relationship is not so speculative, but the classification is both over- and under-inclusive. Children too young to understand what violation of a religious stricture means should not be included. For older children, case-by-case determinations of the child's best interests should be required whenever any parent, for any reason, opposes a recommended course of medical treatment, and parents should have to show that they cannot alleviate their child's anxiety other than by exposing the child to risk of serious illness. In sum, then, a court applying heightened scrutiny should find that all of the blanket religious exemptions to child welfare and education laws discussed in Part I are unconstitutional violations of the equal protection rights of the children of religious objectors, and should therefore invalidate them.⁴⁴⁶

Were a court to apply only the rational basis test to parental religious exemptions, despite the compelling arguments for heightened review adduced above, it would still have to find that the failure of states and the federal government to extend their prohibitions of sexist education universally is unconstitutional. The exclusion of religious schools is not rationally related to any legitimate purpose. The same outcome should befall exemptions to other school regulations, such as school licensing and teacher certification, that do not directly require children to read or hear anything contrary to their parents' religious beliefs, provided that a party challenging these exemptions could present evidence that they result in some harm to children in religious schools. Religious exemptions to medical care laws and to school laws requiring teaching of values objectionable to conservative religious groups would stand a better chance of surviving

446. See *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (stating that the preferred course when courts find that statutes providing benefits are under-inclusive is to extend the benefits to the previously excluded class, rather than to nullify the whole statutory scheme).

rational basis review, though a court could quite reasonably conclude that they too are unconstitutional.

III. PRACTICAL OBSTACLES TO CHALLENGING RELIGIOUS EXEMPTIONS

Regardless of one's view of the soundness of the foregoing analysis of the substantive legal issues that parental religious exemptions raise, one might regard that analysis as a purely theoretical exercise. An equal protection claim on behalf of the affected children might never receive a judicial hearing on the merits, given the potential practical obstacles to advancing it. This Part briefly considers those obstacles and how an advocate for these children might overcome them.

A. *Finding a Plaintiff*

In the first place, an obvious procedural difficulty arises from the fact that this would be a suit that enjoyed the support of none of the affected parties. The defendant in the suit would be the federal government or a state government, which presumably would not support a constitutional challenge to its own statutes, and might not even have the authority to do so.⁴⁴⁷ Religious objector parents, though not defendants, have interests of their own at stake, in addition to being the general guardians of their children, and would certainly oppose abolition of a statutory exemption that they presently enjoy. And the children themselves, in all likelihood, would not only fail to voice *support* for such a claim on their behalf, but if old enough to respond would in fact be likely to express *opposition* to the claim if asked, at least after their parents had a chance to discuss the matter with them. The reality of the situation is therefore such that, if the equal protection rights of religious objectors' children were ever to be vindicated, it would have to be at the behest of some outsider concerned for the welfare of these children. Courts, however,

447. The courts are divided as to whether a state can challenge the constitutionality of its own laws in judicial proceedings. *State v. Chastain*, 871 S.W.2d 661, 662-66 (Tenn. 1994) (holding that Tennessee Attorney General may challenge a state statute only when that statute is directly in conflict with another statute upon which the state relies in a criminal prosecution). Courts that have found that a state's attorney general may not challenge the state's own laws argue that "a statute, presumed to be constitutional, has the right to an advocate for its validity." *Id.* at 663. Courts that have reached the opposite conclusion emphasize the obligation of an attorney general to uphold the Constitution and, somewhat problematically, to promote the interests of the state when its laws are in conflict with its interests. *Id.* at 663-64.

generally do not entertain suits by persons who are not themselves interested parties.⁴⁴⁸

A procedural mechanism is available, however, for avoiding problems of standing in cases involving minors not sufficiently mature to determine and advance their own best interests. Federal Rule of Civil Procedure 17(c) provides for appointment of a "next friend" to bring suit on behalf of a minor in federal court.⁴⁴⁹ The next friend may be " 'anyone who has an interest in the welfare of an infant who may have a grievance or a cause of action,' "⁴⁵⁰ and may file any type of claim that a competent person would be permitted to file on her own behalf.⁴⁵¹ The next friend would not be the real party in interest in the litigation, but rather would act as the representative of the minor, who would be the real party in interest and who would have the requisite stake in the outcome to satisfy standing requirements.

448. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (finding that to have standing to complain of deprivation of a right, plaintiff must show he personally suffered harm as a result of that deprivation).

449. The Federal Rules of Civil Procedure provide:

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

FED. R. CIV. P. 17(c) Historically, 'next friend' has referred to the representative of a minor plaintiff, while 'guardian ad litem' has referred to the representative of a minor defendant, so the difference between the two is purely formal; the duties and powers of the representative are the same in either case. *Gardner v. Parson*, 874 F.2d 131, 137 n.10 (3rd Cir. 1989). Courts today often use the terms interchangeably, ignoring the historical technical distinction between the two. *E.g.*, *N.O. v. Callahan*, 110 F.R.D. 637, 648 n.6 (D. Mass. 1986). States typically have analogous provisions in the laws governing their own courts. *E.g.*, CAL. CIV. PROC. CODE § 373 (West 1973); FLA. R. CIV. PROC. § 1.210(b) (1985); MASS. GEN. LAWS ANN. ch. 201 § 2 (West 1994); N.Y. CIV. PRAC. L. & R. 1201, 1202 (McKinney 1976); S.D. CODIFIED LAWS ANN. § 26-1-3 (1993). This Part focuses on federal court procedure, since challenges to a state's laws on federal constitutional grounds are most likely to be brought in federal district court.

450. *Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist.*, 873 F.2d 25, 31 (2d Cir. 1989) (quoting *Child v. Beame*, 412 F. Supp. 593, 599 (S.D.N.Y. 1976) (finding ACLU lawyer with no prior connection to plaintiff-children to be an appropriate next friend)); *In re Zawisza*, 73 B.R. 929, 936 (Bankr. E.D. Pa. 1987).

451. *Zawisza*, 73 B.R. at 935.

Appointment of a next friend lies within the discretion of the trial court judge,⁴⁵² but the decided cases enunciate a presumption that such appointment will occur whenever a minor is not sufficiently mature to act on her own behalf and the minor's general guardians—typically, her parents—have a conflict of interest with the minor in connection with the litigation.⁴⁵³ The case for appointment of a next friend is thus particularly strong in a suit challenging a law that grants parents power over some aspect of their children's lives.⁴⁵⁴ Although a judge might be uncomfortable in attributing to religious objector parents an interest contrary to the well-being of their child, the conflict that must be shown for Rule 17(c) purposes is a purely formal one, which arises simply from the appearance of adverse legal positions on the face of a complaint and reflects no judgment about the motives or child-rearing approach of the parents or about the merits of the substantive claim.⁴⁵⁵ This presumption in

452. *Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984); *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281, 285 (1st Cir. 1982); *Chaudhary v. O'Neil*, C-93-20967 RMW, 1994 U.S. Dist. LEXIS 6637, *5 (N.D. Cal. Feb. 1, 1994), *aff'd*, No. 94-15408, 1995 U.S. App. LEXIS 35313 (9th Cir. Nov. 30, 1995); *M.K. v. Harter*, 716 F. Supp. 1333, 1335 (E.D. Cal. 1989); *N.O.*, 110 F.R.D. at 648.

453. *E.g.*, *Adelman*, 747 F.2d at 989 (noting that Rule 17(c) dictates that "as a matter of proper procedure, the court should usually appoint a guardian ad litem"); *M.S. v. Wermers*, 557 F.2d 170, 175-76 (8th Cir. 1977) (holding that appointing parents as guardians ad litem for minor seeking access to state-provided contraceptives without parental consent was inappropriate); *Swift v. Swift*, 61 F.R.D. 595, 598 (E.D.N.Y. 1973) (indicating the necessity of appointing a guardian ad litem because of the "diversity of interest" between a minor and her father); *see also Gardner*, 874 F.2d at 138 (holding that person appointed to represent mentally retarded teenager in state court litigation could not serve as the teenager's representative in federal court action in which that person was a defendant and therefore had conflict of interest with the teenager); *Zawisza*, 73 B.R. at 937 ("[W]e are reluctant to heed the claims of an adverse party that the standing of one purporting to act on behalf of an incompetent is lacking."). Moreover, application of Rule 17(c) when a minor is a party in interest in litigation is mandatory, so that if a court does not appoint a next friend or guardian ad litem, it must determine that the minor's interests are otherwise adequately protected. *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989); *Gardner*, 874 F.2d at 140; *Adelman*, 747 F.2d at 988-89 (holding that when complaint alleges conflict of interest between incompetent person and guardian, trial court must determine whether incompetent person's interests would be adequately protected if represented by guardian rather than next friend); *Noe v. True*, 507 F.2d 9, 11 (6th Cir. 1974) ("[T]he failure to consider the necessity for a guardian ad litem and to make a determination appointing one, or finding that the minor's interests were protected without one, is fatal to the judgment rendered under such circumstances."); *see also Brumley*, *supra* note 395, at 334 (finding that Rule 17(c) "establishes a strong presumption in favor of protecting the legal rights of the child litigant").

454. *Wermers*, 557 F.2d at 176.

455. *See Gardner*, 874 F.2d at 140:

The purpose of Rule 17(c) is to further the child's interest in prosecuting or defending a lawsuit, or at least to allow an evaluation of the merits of the suit

cases of conflict lends support for an argument that courts should be willing to appoint a next friend who can bring a constitutional claim on behalf of young children who fail to receive protection from disease or harmful pedagogical practices because of legislation that grants their parents special powers or privileges.

At the same time, though, none of the decided cases has addressed a situation precisely like the hypothetical one here, in which all interested parties would express opposition to the proposed litigation and to the appointment of an outside representative for the children involved. The most closely analogous cases have involved an outside advocate seeking representative status to bring a claim on behalf of minors unable to express any preferences, against the wishes of parents and the state. In those cases, judges have been resistant to making the appointment and to letting the claim go forward.⁴⁵⁶ They sometimes have manifested concern that such an outsider is a political crusader more interested in using the minors to advance some ideological cause than in the well-being of the individual children involved.⁴⁵⁷ The traditional presumptions that parents have

relative to the child's best interests. . . . Rule 17(c) was not intended to be a vehicle for dismissing claims on a summary judgment motion.

See also *Adelman*, 747 F.2d at 988:

[T]he courts have consistently recognized that they have inherent power to appoint a guardian ad litem [or next friend] when it appears that the minor's [or incompetent person's] general representative has interests which *may* conflict with those of the person he is supposed to represent, . . . Taken at face value, the complaint showed a conflict of interest between [the incompetent named plaintiff] and [the plaintiff's guardian].

(quoting 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL*, § 1570, at 774 (1971) (emphasis added)); *Noe*, 507 F.2d at 12 ("[S]ince the respective *legal* positions of the child and guardian are adverse in this lawsuit, it cannot be said that the plaintiff is 'otherwise represented' in the action as provided in Rule 17(c).") (emphasis added); cf. *Wermers*:

When there is a *potential* conflict between a perceived parental responsibility and an obligation to assist the court in achieving a just and speedy determination of the action, parents have no right to act as guardians ad litem. . . . Parents should not be appointed to act as guardians ad litem in litigation challenging a grant of parental veto power.

557 F.2d at 175-76 (emphasis added).

456. *E.g.*, *Melton*, 689 F.2d at 285-86 (declining to appoint advocate for rights of disabled persons as next friend for institutionalized mentally retarded minor still under guardianship of his mother, who opposed the proposed suit on his behalf); *Weber v. Stony Brook Hosp.*, 456 N.E.2d 1186, 1188 (N.Y.) (dismissing proceeding seeking to compel surgery for newborn with spina bifida over objection of parents and in violation of state statutory scheme intended to protect children), *cert. denied*, 464 U.S. 1026 (1983).

457. See, e.g., *Weber*, 456 N.E.2d at 1188 (emphasizing that suit was initiated "at the behest of a person who had no disclosed relationship with the child, her parents, her family, or those treating her illnesses" and who had no "direct or personal knowledge of

a right to control the lives of their children and that parents are the best protectors of their children's interests also color judges' judgment in such cases, even when the Rule 17(c) motion alleges a conflict of interest between parent and child.⁴⁵⁸

In the few cases in which courts *have* appointed a next friend to bring a claim adverse to both parents or guardians and the state, the minors involved themselves initiated, or at least supported, the suit and the courts emphasized that fact, stating that any person who believes her rights have been violated should have some means for seeking judicial redress.⁴⁵⁹ For example, *Child v. Beame*,⁴⁶⁰ which challenged New York City's foster care system, was led by ACLU lawyers and involved the appointment of Dean Monroe Freedman of

the facts relating to the child's condition, the treatment she is presently receiving or the factors which prompted her parents to adopt the course they have"); cf. *Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist.*, 873 F.2d 25, 31 (2d Cir. 1989) ("We would not sanction any attempt to assert the legitimate rights of children as a mere pretext for advancing ulterior political or economic aims.").

458. See, e.g., *Melton*, 689 F.2d at 286 n.12 (distinguishing case in which parents had "abandoned all interest" in institutionalized children (quoting *Child v. Beame*, 412 F. Supp. 593, 599 (S.D.N.Y. 1976))); *Weber*, 456 N.E.2d at 1188 (invoking "the most private and most precious responsibility vested in the parents for the care and nurture of their children"). Similarly, a federal district court rejected the claim of defendant school superintendents that it should appoint a guardian ad litem for the children of parents alleging, on behalf of themselves and their children, that state laws governing home schooling were unconstitutional. *Jeffery v. O'Donnell*, 702 F. Supp. 513, 516 (M.D. Pa. 1987). The defendants pointed out that the parents' preferences regarding their children's schooling, which were motivated by religious beliefs, might not be what was best for the children. *Id.* at 515. In response, the court concluded that parents have a constitutional right to direct the religious upbringing and education of their children, and gave no independent consideration to the interests of the children. *Id.* at 515-16 (noting also the governmental interest in the assurance that children simply receive "an education" (emphasis added)). It did, however, leave open the possibility that a conflict of interest might arise later in the litigation and that appointment of separate representation for the children would then be appropriate. *Id.* at 516.

459. E.g., *Wermers*, 557 F.2d at 175-76 (involving a minor who brought suit to vindicate her right to obtain prescription contraceptives without parental consent); *Noe*, 507 F.2d at 12 (stressing the "very real need of a 14-year-old plaintiff to have her own personal rights and interests protected"); *Child*, 412 F. Supp. at 597-99 (rejecting claim that children's involvement was involuntary and noting that children had significant right of access to courts); cf. *Melton*, 689 F.2d at 286 n.12 (distinguishing *Child* on the basis that in the case before it the minor involved did not consent to litigation on his behalf). Courts have also appointed persons who were not parents or other guardians as next friend for minors suing the state in cases in which there was no opposition from parents. E.g., *Ad Hoc Comm. of Concerned Teachers*, 873 F.2d at 31 (holding that a group of teachers should be allowed to proceed as next friend of students who were no longer in custody of natural parents in order to sue school district for violating the students' right to a learning environment free of state-sanctioned racial discrimination).

460. 412 F. Supp. 593 (S.D.N.Y. 1976).

Hofstra Law School, who had no prior contact with the children, as next friend. The children who were the named representatives of the class of children in foster care consented to the litigation and to representation by the ACLU and by Dean Freedman.⁴⁶¹ In endorsing appointment of Dean Freedman as next friend, the court emphasized that the children clearly embraced the purpose of the lawsuit, which was to secure for them a permanent home placement, and had authorized Dean Freedman to serve as their representative.⁴⁶² The court also worried that denying the children representation in the matter would deny a right of access to the courts to "those who *feel* they are aggrieved."⁴⁶³ These cases also involved children who were either no longer in the custody of their natural parents or in their teens and seeking to free themselves from parental control.⁴⁶⁴ Courts would undoubtedly be less willing to appoint a representative for young children still in the care of their natural parents who do not believe themselves to be aggrieved.

Thus, vindication of the equal protection rights of children of religious objectors could require courts to extend application of Rule 17(c) into a realm where they have never before ventured. One might reasonably predict that few judges would be willing to break new ground in this area unless they felt compelled to do so—that is, unless declining to appoint a next friend for these children would appear clearly at odds with well-established legal principles and basic tenets of justice. Convincing judges that this is in fact the case would require some creative lawyering, but it should not be impossible.

As an initial matter, an outside observer seeking appointment as next friend for children of religious objectors should emphasize that such appointment does not itself decide the substantive claim, nor even decide that the substantive claim will be advanced. It would simply allow a court to hear and decide a constitutional claim on behalf of the children, and only if the appointed representative determined that it would, on the whole, be in the children's interest to advance the claim on their behalf. In this connection, the outside advocate should provide sincere assurance to the court that as next

461. *Id.* at 597-98.

462. *Id.* at 599.

463. *Id.* (emphasis added).

464. *M.S. v. Wermers*, 557 F.2d 170, 173 (8th Cir. 1977) (indicating that plaintiff was a 15-year-old who wished to represent a class of all minors denied contraceptive services or supplies because of lack of parental consent); *Noe v. True*, 507 F.2d 9, 10 (6th Cir. 1974) (indicating that plaintiff was a 14 year old who was in state's custody); *Child*, 412 F. Supp. at 596 (indicating that the plaintiff class consisted of children in foster care).

friend he would make decisions solely on the basis of the children's best interests, rather than using his position to establish a legal principle or to attack a religious group, with no concern or only secondary concern for the interests of the children.⁴⁶⁵ To this end, the advocate should emphasize that the substantive claim does not rest on his own idiosyncratic view of what is best for children, but rather on the defendant state or federal government's own judgment about what is best for children, as reflected in its statutes, combined with the fundamental constitutional principle of equality.

Additionally, the would-be next friend should emphasize that *if* these children are in fact suffering a violation of their right to equal protection, and *if* they would be better off if someone sought judicial redress of this constitutional wrong, then failure to appoint a next friend for them causes them further harm, since in practice no alternative means is available for redressing that wrong. A well-established principle in our legal system holds that *some* effective means should exist for securing the constitutional rights of every person.⁴⁶⁶ When judicial procedural requirements preclude prosecution of the legitimate constitutional claims of some class of persons, they themselves create a denial of equal protection of the laws, and a further substantive constitutional violation. Thus, absent appointment of an outside party to represent the children who suffer the forms of discrimination described in Part I, they will suffer inequality at yet another level, further reinforcing their impotence and marginalization—traits relevant to treating persons as members of a suspect class deserving of special judicial protection.

465. Cf. *Child*, 412 F. Supp. at 599 ("Those who propose to speak for the plaintiffs have manifested an interest in their welfare and should . . . be allowed to proceed."). A person is not disqualified from serving as next friend, however, simply because he is also interested in establishing a constitutional principle. *In re Zawisza*, 73 B.R. 929, 936 (Bankr. E.D. Pa. 1987); *Child*, 412 F. Supp. at 599. Nor does a lack of prior contact with the persons to be represented disqualify a person from serving as next friend. *Zawisza*, 73 B.R. at 936.

466. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (plurality opinion) (concluding that states may not impose undue burdens on minor's exercise of constitutional rights); *Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist.*, 873 F.2d 25, 31 (2d Cir. 1989) ("The right of access of courts by those who feel they are aggrieved should not be curtailed; and this is particularly so in the instance of children who, rightly or wrongly, attribute such grievances to their very custodians.") (quoting *Child*, 412 F. Supp. at 599); *Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984) ("[A]ccess to the courts by aggrieved persons should not be unduly limited, particularly . . . where an incompetent person raises allegations of violations of his rights attributable to his custodians, and further alleges a failure to act on the part of his legal guardian.").

Finally, an advocate for the interests of religious objectors' children should seek appointment as next friend and advance an equal protection claim on their behalf in such a way as to minimize the impact of the judicial proceeding itself on the children's lives. They should strive to convince the court that it can appoint a next friend and adjudicate the claim without harming the children and without interfering directly in family life. The potential for harm would lie principally in generating anxiety in the children. Rule 17(c) in fact appears to require, quite appropriately, that in deciding whether to appoint a next friend for a minor, a court consider whether the potential harm from appointing a next friend and/or from litigating the underlying claim would outweigh the potential benefit for the minor from making the appointment.⁴⁶⁷

Significantly, the equal protection claim articulated in Part II would not involve much, if any, discovery into the individual situation of any child, at least so long as it sought only injunctive and declaratory relief and not also damages. Such a claim would challenge *de jure*, rather than *de facto*, discrimination by the state in provision of benefits, and so would not require extensive factual inquiry such as "disparate impact" cases typically involve. Moreover, to establish that the children discriminated against are harmed, a court should be able to proceed on the basis of evidence or presumptions regarding the costs for broad classes of children from failing to receive the statutory benefits. For example, in a challenge to religious exemptions to immunization laws, a court could presume, without needing to inquire into the medical or family situation of individual children, that any child who does not receive certain vaccinations is at risk of suffering substantial harm.⁴⁶⁸ Resolution of this challenge would therefore involve consideration primarily of legal, rather than factual, issues, so individual parents and children would not necessarily have to play any role in the litigation. In addition, to the extent that parents wished to play a role in opposing

467. The Rule provides that a court "shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or *shall make such other order as it deems proper for the protection of the infant or incompetent person.*" FED. R. CIV. P. 17(c) (emphasis added).

468. As noted in Part I, compulsory immunization laws typically contain an exemption for children whose doctor attests that all or some of the required vaccinations would be medically inappropriate for them. See *supra* note 146. With respect to immunization, the children on whose behalf the equal protection claim analyzed in Part II would be brought would be those who fail to receive vaccinations solely because their parents claim a religious exemption.

such a suit, they could do so collectively through their religious organizations and thereby distribute the costs of doing so among many people.

Further, an advocate for religious objectors' children should seek to avoid making the children's consent to appointment of a next friend or to prosecution of the constitutional claim relevant to the case. Imposing the burden of making such a decision on young children in the types of cases being considered here could be harmful to them, placing them under extreme pressure and possibly causing significant disruption to their lives.⁴⁶⁹ In practice, young children would most likely simply express whatever preference their parents instructed them to express regarding a legal issue beyond their ken. This alleviates any concern about creating conflict within the family but also renders the children's consent, or lack thereof, meaningless. A child advocate seeking next friend status should therefore stipulate at the outset that the children would oppose the appointment and the proposed litigation on their behalf if asked, and request that the court not attempt to elicit the children's views, in light of the harm that doing so might cause them. At the same time, the advocate should point out that the consent or opposition of the children is irrelevant because underlying Rule 17(c) is a presumption that children are not competent to decide such matters for themselves. This is borne out by past court decisions appointing a next friend or guardian ad litem to make decisions for minors in connection with litigation even when the minors had strong views on the matter at hand.⁴⁷⁰ The paternalistic principle that the state may override the preferences of insufficiently mature minors—even those in their teens—when necessary to protect their interests is well-established.⁴⁷¹ Courts should

469. See Sommer, *supra* note 268, at 1222 (noting authority for view that "involving children in these critical and emotionally-charged decisions might harm them psychologically"). This is not to deny that, as a general matter, involving children in decisionmaking regarding their own lives is conducive to their healthy development. The point here is simply that these cases would be so highly charged, triggering adamant opposition by parents, that the children at issue would be better off if left out of the dispute as much as possible.

470. *E.g.*, *Kingsley v. Kingsley*, 623 So. 2d 780, 782-83 (Fla. Dist. Ct. App. 1993) (holding that 11-year-old who filed petition for termination of his parents' custodial rights may not proceed on his own behalf, because "[c]ourts historically have recognized that unemancipated minors do not have the legal capacity to initiate legal proceedings in their own names").

471. See, *e.g.* *Bellotti v. Baird*, 443 U.S. 622, 635, 650 (1979) (plurality opinion) (concluding that states may require parental consent for abortion of unemancipated minor's child unless minor can show she is of sufficient maturity or that abortion is in her best interest, and noting that states "may require a minor to wait until the age of majority

therefore make a Rule 17(c) determination solely on the basis of the interests of the children involved, counting the stipulated opposition of the children to the appointment of a next friend and to litigation on their behalf simply as one of the interests affected.

An additional strategy for minimizing the impact of the litigation on the children would be to diffuse attention to individual parents and children by bringing the equal protection claim as a class action suit on behalf of all similarly situated children, and seeking appointment as next friend to the class.⁴⁷² Class certification may not be necessary to protect all members of the class, since a suit on behalf of an individual child could result in invalidation of a statutory provision that denies equal protection to a whole class of children. Federal rules do permit a class action approach, however, when the relief sought would be declaratory and/or injunctive and the state action complained of is "generally applicable" to many persons, without significant difference in their individual situations.⁴⁷³ Such a suit could proceed without reference to or involvement of any individual children, at least following appointment of the next friend.⁴⁷⁴

B. What Relief?

In addition to this procedural obstacle remains the practical difficulty of fashioning a remedy that does, on the whole, make the children involved better off. The expected opposition of parents to

before being permitted to exercise legal rights independently"); *M.S. v. Wermers*, 557 F.2d 170, 177 (8th Cir. 1977) (Henley, J., dissenting) ("[I]t is well established that the activities of children may be more highly regulated than those of adults. In particular, a state may determine that a child is not possessed of full capacity for individual choice.") (citations omitted).

472. Courts frequently appoint a next friend under Rule 17(c) in class action suits involving a class of children or other incompetent persons, after certification of the class. See *N.O. v. Callahan*, 110 F.R.D. 637, 648 (D. Mass. 1986) and cases cited therein.

473. See JOHN J. COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 663-66 (5th ed. 1989) (discussing requirements for class certification under FED. R. CIV. P. 23). The class action approach is also advisable because parents might be able to take action to thwart a suit brought on behalf of only one or a few children. For example, some Christian Scientist parents might be willing to immunize their child in order to render moot a claim on the child's behalf, justifying their actions as a necessary sacrifice for the greater good of their church. Cf. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (articulating as requirements for the "capable of repetition yet evading review" exception to mootness doctrine that a plaintiff show that the duration of the dispute is "too short to be fully litigated" before its natural expiration and that there is a "reasonable expectation that the same [plaintiff will] be subjected to the same action again").

474. See, e.g., *Child v. Beame*, 412 F. Supp. 593, 596 (S.D.N.Y. 1976) (noting that five children who initiated class action suit, and for whom next friend was appointed, were referred to in court documents by a collective pseudonym).

invalidation of special privileges and rights they have enjoyed, while not a legitimate justification for the exemptions in the context of an equal protection analysis, is something courts will and should consider in drafting an order of relief in these cases, should the equal protection claim succeed. Legally, courts would have to find that the religious exemptions now in place are constitutionally invalid because they deny important protections to a certain class of children. They might, however, be able to recommend alternative regulatory schemes that would give parents some satisfaction, while still giving the children the protection they deserve.

In the medical care context, possible compromises are readily imaginable. With respect to immunization, a court might recommend that a state require that all children receive vaccinations against those serious diseases and infections that a child in this country has a realistic chance of contracting, while allowing religious objector parents to withhold any vaccinations whose medical value for any given child is highly questionable. With respect to medical treatment for illness, a court would have to invalidate spiritual treatment exemptions to neglect, reporting, and criminal laws, but could urge or even order the state to explore effective alternative treatment procedures that do not conflict with the views of various groups of parents. Members of the medical profession have, for example, developed alternatives to blood transfusions in procedures for treating certain illnesses, in response to conflicts with Jehovah's Witnesses.⁴⁷⁵ Finally, with respect to physical examinations, a court might suggest that a state fashion legislation allowing parents in all cases to have their child examined by a certified doctor of their choice, rather than by a nurse or doctor employed by the child's school. While these compromises may give small comfort to parents, they at least avoid handing the parents a complete defeat and conveying the impression that the court has no respect whatsoever for them or their views.

In the realm of schooling, a court could first distinguish between regulations that are intended to protect children from harm or ensure them a high quality education, on the one hand, and those regulations that, on the other hand, principally reflect a legislature's view of ideal citizenship or that are a response to a situation that is present in public but not in private schools. The court could then find that only the former type need be extended to religious schools. A regulation requiring, for example, volunteer community service as a condition for

475. Abraham, *supra* note 127, at 966.

graduating might fall into the latter category, as might a school uniform mandate imposed to counter unruliness in public schools. Unfortunately, with respect to the former category of school regulations, conceiving of appropriate compromises is difficult. No alternative to state certification can adequately ensure the quality of teachers.⁴⁷⁶ Nor does any compromise on the issue of sex discrimination and sex bias in programs, curriculum, and counseling suggest itself. For children born to parents holding sexist religious views, their schooling should provide a corrective to the subordinating socialization they receive at home. It certainly should not reinforce that socialization.

As was the case with desegregation, militant resistance would no doubt follow court-ordered extension of these regulations to religious schools, and states would try to effect their own compromises informally through the enforcement procedures they adopt. In the case of desegregation, initial hopes that over time people's expectations would change and integration would eventually be accepted and accomplished have been disappointed, in large part because of the ability of white parents to move to predominantly white school districts or to enroll their children in private schools.⁴⁷⁷ In the case of regulation of religious schools, such hopes might be more realistic, since parents would have no legal alternative to the desired state of affairs and nowhere to run (unless they were prepared to leave the country). Parents might mount sufficient resistance to prevent the present generation of children in religious schools from receiving all of the educational benefits that the law should ensure them, but when these children become parents they may be more accepting of state regulation of the schools to which they send their own children.

IV. CONCLUSION

Mainstream American society has for several decades been in the throes of a struggle to effectuate its ideal of equality before the law. This ideal is far from being realized, but such significant steps have been taken that today the most debated question is whether historically under-privileged groups are now over-privileged, at least in regard

476. *Cf. Fellowship Baptist Church v. Benton*, 815 F.2d 485, 492-95 (8th Cir. 1987) (describing elements of teacher certification training program in Iowa, which are " 'essential if one is to become a good teacher' ") (quoting *Fellowship Baptist Church v. Benton*, 620 F. Supp. 308, 316 (S.D. Iowa 1985)).

477. See DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 176-80 (1995); JONATHAN KOZOL, *SAVAGE INEQUALITIES* 2-4 (1991).

to higher educational opportunities and employment. This struggle and its successes, however, have not included all disadvantaged groups. The state has denied some groups of children equal protection of the laws to an *increasing*, rather than decreasing, degree, and few persons have noticed, because these children cannot speak for themselves and their parents do not seek equal treatment for them. We in the legal profession should pause from our discussions of affirmative action hiring of law professors and corporate managers to ask whether these children deserve our immediate attention and our efforts to secure equal treatment for all.

This Article has endeavored to explain why religious exemptions to child welfare and education laws violate the Equal Protection Clause and constitute an injustice to children of religious objectors. The legal conclusions strongly support elimination of these exemptions. The discrimination is clear and clearly intentional on the part of legislatures. The purpose of the exemptions is obvious and obviously illegitimate, as a naked preference for the interests of parents over the interests of children. The real obstacle to reversing this history of discrimination against children of religious objectors lies in finding a judge who can conceive of a child as a person distinct from her parents, with independent interests and no real commitment to any religion, and who understands that the religious preferences of parents should be relevant to the legal treatment of children only insofar as frustrating those preferences might unavoidably adversely affect children's temporal well-being.

The world in which all children enjoy equal protection of the laws would be a significantly different world from the present one. One difference that some might mourn is that this "ideal" world would have little place for certain types of religious commitment and religious community—specifically, those based on unreflective, unchosen, inherited religious faith. Proponents of strong parental rights or of toleration of minority religious practices often raise this concern, although these persons themselves are typically not among the persons who have that kind of faith or who belong to that kind of community. Their motivation seems principally the satisfaction they derive from living in a diverse social environment and in a tolerant society.

We must recognize that such satisfaction hardly counts as any justification, let alone an important one, for denying medical care and equal educational opportunity to some children. Liberals and conservatives alike should begin to think less about what kind of world *they* want to live in when they discuss children's upbringing and

more about what kind of world is best for a child born today whose parents have religious views opposed to the types of benefits that we collectively have decided children need. That child alone has fundamental interests in her health and education, and that child is therefore whom the law should put first.