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Legal Contexts of Education

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UMSL

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This Open Educational Resource (OER) is a collection of public domain legal materials for students in UMSL's Legal Contexts of Education course (ED ADM 6205). In this course, students gain an understanding of key amendments to the Constitution—including the First Amendment, Fourth Amendment, Eighth Amendment, and Fourteenth Amendment—and the impact the laws have on schooling. Additionally, students study federal laws that support students with disabilities as well as Missouri state laws that protect students' rights.

In addition to public domain legal materials, this course used the freely available:

> NPBEA. (2018). National Educational Leadership Preparation (NELP) Program Standards—Building Level. Retrieved from: www.npbea.org. Available at: https://irl.umsl.edu/oer/18/

and two low cost textbooks:

> Hachiya, R. F., Shoop, R. J., & Dunklee, D. R. (2014). *The principal's quick-reference guide to school law: Reducing liability, litigation, and other potential legal tangles*. Corwin.
>
> Kluger, R. (2004). *Simple justice*. Vintage Books.

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PART 1

The First Amendment

AMENDMENT I (1791)

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

Tinker v. Des Moines School Dist.

393 U.S. 503 (1969)

United States Supreme Court, Docket No. 21

Argued: November 12, 1968 ***Decided:*** February 24, 1969

Petitioners, three public school pupils in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the Government's policy in Vietnam. They sought nominal damages and an injunction against a regulation that the respondents had promulgated banning the wearing of armbands. The District Court dismissed the complaint on the ground that the regulation was within the Board's power, despite the absence of any finding of substantial interference with the conduct of school activities. The Court of Appeals, sitting en banc, affirmed by an equally divided court.

Held:

1. In wearing armbands, the petitioners were quiet and passive. They were not disruptive and did not impinge upon the rights of others. In these circumstances, their conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth. Pp. 505-506.

2. First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment. Pp. 506-507.

3. A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments. Pp. 507-514.

383 F.2d 988, reversed and remanded.

Dan L. Johnston argued the cause for petitioners. With him on the brief were Melvin L. Wulf and David N. Ellenhorn.

Allan A. Herrick argued the cause for respondents. With him on the brief were Herschel G. Langdon and David W. Belin.

Charles Morgan, Jr., filed a brief for the United States National Student Association, as *amicus curiae*, urging reversal. [393 U.S. 503, 504]

MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their

support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It upheld [393 U.S. 503, 505] the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F. Supp. 971 (1966). The court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars*, 363 F.2d 744, 749 (1966). 1.1

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed, without opinion. 383 F.2d 988 (1967). We granted certiorari. 390 U.S. 942 (1968).

I

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931). *Cf. Thornhill v. Alabama*, 310 U.S. 88 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Brown v. Louisiana*, 383 U.S. 131 (1966). As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" [393 U.S. 503, 506] which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. *Cf. Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their

constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Bartels v. Iowa*, 262 U.S. 404 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent. 1.2 See also *Pierce v. Society of Sisters*, [393 U.S. 503, 507] 268 U.S. 510 (1925); *West Virginia v. Barnette*, 319 U.S. 624 (1943); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Engel v. Vitale*, 370 U.S. 421 (1962); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Epperson v. Arkansas*, *ante*, p. 97 (1968).

In *West Virginia v. Barnette*, *supra*, this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 319 U.S., at 637.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See *Epperson v. Arkansas*, *supra*, at 104; *Meyer v. Nebraska*, *supra*, at 402. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, [393 U.S. 503, 508] to hair style, or deportment. *Cf. Ferrell v. Dallas Independent School District*, 392 F.2d 697 (1968); *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S. W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case

does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is [393 U.S. 503, 509] the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Burnside v. Byars*, *supra*, at 749.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption. 1.3 [393 U.S. 503, 510]

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. 1.4 It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded. 1.5)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement [393 U.S. 503, 511] in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend." *Burnside v. Byars*, *supra*, at 749.

In *Meyer v. Nebraska*, *supra*, at 402, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said:

> "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a [393 U.S. 503, 512] State without doing violence to both letter and spirit of the Constitution."

This principle has been repeated by this Court on numerous occasions during the intervening years. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603, MR. JUSTICE BRENNAN, speaking for the Court, said:

> "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker*, [364 U.S. 479] at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. 1.6 This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on [393 U.S. 503, 513] the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. *Burnside v. Byars*, *supra*, at 749. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. *Cf. Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (C. A. 5th Cir. 1966).

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. *Cf. Hammond* [393 U.S. 503, 514] *v. South Carolina State College*, 272 F. Supp. 947 (D.C. S. C. 1967) (orderly protest meeting on state college campus); *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (D.C. M. D. Ala. 1967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example,

to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Footnotes

[1.1] In Burnside, the Fifth Circuit ordered that high school authorities be enjoined from enforcing a regulation forbidding students to wear "freedom buttons." It is instructive that in *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (1966), the same panel on the same day reached the opposite result on different facts. It declined to enjoin enforcement of such a regulation in another high school where the students wearing freedom buttons harassed students who did not wear them and created much disturbance.

[1.2] *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934), is sometimes cited for the broad proposition that the State may attach conditions to attendance at a state university that require individuals to violate their religious convictions. The case involved dismissal of members of a religious denomination from a land grant college for refusal to participate in military training. Narrowly viewed, the case turns upon the Court's conclusion that merely requiring a student to participate in school training in military "science" could not conflict with his constitutionally protected freedom of conscience. The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees. See, e.g., *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (C. A. 5th Cir. 1961); *Knight v. State Board of Education*, 200 F. Supp. 174 (D.C. M. D. Tenn. 1961); *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (D.C. M. D. Ala. 1967). See also Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960); Note, Academic Freedom, 81 Harv. L. Rev. 1045 (1968).

[1.3] The only suggestions of fear of disorder in the report are these:

> "A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and it was felt that if any kind of a demonstration existed, it might evolve into something which would be difficult to control."
>
> "Students at one of the high schools were heard to say they would wear arm bands of other colors if the black bands prevailed."

Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; the regulation was directed against "the principle of the demonstration" itself. School authorities simply felt that "the schools are no place for demonstrations," and

if the students "didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools."

[1.4] The District Court found that the school authorities, in prohibiting black armbands, were influenced by the fact that "[t]he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views." 258 F. Supp., at 972-973.

[1.5] After the principals' meeting, the director of secondary education and the principal of the high school informed the student that the principals were opposed to publication of his article. They reported that "we felt that it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one."

[1.6] In *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.C. S. C. 1967), District Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. *Cf. Cox v. Louisiana*, 379 U.S. 536 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. *Cf. Edwards v. South Carolina*, 372 U.S. 229 (1963); *Brown v. Louisiana*, 383 U.S. 131 (1966).

MR. JUSTICE STEWART, concurring.

Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I [393 U.S. 503, 515] cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in *Ginsberg v. New York*, 390 U.S. 629. I continue to hold the view I expressed in that case: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Id.*, at 649-650 (concurring in result). *Cf. Prince v. Massachusetts*, 321 U.S. 158.

MR. JUSTICE WHITE, concurring.

While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in *Burnside v. Byars*, 363 F.2d 744, 748 (C. A. 5th Cir. 1966), a case relied upon by the Court in the matter now before us.

MR. JUSTICE BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court. 2.1 The Court brought [393 U.S. 503, 516] this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His mother is an official in the Women's International League for Peace and Freedom.

As I read the Court's opinion it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is "symbolic speech" which is "akin to 'pure speech'" and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school functions [393 U.S. 503, 517] are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, *cf.*, e.g., *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In *Cox v. Louisiana*, 379 U.S. 536, 554 (1965), for example, the Court clearly stated that the rights of

free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration." [393 U.S. 503, 518] Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education. 2.2

The United States District Court refused to hold that the state school order violated the First and Fourteenth Amendments. 258 F. Supp. 971. Holding that the protest was akin to speech, which is protected by the First [393 U.S. 503, 519] and Fourteenth Amendments, that court held that the school order was "reasonable" and hence constitutional. There was at one time a line of cases holding "reasonableness" as the court saw it to be the test of a "due process" violation. Two cases upon which the Court today heavily relies for striking down this school order used this test of reasonableness, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Bartels v. Iowa*, 262 U.S. 404 (1923). The opinions in both cases were written by Mr. Justice McReynolds; Mr. Justice Holmes, who opposed this reasonableness test, dissented from the holdings as did Mr. Justice Sutherland. This constitutional test of reasonableness prevailed in this Court for a season. It was this test that brought on President Franklin Roosevelt's well-known Court fight. His proposed legislation did not pass, but the fight left the "reasonableness" constitutional test dead on the battlefield, so much so that this Court in *Ferguson v. Skrupa*, 372 U.S. 726, 729, 730, after a thorough review of the old cases, was able to conclude in 1963:

> "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.
>
> . . . . .

> "The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."

The *Ferguson* case totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they "shock the conscience" or that they are [393 U.S. 503, 520] "unreasonable," "arbitrary," "irrational," "contrary to fundamental 'decency,'" or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother FORTAS, is resurrecting that old reasonableness-due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of the bench and bar. It will be a sad day for the country, I believe, when the present-day Court returns to the McReynolds due process concept. Other cases cited by the Court do not, as implied, follow the McReynolds reasonableness doctrine. *West Virginia v. Barnette*, 319 U.S. 624, clearly rejecting the "reasonableness" test, held that the Fourteenth Amendment made the First applicable to the States, and that the two forbade a State to compel little schoolchildren to salute the United States flag when they had religious scruples against doing so. 2.3 Neither *Thornhill v. Alabama*, 310 U.S. 88; *Stromberg v. California*, 283 U.S. 359; *Edwards* [393 U.S. 503, 521] *v. South Carolina*, 372 U.S. 229; nor *Brown v. Louisiana*, 383 U.S. 131, related to schoolchildren at all, and none of these cases embraced Mr. Justice McReynolds' reasonableness test; and *Thornhill*, *Edwards*, and *Brown* relied on the vagueness of state statutes under scrutiny to hold them unconstitutional. *Cox v. Louisiana*, 379 U.S. 536, 555, and *Adderley v. Florida*, 385 U.S. 39, cited by the Court as a "compare," indicating, I suppose, that these two cases are no longer the law, were not rested to the slightest extent on the Meyer and Bartels "reasonableness-due process-McReynolds" constitutional test.

I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." Even *Meyer* did not hold that. It makes no reference to "symbolic speech" at all; what it did was to strike down as "unreasonable" and therefore unconstitutional a Nebraska law barring the teaching of the German language before the children reached the eighth grade. One can well agree with Mr. Justice Holmes and Mr. Justice Sutherland, as I do, that such a law was no more unreasonable than it would be to bar the teaching of Latin and Greek to pupils who have not reached the eighth grade. In fact, I think the majority's reason for invalidating the Nebraska law was that it did not like it or in legal jargon that it "shocked the Court's conscience," "offended its sense of justice," or was "contrary to fundamental concepts of the English-speaking world," as the Court has sometimes said. See, e.g., *Rochin v. California*, 342 U.S. 165, and *Irvine v. California*, 347 U.S. 128. The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of [393 U.S. 503, 522] speech and religion

into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 555; *Adderley v. Florida*, 385 U.S. 39.

In my view, teachers in state-controlled public schools are hired to teach there. Although Mr. Justice McReynolds may have intimated to the contrary in *Meyer v. Nebraska*, *supra*, certainly a teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.

The true principles on this whole subject were in my judgment spoken by Mr. Justice McKenna for the Court in *Waugh v. Mississippi University* in 237 U.S. 589, 596-597. The State had there passed a law barring students from peaceably assembling in Greek letter fraternities and providing that students who joined them could be expelled from school. This law would appear on the surface to run afoul of the First Amendment's [393 U.S. 503, 523] freedom of assembly clause. The law was attacked as violative of due process and of the privileges and immunities clause and as a deprivation of property and of liberty, under the Fourteenth Amendment. It was argued that the fraternity made its members more moral, taught discipline, and inspired its members to study harder and to obey better the rules of discipline and order. This Court rejected all the "fervid" pleas of the fraternities' advocates and decided unanimously against these Fourteenth Amendment arguments. The Court in its next to the last paragraph made this statement which has complete relevance for us today:

> "It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that *membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions*. It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity." (Emphasis supplied.)

It was on the foregoing argument that this Court sustained the power of Mississippi to curtail the First Amendment's right of peaceable assembly. And the same reasons are equally applicable to curtailing in the States' public schools the right to complete freedom of expression. Iowa's public schools, like Mississippi's university, are operated to give students an opportunity to learn, not to talk politics by actual speech, or by "symbolic" [393 U.S. 503, 524] speech. And, as I have pointed out before, the record amply shows that public protest in the school classes against the Vietnam war "distracted from that singleness of purpose which the State [here Iowa] desired to exist in its public educational institutions." Here the Court should accord Iowa educational institutions the same right to determine for themselves to what extent free expression should be allowed in its schools as it accorded Mississippi with reference to freedom of assembly. But even if the record were silent as to protests against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues ever have. Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily [393 U.S. 503, 525] refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for

damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school [393 U.S. 503, 526] systems 2.4 in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

[2.1] The petition for certiorari here presented this single question:

> "Whether the First and Fourteenth Amendments permit officials of state supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum."

[2.2] The following Associated Press article appeared in the Washington Evening Star, January 11, 1969, p. A-2, col. 1:

> "BELLINGHAM, Mass. (AP)—Todd R. Hennessy, 16, has filed nominating papers to run for town park commissioner in the March election.
>
> "'I can see nothing illegal in the youth's seeking the elective office,' said Lee Ambler, the town counsel. 'But I can't overlook the possibility that if he is elected any legal contract entered into by the park commissioner would be void because he is a juvenile.'
>
> "Todd is a junior in Mount St. Charles Academy, where he has a top scholastic record."

[2.3] In *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940), this Court said:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

[2.4] *Statistical Abstract of the United States* (1968), Table No. 578, p. 406.

MR. JUSTICE HARLAN, dissenting.

I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below. [393 U.S. 503, 527]

Hazelwood School District v. Kuhlmeier

484 U.S. 260 (1988)

United States Supreme Court, Docket No. 86-836

Argued: October 13, 1987 ***Decided:*** January 13, 1988

Respondents, former high school students who were staff members of the school's newspaper, filed suit in Federal District Court against petitioners, the school district and school officials, alleging that respondents' First Amendment rights were violated by the deletion from a certain issue of the paper of two pages that included an article describing school students' experiences with pregnancy and another article discussing the impact of divorce on students at the school. The newspaper was written and edited by a journalism class, as part of the school's curriculum. Pursuant to the school's practice, the teacher in charge of the paper submitted page proofs to the school's principal, who objected to the pregnancy story because the pregnant students, although not named, might be identified from the text, and because he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students. The principal objected to the divorce article because the page proofs he was furnished identified by name (deleted by the teacher from the final version) a student who complained of her father's conduct, and the principal believed that the student's parents should have been given an opportunity to respond to the remarks or to consent to their publication. Believing that there was no time to make necessary changes in the articles if the paper was to be issued before the end of the school year, the principal directed that the pages on which they appeared be withheld from publication even though other, unobjectionable articles were included on such pages. The District Court held that no First Amendment violation had occurred. The Court of Appeals reversed.

Held:

Respondents' First Amendment rights were not violated. Pp. 266-276.

(a) First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school. Pp. 266-267.

(b) The school newspaper here cannot be characterized as a forum for public expression. School facilities may be deemed to be public forums [484 U.S. 260, 261] only if school authorities have by policy or by practice opened the facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. The school officials in this case did not

deviate from their policy that the newspaper's production was to be part of the educational curriculum and a regular classroom activity under the journalism teacher's control as to almost every aspect of publication. The officials did not evince any intent to open the paper's pages to indiscriminate use by its student reporters and editors, or by the student body generally. Accordingly, school officials were entitled to regulate the paper's contents in any reasonable manner. Pp. 267-270.

(c) The standard for determining when a school may punish student expression that happens to occur on school premises is not the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, distinguished. Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. Pp. 270-273.

(d) The school principal acted reasonably in this case in requiring the deletion of the pregnancy article, the divorce article, and the other articles that were to appear on the same pages of the newspaper. Pp. 274-276.

795 F.2d 1368, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 277.

Robert P. Baine, Jr., argued the cause for petitioners. With him on the briefs were John Gianoulakis and Robert T. Haar.

Leslie D. Edwards argued the cause and filed a brief for respondents. [*]

[*] Ronald A. Zumbrun and Anthony T. Caso filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by Janet L. Benshoof, John A. Powell, Steven [484 U.S. 260, 261] R. Shapiro, and Frank Susman; for the American Society of Newspaper Editors et al. by Richard M. Schmidt, Jr.; for People for the American Way by Marvin E. Frankel; for the NOW Legal Defense and Education Fund et al. by Martha L. Minow, Sarah E. Burns, and Marsha Levick; for the Planned Parenthood Federation of America, Inc., et al. by Eve W. Paul; and for the Student Press Law Center et al. by J. Marc Abrams.

Briefs of *amici curiae* were filed for the National School Boards Association et al. by Gwendolyn H. Gregory, August W. Steinhilber, Thomas A. Shannon, and Ivan B. Gluckman; and for the School Board of Dade County, Florida, by Frank A. Howard, Jr., and Johnny Brown. [484 U.S. 260, 262]

JUSTICE WHITE delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

I

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper. The printing expenses during the 1982-1983 school year totaled $4,668.50; revenue from sales was $1,166.84. The other costs associated with the newspaper—such as supplies, textbooks, [484 U.S. 260, 263] and a portion of the journalism teacher's salary—were borne entirely by the Board.

The Journalism II course was taught by Robert Stergos for most of the 1982-1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. App. to Pet. for Cert.

38. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run [484 U.S. 260, 264] and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. 1.1 He informed his superiors of the decision, and they concurred.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages. After a bench trial, the District Court denied an injunction, holding that no First Amendment violation had occurred. 607 F. Supp. 1450 (1985).

The District Court concluded that school officials may impose restraints on students' speech in activities that are "'an integral part of the school's educational function'"—including the publication of a school-sponsored newspaper by a journalism class—so long as their decision has "'a substantial and reasonable basis.'" *Id.*, at 1466 (quoting *Frasca v. Andrews*, 463 F. Supp. 1043, 1052 (EDNY 1979)). The court found that Principal Reynolds' concern that the pregnant student's anonymity would be lost and their privacy invaded was "legitimate and reasonable," given "the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article." 607 F. Supp., at 1466. The court held that Reynolds' action was also justified "to avoid the impression that [the school] endorses [484 U.S. 260, 265] the sexual norms of the subjects" and to shield younger students from exposure to unsuitable material. *Ibid.* The deletion of the article on divorce was seen by the court as a reasonable response to the invasion of privacy concerns raised by the named student's remarks. Because the article did not indicate that the student's parents had been offered an opportunity to respond to her allegations, said the court, there was cause for "serious doubt that the article complied with the rules of fairness which are standard in the field of journalism and which were covered in the textbook used in the Journalism II class." *Id.*, at 1467. Furthermore, the court concluded that Reynolds was justified in deleting two full pages of the newspaper, instead of deleting only the pregnancy and divorce stories or requiring that those stories be modified to address his concerns, based on his "reasonable belief that he had to make an immediate decision and that there was no time to make modifications to the articles in question." *Id.*, at 1466.

The Court of Appeals for the Eighth Circuit reversed. 795 F.2d 1368 (1986). The court held at the outset that Spectrum was not only "a part of the school adopted curriculum," *id.*, at 1373, but also a public forum, because the newspaper was "intended to be and operated as a conduit for student

viewpoint." *Id.*, at 1372. The court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when "'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.'" *Id.*, at 1374 (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969)).

The Court of Appeals found "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school." 795 F.2d, at 1375. School officials were entitled to censor the articles on the ground that [484 U.S. 260, 266] they invaded the rights of others, according to the court, only if publication of the articles could have resulted in tort liability to the school. The court concluded that no tort action for libel or invasion of privacy could have been maintained against the school by the subjects of the two articles or by their families. Accordingly, the court held that school officials had violated respondents' First Amendment rights by deleting the two pages of the newspaper.

We granted certiorari, 479 U.S. 1053 (1987), and we now reverse.

II

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, *supra*, at 506. They cannot be punished merely for expressing their personal views on the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours," 393 U.S., at 512-513—unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Id.*, at 509.

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and must be "applied in light of the special characteristics of the school environment." *Tinker*, *supra*, at 506; *cf. New Jersey v. T. L. O.*, 469 U.S. 325, 341-343 (1985). A school need not tolerate student speech that is inconsistent with its "basic educational mission," *Fraser*, *supra*, at 685, even though the government could not censor similar speech outside the school. Accordingly, we held in *Fraser* that a student could be disciplined for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a manner [484 U.S. 260, 267] that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education." 478 U.S., at 685-686. We thus recognized that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," *id.*, at 683, rather than with the federal courts. It is in this context that respondents' First Amendment claims must be considered.

A

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). *Cf. Widmar v. Vincent*, 454 U.S. 263, 267-268, n. 5 (1981). Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983), or by some segment of the public, such as student organizations. *Id.*, at 46, n. 7 (citing *Widmar v. Vincent*). If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. 460 U.S., at 46, n. 7. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). [484 U.S. 260, 268]

The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." App. 22. The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." *Id.*, at 11. The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." *Ibid.* Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982-1983 school year, "both had the authority to exercise and in fact exercised a great deal of control over Spectrum." 607 F. Supp., at 1453. For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. Many of these decisions were made without consultation with the Journalism II students. The District Court thus found it "clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of Spectrum, including its content." *Ibid.* Moreover, after [484 U.S. 260, 269] each Spectrum issue had

been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication. Respondents' assertion that they had believed that they could publish "practically anything" in Spectrum was therefore dismissed by the District Court as simply "not credible." *Id.*, at 1456. These factual findings are amply supported by the record, and were not rejected as clearly erroneous by the Court of Appeals.

The evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum, see 795 F.2d, at 1372-1373, is equivocal at best. For example, Board Policy 348.51, which stated in part that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism," also stated that such publications were "developed within the adopted curriculum and its educational implications." App. 22. One might reasonably infer from the full text of Policy 348.51 that school officials retained ultimate control over what constituted "responsible journalism" in a school-sponsored newspaper. Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "Spectrum, as a student-press publication, accepts all rights implied by the First Amendment," this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum. 1.2 Finally, [484 U.S. 260, 270] that students were permitted to exercise some authority over the contents of Spectrum was fully consistent with the Curriculum Guide objective of teaching the Journalism II students "leadership responsibilities as issue and page editors." App. 11. A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. In sum, the evidence relied upon by the Court of Appeals fails to demonstrate the "clear intent to create a public forum," Cornelius, 473 U.S., at 802, that existed in cases in which we found public forums to have been created. See *id.*, at 802-803 (citing *Widmar v. Vincent*, 454 U.S., at 267; *Madison School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174, n. 6 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975)). School officials did not evince either "by policy or by practice," Perry Education Assn., 460 U.S., at 47, any intent to open the pages of Spectrum to "indiscriminate use," *ibid.*, by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," *id.*, at 46, as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. *Ibid.* It is this standard, rather than our decision in *Tinker*, that governs this case.

B

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively [484 U.S. 260, 271] to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that

happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. 1.3

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," *Fraser*, 478 U.S., at 685, not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," *Tinker*, 393 U.S., at 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. 1.4 A school must be able to set high standards for [484 U.S. 260, 272] the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," *Fraser*, *supra*, at 683, or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination [484 U.S. 260, 273] of student expression. 1.5 Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. 1.6

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. See, e.g., *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S.

176, 208 (1982); *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]," *ibid.*, as to require judicial intervention to protect students' constitutional rights. 1.7 [484 U.S. 260, 274]

III

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen [484 U.S. 260, 275] and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent—indeed, as one who chose "playing cards with the guys" over home and family—was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982-1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name. 1.8

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that

the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. These circumstances included the very recent [484 U.S. 260, 276] replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred. 1.9

The judgment of the Court of Appeals for the Eighth Circuit is therefore

Reversed.

Footnotes

[1.1] The two pages deleted from the newspaper also contained articles on teenage marriage, runaways, and juvenile delinquents, as well as a general article on teenage pregnancy. Reynolds testified that he had no objection to these articles and that they were deleted only because they appeared on the same pages as the two objectionable articles.

[1.2] The Statement also cited *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), for the proposition that "[o]nly speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore be prohibited." App. 26. This portion of the Statement does not, of course, even accurately reflect our holding in *Tinker*. Furthermore, the Statement nowhere expressly extended the *Tinker* standard to the news and feature articles contained in a school-sponsored newspaper. The dissent [484 U.S. 260, 270] apparently finds as a fact that the Statement was published annually in Spectrum; however, the District Court was unable to conclude that the Statement appeared on more than one occasion. In any event, even if the Statement says what the dissent believes that it says, the evidence that school officials never intended to designate Spectrum as a public forum remains overwhelming.

[1.3] The distinction that we draw between speech that is sponsored by the school and speech that is not is fully consistent with *Papish v. University of Missouri Board of Curators*, 410 U.S. 667 (1973) (per curiam), which involved an off-campus "underground" newspaper that school officials merely had allowed to be sold on a state university campus.

[1.4] The dissent perceives no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*. We disagree. The decision in *Fraser* rested on the "vulgar," "lewd," and "plainly offensive" character of a speech delivered at an official school assembly rather than on [484 U.S. 260, 272] any propensity of the speech to "materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others." 393 U.S., at 513. Indeed, the *Fraser* Court cited as "especially relevant" a portion of Justice Black's dissenting opinion in *Tinker* "'disclaim[ing] any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.'" 478 U.S., at 686 (quoting 393 U.S., at 526). Of course, Justice Black's observations are equally relevant to the instant case.

[1.5] We therefore need not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid "invasion of the rights of others," 393 U.S., at 513, except where that speech could result in tort liability to the school.

[1.6] We reject respondents' suggestion that school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to specific written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate. We need not now decide whether such regulations are required before school officials may censor publications not sponsored by the school that students seek to distribute on school grounds. See *Baughman v. Freienmuth*, 478 F.2d 1345 (CA4 1973); *Shanley v. Northeast Independent School Dist., Bexar Cty., Tex.*, 462 F.2d 960 (CA5 1972); *Eisner v. Stamford Board of Education*, 440 F.2d 803 (CA2 1971).

[1.7] A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. See, e.g., *Nicholson v. Board of Education*, Torrance Unified School Dist., 682 F.2d 858 (CA9 1982); *Seyfried v.* [484 U.S. 260, 274] *Walton*, 668 F.2d 214 (CA3 1981); *Trachtman v. Anker*, 563 F.2d 512 (CA2 1977), cert. denied, 435 U.S. 925 (1978); *Frasca v. Andrews*, 463 F. Supp. 1043 (EDNY 1979). We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.

[1.8] The reasonableness of Principal Reynolds' concerns about the two articles was further substantiated by the trial testimony of Martin Duggan, a former editorial page editor of the St. Louis Globe Democrat and a former college journalism instructor and newspaper adviser. Duggan testified that the divorce story did not meet journalistic standards of fairness and balance because the father was not given an opportunity to respond, and that the pregnancy story was not appropriate for publication in a high school newspaper because it was unduly intrusive into the privacy of the girls, their parents, and their boyfriends. The District Court found Duggan to be "an objective and independent witness" whose testimony was entitled to significant weight. 607 F. Supp. 1450, 1461 (ED Mo. 1985).

[1.9] It is likely that the approach urged by the dissent would as a practical matter have far more deleterious consequences for the student press than does the approach that we adopt today. The dissent correctly acknowledges "[t]he State's prerogative to dissolve the student newspaper entirely." *Post*, at 287. It is likely that many public schools would do just that rather than open their newspapers to all student expression that does not threaten "materia[l] disrup[tion of] classwork" or violation of "rights that

are protected by law," *post*, at 289, regardless of how sexually explicit, racially intemperate, or personally insulting that expression otherwise might be. [484 U.S. 260, 277]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. Spectrum, the newspaper they were to publish, "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution. . . ." 795 F.2d 1368, 1373 (CA8 1986). "[A]t the beginning of each school year," *id.*, at 1372, the student journalists published a Statement of Policy—tacitly approved each year by school authorities—announcing their expectation that "Spectrum, as a student-press publication, accepts all rights implied by the First Amendment. . . . Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." App. 26 (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 513 (1969)). 2.1 The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism." App. 22 (Board Policy 348.51). [484 U.S. 260, 278]

This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles—comprising two full pages—of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would "materially and substantially interfere with the requirements of appropriate discipline," but simply because he considered two of the six "inappropriate, personal, sensitive, and unsuitable" for student consumption. 795 F.2d, at 1371.

In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

I

Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a

democratic political system. . . .” *Ambach v. Norwick*, 441 U.S. 68, 77 (1979). All the while, the public educator nurtures students’ social and moral development by transmitting to them an official dogma of “‘community values.’” *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (citation omitted).

The public educator’s task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally reserved [484 U.S. 260, 279] the “daily operation of school systems” to the States and their local school boards. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); see *Board of Education v. Pico*, *supra*, at 863-864. We have not, however, hesitated to intervene where their decisions run afoul of the Constitution. See e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking state statute that forbade teaching of evolution in public school unless accompanied by instruction on theory of “creation science”); *Board of Education v. Pico*, *supra* (school board may not remove books from library shelves merely because it disapproves of ideas they express); *Epperson v. Arkansas*, *supra* (striking state-law prohibition against teaching Darwinian theory of evolution in public school); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (public school may not compel student to salute flag); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law prohibiting the teaching of foreign languages in public or private schools is unconstitutional).

Free student expression undoubtedly sometimes interferes with the effectiveness of the school’s pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). Other student speech, however, frustrates the school’s legitimate pedagogical purposes merely by expressing a message that conflicts with the school’s, without directly interfering with the school’s expression of its message: A student who responds to a political science teacher’s question with the retort, “socialism is good,” subverts the school’s inculcation of the message that capitalism is better. [484 U.S. 260, 280] Even the maverick who sits in class passively sporting a symbol of protest against a government policy, *cf. Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex. Likewise, the student newspaper that, like Spectrum, conveys a moral position at odds with the school’s official stance might subvert the administration’s legitimate inculcation of its own perception of community values.

If mere incompatibility with the school’s pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools

into "enclaves of totalitarianism," *id.*, at 511, that "strangle the free mind at its source," *West Virginia Board of Education v. Barnette*, *supra*, at 637. The First Amendment permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Fraser*, *supra*, at 682, students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, *supra*, at 506. Just as the public on the street corner must, in the interest of fostering "enlightened opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), tolerate speech that "tempt[s] [the listener] to throw [the speaker] off the street," *id.*, at 309, public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

In *Tinker*, this Court struck the balance. We held that official censorship of student expression—there the suspension of several students until they removed their armbands protesting the Vietnam war—is unconstitutional unless the [484 U.S. 260, 281] speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . ." 393 U.S., at 513. School officials may not suppress "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of" the speaker. *Id.*, at 508. The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id.*, at 509, or an unsavory subject, *Fraser*, *supra*, at 688-689 (BRENNAN, J., concurring in judgment), does not justify official suppression of student speech in the high school.

This Court applied the *Tinker* test just a Term ago in *Fraser*, *supra*, upholding an official decision to discipline a student for delivering a lewd speech in support of a student-government candidate. The Court today casts no doubt on *Tinker*'s vitality. Instead it erects a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another. On the one hand is censorship "to silence a student's personal expression that happens to occur on the school premises." *Ante*, at 271. On the other hand is censorship of expression that arises in the context of "school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Ibid.*

The Court does not, for it cannot, purport to discern from our precedents the distinction it creates. One could, I suppose, readily characterize the students' symbolic speech in *Tinker* as "personal expression that happens to [have] occur[red] on school premises," although *Tinker* did not even hint that the personal nature of the speech was of any (much less dispositive) relevance. But that same description could not by any stretch of the imagination fit Fraser's speech. He did not just "happen" to deliver his lewd speech to an ad hoc gathering on the playground. As the second paragraph of *Fraser* evinces, if ever a forum for student expression was "school-sponsored," Fraser's was: [484 U.S. 260, 282]

> "Fraser . . . delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students . . . attended the assembly. Students were required to

> attend the assembly or to report to the study hall. The assembly was part of a *school-sponsored* educational program in self-government." *Fraser*, 478 U.S., at 677 (emphasis added).

Yet, from the first sentence of its analysis, see *id.*, at 680, *Fraser* faithfully applied *Tinker*.

Nor has this Court ever intimated a distinction between personal and school-sponsored speech in any other context. Particularly telling is this Court's heavy reliance on *Tinker* in two cases of First Amendment infringement on state college campuses. See *Papish v. University of Missouri Board of Curators*, 410 U.S. 667, 671, n. 6 (1973) (per curiam); *Healy v. James*, 408 U.S. 169, 180, 189, and n. 18, 191 (1972). One involved the expulsion of a student for lewd expression in a newspaper that she sold on campus pursuant to university authorization, see *Papish*, *supra*, at 667-668, and the other involved the denial of university recognition and concomitant benefits to a political student organization, see *Healy*, *supra*, at 174, 176, 181-182. Tracking *Tinker*'s analysis, the Court found each act of suppression unconstitutional. In neither case did this Court suggest the distinction, which the Court today finds dispositive, between school-sponsored and incidental student expression.

II

Even if we were writing on a clean slate, I would reject the Court's rationale for abandoning *Tinker* in this case. The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit: the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need [484 U.S. 260, 283] to dissociate itself from student expression. *Ante*, at 271. None of the excuses, once disentangled, supports the distinction that the Court draws. *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.

A

The Court is certainly correct that the First Amendment permits educators "to assure that participants learn whatever lessons the activity is designed to teach. . . ." *Ante*, at 271. That is, however, the essence of the *Tinker* test, not an excuse to abandon it. Under *Tinker*, school officials may censor only such student speech as would "materially disrup[t]" a legitimate curricular function. Manifestly, student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity—one that "is designed to teach" something—than when it arises in the context of a noncurricular activity. Thus, under *Tinker*, the school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria. See *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 544-545 (1980) (STEVENS, J., concurring in judgment). That is not because some more stringent standard applies in the curricular context. (After all, this Court applied the same standard whether the students in *Tinker* wore their armbands to the "classroom" or the "cafeteria." 393 U.S., at 512.) It is because student

speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.

I fully agree with the Court that the First Amendment should afford an educator the prerogative not to sponsor the publication of a newspaper article that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced," or that falls short of the "high standards for . . . student speech that is disseminated under [the school's] auspices. . . ." *Ante*, at 271-272. But we need not abandon *Tinker* [484 U.S. 260, 284] to reach that conclusion; we need only apply it. The enumerated criteria reflect the skills that the curricular newspaper "is designed to teach." The educator may, under *Tinker*, constitutionally "censor" poor grammar, writing, or research because to reward such expression would "materially disrup[t]" the newspaper's curricular purpose.

The same cannot be said of official censorship designed to shield the *audience* or dissociate the *sponsor* from the expression. Censorship so motivated might well serve (although, as I demonstrate *infra*, at 285-289, cannot legitimately serve) some other school purpose. But it in no way furthers the curricular purposes of a student *newspaper*, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors. Unsurprisingly, Hazelwood East claims no such pedagogical purpose.

The Court relies on bits of testimony to portray the principal's conduct as a pedagogical lesson to Journalism II students who "had not sufficiently mastered those portions of the . . . curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals . . ., and 'the legal, moral, and ethical restrictions imposed upon journalists. . . .'" *Ante*, at 276. In that regard, the Court attempts to justify censorship of the article on teenage pregnancy on the basis of the principal's judgment that (1) "the [pregnant] students' anonymity was not adequately protected," despite the article's use of aliases; and (2) the judgment that "the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents. . . ." *Ante*, at 274. Similarly, the Court finds in the principal's decision to censor the divorce article a journalistic lesson that the author should have given the father of one student an "opportunity to defend himself" against her charge that (in the Court's words) he "chose [484 U.S. 260, 285] 'playing cards with the guys' over home and family. . . ." *Ante*, at 275.

But the principal never consulted the students before censoring their work. "[T]hey learned of the deletions when the paper was released. . . ." 795 F.2d, at 1371. Further, he explained the deletions only in the broadest of generalities. In one meeting called at the behest of seven protesting Spectrum staff members (presumably a fraction of the full class), he characterized the articles as "'too sensitive' for 'our immature audience of readers,'" 607 F. Supp. 1450, 1459 (ED Mo. 1985), and in a later meeting he deemed them simply "inappropriate, personal, sensitive and unsuitable for the newspaper," *ibid.* The Court's supposition that the principal intended (or the protesters understood) those generalities as a lesson on the nuances of journalistic responsibility is utterly incredible. If he did, a fact that

neither the District Court nor the Court of Appeals found, the lesson was lost on all but the psychic Spectrum staffer.

B

The Court's second excuse for deviating from precedent is the school's interest in shielding an impressionable high school audience from material whose substance is "unsuitable for immature audiences." *Ante*, at 271 (footnote omitted). Specifically, the majority decrees that we must afford educators authority to shield high school students from exposure to "potentially sensitive topics" (like "the particulars of teenage sexual activity") or unacceptable social viewpoints (like the advocacy of "irresponsible se[x] or conduct otherwise inconsistent with 'the shared values of a civilized social order'") through school-sponsored student activities. *Ante*, at 272 (citation omitted).

Tinker teaches us that the state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as "thought police" stifling discussion of all but state-approved topics and advocacy of all [484 U.S. 260, 286] but the official position. See also *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Otherwise educators could transform students into "closed-circuit recipients of only that which the State chooses to communicate," *Tinker*, 393 U.S., at 511, and cast a perverse and impermissible "pall of orthodoxy over the classroom," *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Thus, the State cannot constitutionally prohibit its high school students from recounting in the locker room "the particulars of [their] teen-age sexual activity," nor even from advocating "irresponsible se[x]" or other presumed abominations of "the shared values of a civilized social order." Even in its capacity as educator the State may not assume an Orwellian "guardianship of the public mind," *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

The mere fact of school sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity. 2.2 The former would constitute unabashed and unconstitutional viewpoint [484 U.S. 260, 287] discrimination, see *Board of Education v. Pico*, 457 U.S., at 878-879 (BLACKMUN, J., concurring in part and concurring in judgment), as well as an impermissible infringement of the students' "'right to receive information and ideas,'" *id.*, at 867 (plurality opinion) (citations omitted); see *First National Bank v. Bellotti*, 435 U.S. 765, 783 (1978). 2.3 Just as a school board may not purge its state-funded library of all books that "'offen[d] [its] social, political and moral tastes,'" 457 U.S., at 858-859 (plurality opinion) (citation omitted), school officials may not, out of like motivation, discriminatorily excise objectionable ideas from a student publication. The State's prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which viewpoints students may express on its pages, than the State's prerogative to close down the schoolhouse entitles it to prohibit the nondisruptive expression of antiwar sentiment within its gates.

Official censorship of student speech on the ground that it addresses "potentially sensitive topics" is, for related reasons, equally impermissible. I would not begrudge an educator the authority to limit the substantive scope of a school-sponsored publication to a certain, objectively definable topic, such as literary criticism, school sports, or an overview of the school year. Unlike those determinate limitations, "potential topic sensitivity" is a vaporous nonstandard—like "'public welfare, peace, safety, health, decency, good order, morals or convenience,'" *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969), or "'general welfare of citizens,'" *Staub v. Baxley*, 355 U.S. 313, 322 (1958)—that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not [484 U.S. 260, 288] object. In part because of those dangers, this Court has consistently condemned any scheme allowing a state official boundless discretion in licensing speech from a particular forum. See, e.g., *Shuttlesworth v. Birmingham*, *supra*, at 150-151, and n. 2; *Cox v. Louisiana*, 379 U.S. 536, 557-558 (1965); *Staub v. Baxley*, *supra*, at 322-324.

The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the "mere" protection of students from sensitive topics. Among the grounds that the Court advances to uphold the principal's censorship of one of the articles was the potential sensitivity of "teenage sexual activity." *Ante*, at 272. Yet the District Court specifically found that the principal "did not, as a matter of principle, oppose discussion of said topi[c] in Spectrum." 607 F. Supp., at 1467. That much is also clear from the same principal's approval of the "squeal law" article on the same page, dealing forthrightly with "teenage sexuality," "the use of contraceptives by teenagers," and "teenage pregnancy," App. 4-5. If topic sensitivity were the true basis of the principal's decision, the two articles should have been equally objectionable. It is much more likely that the objectionable article was objectionable because of the viewpoint it expressed: It might have been read (as the majority apparently does) to advocate "irresponsible sex." See *ante*, at 272.

C

The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk "that the views of the individual speaker [might be] erroneously attributed to the school." *Ante*, at 271. Of course, the risk of erroneous attribution inheres in any student expression, including "personal expression" that, like the armbands in *Tinker*, "happens to occur on the school premises," *ante*, at 271. Nevertheless, the majority is certainly correct that indicia of school sponsorship increase the likelihood [484 U.S. 260, 289] of such attribution, and that state educators may therefore have a legitimate interest in dissociating themselves from student speech.

But "'[e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Keyishian v. Board of Regents*, 385 U.S., at 602 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). Dissociative means short of censorship are available to the school. It could,

for example, require the student activity to publish a disclaimer, such as the "Statement of Policy" that Spectrum published each school year announcing that "[a]ll . . . editorials appearing in this newspaper reflect the opinions of the Spectrum staff, which are not necessarily shared by the administrators or faculty of Hazelwood East," App. 26; or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong. Yet, without so much as acknowledging the less oppressive alternatives, the Court approves of brutal censorship.

III

Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent "materia[l] disrup[tion of] classwork," *Tinker*, 393 U.S., at 513. Nor did the censorship fall within the category that *Tinker* described as necessary to prevent student expression from "inva[ding] the rights of others," *ibid.* If that term is to have any content, it must be limited to rights that are protected by law. "Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance," 795 F.2d, at 1376, a prospect that would be completely at odds with this Court's pronouncement that the "undifferentiated fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expression." [484 U.S. 260, 290] *Tinker*, *supra*, at 508. And, as the Court of Appeals correctly reasoned, whatever journalistic impropriety these articles may have contained, they could not conceivably be tortious, much less criminal. See 795 F.2d, at 1375-1376.

Finally, even if the majority were correct that the principal could constitutionally have censored the objectionable material, I would emphatically object to the brutal manner in which he did so. Where "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools" *Speiser v. Randall*, 357 U.S. 513, 525 (1958); see *Keyishian v. Board of Regents*, *supra*, at 602, the principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

IV

The Court opens its analysis in this case by purporting to reaffirm *Tinker*'s time-tested proposition that public school students "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Ante*, at 266 (quoting *Tinker*, *supra*, at 506). That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," *Board of Education v. Pico*, 457 U.S., at 880

(BLACKMUN, J., concurring in part and concurring in judgment), and "that our Constitution is a living reality, not parchment preserved under glass," *Shanley v. Northeast Independent School Dist., Bexar Cty., Tex.*, 462 F.2d 960, 972 (CA5 [484 U.S. 260, 291] 1972), the Court today "teach[es] youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette*, 319 U.S., at 637. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.

[2.1] The Court suggests that the passage quoted in the text did not "exten[d] the *Tinker* standard to the news and feature articles contained in a school-sponsored newspaper" because the passage did not expressly mention them. *Ante*, at 269, n. 2. It is hard to imagine why the Court (or anyone else) might expect a passage that applies categorically to "a student-press publication," composed almost exclusively of "news and feature articles," to mention those categories expressly. Understandably, neither court below so limited the passage.

[2.2] The Court quotes language in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), for the proposition that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.'" *Ante*, at 267 (quoting 478 U.S., at 683). As the discussion immediately preceding that quotation makes clear, however, the Court was referring only to the appropriateness of the *manner* in which the message is conveyed, not of the message's *content*. See, e.g., *Fraser*, 478 U.S., at 683 ("[T]he 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others"). In fact, the *Fraser* Court coupled its first mention of "society's . . . interest in teaching students the boundaries of *socially appropriate behavior*," with an acknowledgment of "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms," *id.*, at 681 (emphasis added). See also *id.*, at 689 (BRENNAN, J., concurring in judgment) ("Nor does this case involve an attempt by school officials to ban written materials they consider 'inappropriate' for high school students" (citation omitted)).

[2.3] Petitioners themselves concede that "'[c]ontrol over access'" to Spectrum is permissible only if "'the distinctions drawn . . . are viewpoint neutral.'" Brief for Petitioners 32 (quoting *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 806 (1985)). [484 U.S. 260, 292]

Bethel School Dist. No. 403 v. Fraser

478 U.S. 675 (1986)

United States Supreme Court, Docket No. 84-1667

Argued: March 3, 1986 ***Decided:*** July 7, 1986

Respondent public high school student (hereafter respondent) delivered a speech nominating a fellow student for a student elective office at a voluntary assembly that was held during school hours as part of a school-sponsored educational program in self-government, and that was attended by approximately 600 students, many of whom were 14-year-olds. During the entire speech, respondent referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. Some of the students at the assembly hooted and yelled during the speech, some mimicked the sexual activities alluded to in the speech, and others appeared to be bewildered and embarrassed. Prior to delivering the speech, respondent discussed it with several teachers, two of whom advised him that it was inappropriate and should not be given. The morning after the assembly, the Assistant Principal called respondent into her office and notified him that the school considered his speech to have been a violation of the school's "disruptive-conduct rule," which prohibited conduct that substantially interfered with the educational process, including the use of obscene, profane language or gestures. Respondent was given copies of teacher reports of his conduct, and was given a chance to explain his conduct. After he admitted that he deliberately used sexual innuendo in the speech, he was informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises. Review of the disciplinary action through petitioner School District's grievance procedures resulted in affirmance of the discipline, but respondent was allowed to return to school after serving only two days of his suspension. Respondent, by his father (also a respondent) as guardian *ad litem*, then filed suit in Federal District Court, alleging a violation of his First Amendment right to freedom of speech and seeking injunctive relief and damages under 42 U.S.C. § 1983. The court held that the school's sanctions violated the First Amendment, that the school's disruptive-conduct rule was unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment. The court awarded respondent monetary relief and enjoined [478 U.S. 675, 676] the School District from preventing him from speaking at the commencement ceremonies. The Court of Appeals affirmed.

Held:

1. The First Amendment did not prevent the School District from disciplining respondent for giving the offensively lewd and indecent speech at the assembly. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, distinguished. Under the First Amendment, the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, but it does not follow that the same latitude must be permitted to children in a public school. It is a highly appropriate function of public school education to prohibit the

use of vulgar and offensive terms in public discourse. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the school, and the determination of what manner of speech is inappropriate properly rests with the school board. First Amendment jurisprudence recognizes an interest in protecting minors from exposure to vulgar and offensive spoken language, *FCC v. Pacifica Foundation*, 438 U.S. 726, as well as limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children, *Ginsberg v. New York*, 390 U.S. 629. Petitioner School District acted entirely within its permissible authority in imposing sanctions upon respondent in response to his offensively lewd and indecent speech, which had no claim to First Amendment protection. Pp. 680-686.

2. There is no merit to respondent's contention that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech would subject him to disciplinary sanctions. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to respondent that his lewd speech could subject him to sanctions. P. 686.

755 F.2d 1356, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 687. BLACKMUN, J., concurred in the result. MARSHALL, J., *post*, p. 690, and STEVENS, J., *post*, p. 691, filed dissenting opinions. [478 U.S. 675, 677]

William A. Coats argued the cause for petitioners. With him on the briefs was Clifford D. Foster, Jr.

Jeffrey T. Haley argued the cause for respondents. With him on the brief was Charles S. Sims. *

[*] Briefs of *amici curiae* urging reversal were filed for the United States by Solicitor General Fried, Assistant Attorney General Willard, Deputy Solicitor General Kuhl, Anthony J. Steinmeyer, and Robert V Zener; for the Pacific Legal Foundation et al. by Ronald A. Zumbrun, John H Findley, and George Nicholson; and for the Texas Council of School Attorneys by Jean F. Powers and David Crump. Briefs of *amici curiae* urging affirmance were filed for the American Booksellers Association et al. by Ronald Coles; for the Freedom to Read Foundation by James A. Klenk; for the National Education Association by Michael D. Simpson; and for the Student Press Law Center by J. Marc Abrams. Gwendolyn H. Gregory, August W. Steinhilber, and Thomas A. Shannon filed a brief for the National School Boards Association as *amicus curiae*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

I

A

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred [478 U.S. 675, 678] to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," App. 30, and that his delivery of the speech might have "severe consequences." *Id.*, at 61.

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class. *Id.*, at 41-44.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

> "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of [478 U.S. 675, 679] many of the students and faculty in attendance at the

assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

B

Respondent, by his father as guardian *ad litem*, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U.S.C. § 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive-conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The District Court awarded respondent $278 in damages, $12,750 in litigation costs and attorney's fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, 755 F.2d 1356 (1985), holding that respondent's speech was indistinguishable from the protest armband in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). The court explicitly rejected the School District's argument that the speech, unlike the passive conduct of wearing a black armband, had a disruptive effect on the educational process. The Court of [478 U.S. 675, 680] Appeals also rejected the School District's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school, reasoning that the School District's "unbridled discretion" to determine what discourse is "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools." 755 F.2d, at 1363. Finally, the Court of Appeals rejected the School District's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity.

We granted certiorari, 474 U.S. 814 (1985). We reverse.

II

This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist.*, *supra*, that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*, at 506. The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker

considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Id.*, at 508. [478 U.S. 675, 681]

It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

III

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." C. Beard & M. Beard, *New Basic History of the United States* 228 (1968). In *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979), we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary [478 U.S. 675, 682] Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use indecent language against the proceedings of the House." Jefferson's Manual of Parliamentary Practice §§ 359, 360, reprinted in Manual and Rules of House of Representatives, H. R. Doc. No. 97-271, pp. 158-159 (1982); see *id.*, at 111, n. a (Jefferson's Manual governs the House in all cases to which it applies). The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order for

imputing improper motives to another Senator or for referring offensively to any state. See Senate Procedure, S. Doc. No. 97-2, Rule XIX, pp. 568-569, 588-591 (1981). Senators have been censured for abusive language directed at other Senators. See Senate Election, Expulsion and Censure Cases from 1793 to 1972, S. Doc. No. 92-7, pp. 95-98 (1972) (Sens. McLaurin and Tillman); *id.*, at 152-153 (Sen. McCarthy). Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen v. California*, 403 U.S. 15 (1971). It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. In *New Jersey v. T. L. O.*, 469 U.S. 325, 340-342 (1985), we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Thomas v. Board of Education, Granville Central School* [478 U.S. 675, 683] *Dist.*, 607 F.2d 1043, 1057 (CA2 1979) (opinion concurring in result).

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker*, 393 U.S., at 508; see *Ambach v. Norwick*, *supra*. The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. See App. 77-81. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on

the threshold of awareness of human sexuality. Some students were reported as [478 U.S. 675, 684] bewildered by the speech and the reaction of mimicry it provoked.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. *Board of Education v. Pico*, 457 U.S. 853, 871-872 (1982) (plurality opinion); *id.*, at 879-881 (BLACKMUN, J., concurring in part and in judgment); *id.*, at 918-920 (REHNQUIST, J., dissenting). These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), we dealt with the power of the Federal Communications Commission to regulate a radio broadcast described as "indecent but not obscene." There the Court reviewed an administrative condemnation of the radio broadcast of a self-styled "humorist" who described his own performance as being in "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say ever." *Id.*, at 729; see also *id.*, at 751-755 (Appendix to opinion of the Court). The Commission concluded that "certain words depicted sexual and excretory activities in a patently offensive manner, [and] noted [478 U.S. 675, 685] that they 'were broadcast at a time when children were undoubtedly in the audience.'" The Commission issued an order declaring that the radio station was guilty of broadcasting indecent language in violation of 18 U.S.C. 1464. 438 U.S., at 732. The Court of Appeals set aside the Commission's determination, and we reversed, reinstating the Commission's citation of the station. We concluded that the broadcast was properly considered "obscene, indecent, or profane" within the meaning of the statute. The plurality opinion went on to reject the radio station's assertion of a First Amendment right to broadcast vulgarity:

> "These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky v. New Hampshire*, 315 U.S., at 572." *Id.*, at 746.

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions

imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public [478 U.S. 675, 686] school education. Justice Black, dissenting in *Tinker*, made a point that is especially relevant in this case:

> "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." 393 U.S., at 526.

IV

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." *New Jersey v. T. L. O.*, 469 U.S., at 340. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. *Cf. Arnett v. Kennedy*, 416 U.S. 134, 161 (1974) (REHNQUIST, J., concurring). Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution. *Cf. Goss v. Lopez*, 419 U.S. 565 (1975). The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions. * [478 U.S. 675, 687]

The judgment of the Court of Appeals for the Ninth Circuit is

> Reversed.

JUSTICE BLACKMUN concurs in the result.

[*] Petitioners also challenge the ruling of the District Court that the removal of Fraser's name from the ballot for graduation speaker violated his due process rights because that sanction was not indicated as a potential punishment in the school's disciplinary rules. We agree with the Court of Appeals that this issue has become moot, since the graduation ceremony has long since passed and Fraser was permitted to speak in accordance [478 U.S. 675, 687] with the District Court's injunction. No part of the damages award

was based upon the removal of Fraser's name from the list, since damages were based upon the loss of two days' schooling.

JUSTICE BRENNAN, concurring in the judgment.

Respondent gave the following speech at a high school assembly in support of a candidate for student government office:

> "'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> "'Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> "'Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> "'So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.'" App. 47.

The Court, referring to these remarks as "obscene," "vulgar," "lewd," and "offensively lewd," concludes that school officials properly punished respondent for uttering the speech. Having read the full text of respondent's remarks, I find it difficult to believe that it is the same speech the Court describes. To my mind, the most that can be said about respondent's speech—and all that need be said—is that in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was [478 U.S. 675, 688] not unconstitutional for school officials to conclude, under the circumstances of this case, that respondent's remarks exceeded permissible limits. Thus, while I concur in the Court's judgment, I write separately to express my understanding of the breadth of the Court's holding.

The Court today reaffirms the unimpeachable proposition that students do not "'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Ante*, at 680 (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)). If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate, see *Cohen v. California*, 403 U.S. 15 (1971); the Court's opinion does not suggest otherwise. 2.1 Moreover, despite the Court's characterizations, the language respondent used is far removed from the very narrow class of "obscene" speech which the Court has held is not protected by the First Amendment. *Ginsberg v. New York*, 390 U.S. 629, 635 (1968); *Roth v. United States*, 354 U.S. 476, 485 (1957). It is true, however, that the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities. Thus, the Court holds that under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school's

educational [478 U.S. 675, 689] mission. 2.2 Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty.

In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express. *Cf. Tinker*, *supra*. Nor does this case involve an attempt by school officials to ban written materials they consider "inappropriate" for high school students, *cf. Board of Education v. Pico*, 457 U.S. 853 (1982), or to limit what students should hear, read, or learn about. Thus, the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly.

The authority school officials have to regulate such speech by high school students is not limitless. See *Thomas v. Board of Education, Granville Central School Dist.*, 607 F.2d 1043, 1057 (CA2 1979) (Newman, J., concurring in result) ("[S]chool officials . . . do [not] have limitless discretion to apply their own notions of indecency. Courts have a First [478 U.S. 675, 690] Amendment responsibility to insure that robust rhetoric . . . is not suppressed by prudish failures to distinguish the vigorous from the vulgar"). Under the circumstances of this case, however, I believe that school officials did not violate the First Amendment in determining that respondent should be disciplined for the disruptive language he used while addressing a high school assembly. 2.3 Thus, I concur in the judgment reversing the decision of the Court of Appeals.

Footnotes

[2.1] In the course of its opinion, the Court makes certain remarks concerning the authority of school officials to regulate student language in public schools. For example, the Court notes that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions." *Ante*, at 683. These statements obviously do not, and indeed given our prior precedents could not, refer to the government's authority generally to regulate the language used in public debate outside of the school environment.

[2.2] The Court speculates that the speech was "insulting" to female students, and "seriously damaging" to 14-year-olds, so that school officials could legitimately suppress such expression in order to protect these groups. *Ante*, at 683. There is no evidence in the record that any students, male or female, found the speech "insulting." And while it was not unreasonable for school officials to conclude that respondent's remarks were inappropriate for a school-sponsored assembly, the language respondent used does not even approach the sexually explicit speech regulated in *Ginsberg v. New York*, 390 U.S. 629 (1968), or the indecent speech banned in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Indeed, to my mind, respondent's speech was no more "obscene," "lewd," or "sexually explicit" than the bulk of programs currently appearing on prime time television or in the local cinema. Thus, I disagree with the Court's suggestion that school officials could punish respondent's speech out of a need to protect younger students.

[2.3] Respondent served two days' suspension and had his name removed from the list of candidates for graduation speaker at the school's commencement exercises, although he was eventually permitted to speak at the graduation. While I find this punishment somewhat severe in light of the nature of respondent's transgression, I cannot conclude that school officials exceeded the bounds of their disciplinary authority.

JUSTICE MARSHALL, dissenting.

I agree with the principles that JUSTICE BRENNAN sets out in his opinion concurring in the judgment. I dissent from the Court's decision, however, because in my view the School District failed to demonstrate that respondent's remarks were indeed disruptive. The District Court and Court of Appeals conscientiously applied *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), and concluded that the School District had not demonstrated any disruption of the educational process. I recognize that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission, nevertheless, where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education. Here the School District, despite a clear opportunity to do so, failed to bring in evidence sufficient to convince either of the two lower courts that education at Bethel School was disrupted by respondent's speech. I therefore see no reason to disturb the Court of Appeals' judgment. [478 U.S. 675, 691]

JUSTICE STEVENS, dissenting.

"Frankly, my dear, I don't give a damn."

When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is less offensive than it was then. Nevertheless, I assume that high school administrators may prohibit the use of that word in classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises. For I believe a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission. 3.1 It does seem to me, however, that if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation. [478 U.S. 675, 692] The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion.

This respondent was an outstanding young man with a fine academic record. The fact that he was chosen by the student body to speak at the school's commencement exercises demonstrates that he was respected by his peers. This fact is relevant for two reasons. It confirms the conclusion that the discipline imposed on him—a 3-day suspension and ineligibility to speak at the school's graduation exercises—was sufficiently serious to justify invocation of the School District's grievance procedures. See *Goss v. Lopez*, 419 U.S. 565, 574-575 (1975). More importantly, it indicates that he was probably

in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime. 3.2

The fact that the speech may not have been offensive to his audience—or that he honestly believed that it would be inoffensive—does not mean that he had a constitutional right to deliver it. For the school not the student—must prescribe the rules of conduct in an educational institution. 3.3 But it [478 U.S. 675, 693] does mean that he should not be disciplined for speaking frankly in a school assembly if he had no reason to anticipate punitive consequences.

One might conclude that respondent should have known that he would be punished for giving this speech on three quite different theories: (1) It violated the "Disruptive Conduct" rule published in the student handbook; (2) he was specifically warned by his teachers; or (3) the impropriety is so obvious that no specific notice was required. I discuss each theory in turn.

The Disciplinary Rule

At the time the discipline was imposed, as well as in its defense of this lawsuit, the school took the position that respondent violated the following published rule:

> "In addition to the criminal acts defined above, the commission of, or participation in certain noncriminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process.
>
> . . . . .
>
> "'*Disruptive Conduct.* Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.'" 755 F.2d 1356, 1357, n. 1 (CA9 1985).

Based on the findings of fact made by the District Court, the Court of Appeals concluded that the evidence did not show "that the speech had a materially disruptive effect on the educational process." *Id.*, at 1361. The Court of Appeals explained the basis for this conclusion:

> "[T]he record now before us yields no evidence that Fraser's use of a sexual innuendo in his speech materially interfered with activities at Bethel High School. While the students' reaction to Fraser's speech may fairly be characterized as boisterous, it was hardly disruptive [478 U.S. 675, 694] of the educational process. In the words of Mr. McCutcheon, the school counselor whose testimony the District relies upon, the reaction of the student body 'was not atypical to a high school auditorium assembly.' In our view, a noisy response to the speech and sexually suggestive movements by three students in a crowd of 600 fail to rise to the level of a material interference with the educational process that justifies impinging upon Fraser's First Amendment right to express himself freely.

> "We find it significant that although four teachers delivered written statements to an assistant principal commenting on Fraser's speech, none of them suggested that the speech disrupted the assembly or otherwise interfered with school activities. See, Finding of Fact No. 8. Nor can a finding of material disruption be based upon the evidence that the speech proved to be a lively topic of conversation among students the following day." *Id.*, at 1360-1361.

Thus, the evidence in the record, as interpreted by the District Court and the Court of Appeals, makes it perfectly clear that respondent's speech was not "conduct" prohibited by the disciplinary rule. 3.4 Indeed, even if the language of the rule could be stretched to encompass the nondisruptive use of obscene or profane language, there is no such language in respondent's speech. What the speech does contain is a sexual metaphor that may unquestionably be offensive to some listeners in some settings. But if an impartial judge puts his [478 U.S. 675, 695] or her own views about the metaphor to one side, I simply cannot understand how he or she could conclude that it is embraced by the above-quoted rule. At best, the rule is sufficiently ambiguous that without a further explanation or construction it could not advise the reader of the student handbook that the speech would be forbidden. 3.5

The Specific Warning by the Teachers

Respondent read his speech to three different teachers before he gave it. Mrs. Irene Hicks told him that she thought the speech "was inappropriate and that he probably should not deliver it." App. 30. Steven DeHart told respondent "that this would indeed cause problems in that it would raise eyebrows." *Id.*, at 61. The third teacher, Shawn Madden, did not testify. None of the three suggested that the speech might violate a school rule. *Id.*, at 49-50.

The fact that respondent reviewed the text of his speech with three different teachers before he gave it does indicate that he must have been aware of the possibility that it would provoke an adverse reaction, but the teachers' responses certainly did not give him any better notice of the likelihood of discipline than did the student handbook itself. In my opinion, therefore, the most difficult question is whether the speech was so obviously offensive that an intelligent high school student must be presumed to have realized that he would be punished for giving it. [478 U.S. 675, 696]

Obvious Impropriety

Justice Sutherland taught us that a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). Vulgar language, like vulgar animals, may be acceptable in some contexts and intolerable in others. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978). Indeed, even ordinary, inoffensive speech may be wholly unacceptable in some settings. See *Schenck v. United States*, 249 U.S. 47, 52 (1919); Pacifica, *supra*, at 744-745.

It seems fairly obvious that respondent's speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment. If this be true, and if respondent's audience consisted almost entirely of young people with whom he conversed on a daily basis, can we—at this distance—confidently assert that he must have known that the school administration would punish him for delivering it?

For three reasons, I think not. First, it seems highly unlikely that he would have decided to deliver the speech if he had known that it would result in his suspension and disqualification from delivering the school commencement address. Second, I believe a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable. Third, because the Court has adopted the policy of applying contemporary community standards in evaluating expression with sexual connotations, this Court should defer to the views of the district and circuit judges who are in a much better position to evaluate this speech than we are.

I would affirm the judgment of the Court of Appeals.

[3.1] "Because every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities. In my judgment, it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity. I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first. Nor do I see why a university should have to establish a 'compelling state interest' to defend its decision to permit one group to use the facility and not the other. In my opinion, a university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom. Judgments of this kind should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like 'compelling state interest.'" *Widmar v. Vincent*, 454 U.S. 263, 278-279 (1981) (STEVENS, J., concurring in judgment) (footnotes omitted).

"Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based upon either the content or subject matter of speech.'" *Consolidated Edison Co. v. Public Service Comm'n of N. Y.*, 447 U.S. 530, 544-545 (1980) (STEVENS, J., concurring in judgment).

[3.2] As the Court of Appeals noted, there "is no evidence in the record indicating that any students found the speech to be offensive." 755 F.2d 1356, 1361, n. 4 (CA9 1985).

In its opinion today, the Court describes respondent as a "confused boy," *ante*, at 683, and repeatedly characterizes his audience of high school students as "children," *ante*, at 682, 684. When a more orthodox message is being conveyed to a similar audience, four Members of today's majority would treat high school students like college students rather than like children. See *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (dissenting opinions).

[3.3] See *Arnold v. Carpenter*, 459 F.2d 939, 944 (CA7 1972) (STEVENS, J., dissenting).

[3.4] The Court's reliance on the school's authority to prohibit "unanticipated conduct disruptive of the educational process," *ante*, at 686, is misplaced. The findings of the District Court, which were upheld by the Court of Appeals, established that the speech was not "disruptive." Departing from our normal practice concerning factual findings, the Court's decision rests on "utterly unproven, subjective impressions of some hypothetical students." *Bender v. Williamsport Area School Dist.*, 475 U.S., at 553 (BURGER, C. J., dissenting).

[3.5] The school's disruptive conduct rule is entirely concerned with "the educational process." It does not expressly refer to extracurricular activities in general, or to student political campaigns or student debates. In contrast, "[i]n our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate." See *ante*, at 681. If a written rule is needed to forewarn a United States Senator that the use of offensive speech may give rise to discipline, a high school student should be entitled to an equally unambiguous warning. Unlike the Manual of Parliamentary Practice drafted by Thomas Jefferson, this School District's rules of conduct contain no unequivocal prohibition against the use of "impertinent" speech or "indecent language." [478 U.S. 675, 697]

What Does Free Speech Mean?

Among other cherished values, the First Amendment protects freedom of speech. The U.S. Supreme Court often has struggled to determine what exactly constitutes protected speech. The following are examples of speech, both direct (words) and symbolic (actions), that the Court has decided are either entitled to First Amendment protections, or not.

The First Amendment states, in relevant part, that:

> "Congress shall make no law . . . abridging freedom of speech."

Freedom of speech includes the right:

- Not to speak (specifically, the right not to salute the flag).
  West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).
- Of students to wear black armbands to school to protest a war ("Students do not shed their constitutional rights at the schoolhouse gate.").
  Tinker v. Des Moines, 393 U.S. 503 (1969).
- To use certain offensive words and phrases to convey political messages.
  Cohen v. California, 403 U.S. 15 (1971).
- To contribute money (under certain circumstances) to political campaigns.
  Buckley v. Valeo, 424 U.S. 1 (1976).
- To advertise commercial products and professional services (with some restrictions).
  Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
- To engage in symbolic speech, (e.g., burning the flag in protest).
  Texas v. Johnson, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

Freedom of speech does not include the right:

- To incite actions that would harm others (e.g., "[S]hout[ing] 'fire' in a crowded theater.").
  Schenck v. United States, 249 U.S. 47 (1919).
- To make or distribute obscene materials.
  Roth v. United States, 354 U.S. 476 (1957).
- To burn draft cards as an anti-war protest.
  United States v. O'Brien, 391 U.S. 367 (1968).
- To permit students to print articles in a school newspaper over the objections of the school administration.
  Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

- Of students to make an obscene speech at a school-sponsored event. *Bethel School District #43 v. Fraser*, 478 U.S. 675 (1986).
- Of students to advocate illegal drug use at a school-sponsored event. *Morse v. Frederick*, __ U.S. __ (2007).

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Supreme Court Landmark Case Tinker v. Des Moines

https://www.c-span.org/video/?440875-1/supreme-court-landmark-case-tinker-v-des-moines

PART 2

The Fourth Amendment

AMENDMENT IV (1791)

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

New Jersey v. T. L. O.

469 U.S. 325 (1985)

United States Supreme Court, Docket No. 83-712

Argued: March 28, 1984 ***Decided:*** January 15, 1985

A teacher at a New Jersey high school, upon discovering respondent, then a 14-year-old freshman, and her companion smoking cigarettes in a school lavatory in violation of a school rule, took them to the Principal's office, where they met with the Assistant Vice Principal. When respondent, in response to the Assistant Vice Principal's questioning, denied that she had been smoking and claimed that she did not smoke at all, the Assistant Vice Principal demanded to see her purse. Upon opening the purse, he found a pack of cigarettes and also noticed a package of cigarette rolling papers that are commonly associated with the use of marihuana. He then proceeded to search the purse thoroughly and found some marihuana, a pipe, plastic bags, a fairly substantial amount of money, an index card containing a list of students who owed respondent money, and two letters that implicated her in marihuana dealing. Thereafter, the State brought delinquency charges against respondent in the Juvenile Court, which, after denying respondent's motion to suppress the evidence found in her purse, held that the Fourth Amendment applied to searches by school officials but that the search in question was a reasonable one, and adjudged respondent to be a delinquent. The Appellate Division of the New Jersey Superior Court affirmed the trial court's finding that there had been no Fourth Amendment violation but vacated the adjudication of delinquency and remanded on other grounds. The New Jersey Supreme Court reversed and ordered the suppression of the evidence found in respondent's purse, holding that the search of the purse was unreasonable.

Held:

1. The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers. Nor are school officials exempt from the Amendment's dictates by virtue of the special nature of their authority over schoolchildren. In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the State, not merely as surrogates for the parents of students, and they cannot claim the parents' immunity from the Fourth Amendment's strictures. Pp. 333-337. [469 U.S. 325, 326]

2. Schoolchildren have legitimate expectations of privacy. They may find it necessary to carry with them a variety of legitimate, non-contraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items by bringing them onto school grounds. But striking the balance between schoolchildren's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions to which searches by public authorities are ordinarily subject. Thus, school officials need not obtain a warrant before searching a student who is

under their authority. Moreover, school officials need not be held subject to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a determination of whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. Under ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. And such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction. Pp. 337-343.

3. Under the above standard, the search in this case was not unreasonable for Fourth Amendment purposes. First, the initial search for cigarettes was reasonable. The report to the Assistant Vice Principal that respondent had been smoking warranted a reasonable suspicion that she had cigarettes in her purse, and thus the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation of the no-smoking rule. Second, the discovery of the rolling papers then gave rise to a reasonable suspicion that respondent was carrying marihuana as well as cigarettes in her purse, and this suspicion justified the further exploration that turned up more evidence of drug-related activities. Pp. 343-347.

94 N. J. 331, 463 A. 2d 934, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part II of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 348. [469 U.S. 325, 327] BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 351. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 353. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, and in Part I of which BRENNAN, J., joined, *post*, p. 370.

Allan J. Nodes, Deputy Attorney General of New Jersey, reargued the cause for petitioner. With him on the brief on reargument were Irwin J. Kimmelman, Attorney General, and Victoria Curtis Bramson, Linda L. Yoder, and Gilbert G. Miller, Deputy Attorneys General. With him on the briefs on the original argument were Mr. Kimmelman and Ms. Bramson.

Lois De Julio reargued the cause for respondent. With her on the briefs were Joseph H. Rodriguez and Andrew Dillmann. *

[*] Briefs of *amici curiae* urging reversal were filed for the United States by Solicitor General Lee, Deputy Solicitor General Frey, and Kathryn A. Oberly; for the National Association of Secondary School Principals

et al. by Ivan B. Gluckman; for the National School Boards Association by Gwendolyn H. Gregory, August W. Steinhilber, and Thomas A. Shannon; for the Washington Legal Foundation by Daniel J. Popeo and Paul D. Kamenar; and for the New Jersey School Boards Association by Paula A. Mullaly and Thomas F. Scully.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by Mary L. Heen, Burt Neuborne, E. Richard Larson, Barry S. Goodman, and Charles S. Sims; and for the Legal Aid Society of the City of New York et al. by Janet Fink and Henry Weintraub.

Julia Penny Clark and Robert Chanin filed a brief for the National Education Association as *amicus curiae*.

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to [469 U.S. 325, 328] the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

I

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N. J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T. L. O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T. L. O.'s companion admitted that she had violated the rule. T. L. O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T. L. O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T. L. O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T. L. O. money, and two letters that implicated T. L. O. in marihuana dealing.

Mr. Choplick notified T. L. O.'s mother and the police, and turned the evidence of drug dealing over to the police. At [469 U.S. 325, 329] the request of the police, T. L. O.'s mother took her daughter to

police headquarters, where T. L. O. confessed that she had been selling marihuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T. L. O. in the Juvenile and Domestic Relations Court of Middlesex County. 1.1 Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T. L. O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress. *State ex rel. T. L. O.*, 178 N. J. Super. 329, 428 A. 2d 1327 (1980). Although the court concluded that the Fourth Amendment did apply to searches carried out by school officials, it held that

> "a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, *or* reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies." *Id.*, at 341, 428 A. 2d, at 1333 (emphasis in original).

Applying this standard, the court concluded that the search conducted by Mr. Choplick was a reasonable one. The initial decision to open the purse was justified by Mr. Choplick's well-founded suspicion that T. L. O. had violated the rule forbidding smoking in the lavatory. Once the purse [469 U.S. 325, 330] was open, evidence of marihuana violations was in plain view, and Mr. Choplick was entitled to conduct a thorough search to determine the nature and extent of T. L. O.'s drug-related activities. *Id.*, at 343, 428 A. 2d, at 1334. Having denied the motion to suppress, the court on March 23, 1981, found T. L. O. to be a delinquent and on January 8, 1982, sentenced her to a year's probation.

On appeal from the final judgment of the Juvenile Court, a divided Appellate Division affirmed the trial court's finding that there had been no Fourth Amendment violation, but vacated the adjudication of delinquency and remanded for a determination whether T. L. O. had knowingly and voluntarily waived her Fifth Amendment rights before confessing. *State ex rel. T. L. O.*, 185 N. J. Super. 279, 448 A. 2d 493 (1982). T. L. O. appealed the Fourth Amendment ruling, and the Supreme Court of New Jersey reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in T. L. O.'s purse. *State ex rel. T. L. O.*, 94 N. J. 331, 463 A. 2d 934 (1983).

The New Jersey Supreme Court agreed with the lower courts that the Fourth Amendment applies to searches conducted by school officials. The court also rejected the State of New Jersey's argument that the exclusionary rule should not be employed to prevent the use in juvenile proceedings of evidence unlawfully seized by school officials. Declining to consider whether applying the rule to the fruits of searches by school officials would have any deterrent value, the court held simply that the precedents of this Court establish that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings." *Id.*, at 341, 463 A. 2d, at 939 (footnote omitted).

With respect to the question of the legality of the search before it, the court agreed with the Juvenile Court that a warrantless search by a school official does not violate the Fourth Amendment so long as the official "has reasonable grounds to believe that a student possesses evidence of illegal

[469 U.S. 325, 331] activity or activity that would interfere with school discipline and order." *Id.*, at 346, 463 A. 2d, at 941-942. However, the court, with two justices dissenting, sharply disagreed with the Juvenile Court's conclusion that the search of the purse was reasonable. According to the majority, the contents of T. L. O.'s purse had no bearing on the accusation against T. L. O., for possession of cigarettes (as opposed to smoking them in the lavatory) did not violate school rules, and a mere desire for evidence that would impeach T. L. O.'s claim that she did not smoke cigarettes could not justify the search. Moreover, even if a reasonable suspicion that T. L. O. had cigarettes in her purse would justify a search, Mr. Choplick had no such suspicion, as no one had furnished him with any specific information that there were cigarettes in the purse. Finally, leaving aside the question whether Mr. Choplick was justified in opening the purse, the court held that the evidence of drug use that he saw inside did not justify the extensive "rummaging" through T. L. O.'s papers and effects that followed. *Id.*, at 347, 463 A. 2d, at 942-943.

We granted the State of New Jersey's petition for certiorari. 464 U.S. 991 (1983). Although the State had argued in the Supreme Court of New Jersey that the search of T. L. O.'s purse did not violate the Fourth Amendment, the petition for certiorari raised only the question whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers. When this case was first argued last Term, the State conceded for the purpose of argument that the standard devised by the New Jersey Supreme Court for determining the legality of school searches was appropriate and that the court had correctly applied that standard; the State contended only that the remedial purposes of the exclusionary rule were not well served by applying it to searches conducted by public authorities not primarily engaged in law enforcement. [469 U.S. 325, 332]

Although we originally granted certiorari to decide the issue of the appropriate remedy in juvenile court proceedings for unlawful school searches, our doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities prompted us to order reargument on that question. 1.2 Having heard argument on [469 U.S. 325, 333] the legality of the search of T. L. O.'s purse, we are satisfied that the search did not violate the Fourth Amendment. 1.3

II

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does. [469 U.S. 325, 334]

It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." *Elkins v. United States*, 364 U.S. 206, 213 (1960); accord, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949). Equally

indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943).

These two propositions—that the Fourth Amendment applies to the States through the Fourteenth Amendment, and that the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment—might appear sufficient to answer the suggestion that the Fourth Amendment does not proscribe unreasonable searches by school officials. On reargument, however, the State of New Jersey has argued that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them. 1.4
[469 U.S. 325, 335]

It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown. See *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *Boyd v. United States*, 116 U.S. 616, 624-629 (1886). But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, see *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967), Occupational Safety and Health Act inspectors, see *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-313 (1978), and even firemen entering privately owned premises to battle a fire, see *Michigan v. Tyler*, 436 U.S. 499, 506 (1978), are all subject to the restraints imposed by the Fourth Amendment. As we observed in *Camara v. Municipal Court*, *supra*, "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." 387 U.S., at 528. Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," *Marshall v. Barlow's, Inc.*, *supra*, at 312-313, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only

when the individual is suspected of criminal behavior." *Camara v. Municipal Court*, *supra*, at 530.
[469 U.S. 325, 336]

Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren. See, e.g., *R. C. M. v. State*, 660 S. W. 2d 552 (Tex. App. 1983). Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment. *Ibid.*

Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment, see *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and the Due Process Clause of the Fourteenth Amendment, see *Goss v. Lopez*, 419 U.S. 565 (1975). If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." *Ingraham v. Wright*, 430 U.S. 651, 662 (1977). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. See, e.g., the opinion in *State ex rel. T. L. O.*, 94 N. J., at 343, 463 A. 2d, at 934, 940, describing the New Jersey statutes regulating school disciplinary policies and establishing the authority of school officials over their students. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they
[469 U.S. 325, 337] cannot claim the parents' immunity from the strictures of the Fourth Amendment.

III

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, *supra*, at 536-537. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

We have recognized that even a limited search of the person is a substantial invasion of privacy. *Terry v. Ohio*, 392 U.S. 1, 24-25 (1967). We have also recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States*

v. Ross, 456 U.S. 798, 822-823 (1982). A search of a child's person or of a closed purse or other bag carried on her person, 1.5 no less [469 U.S. 325, 338] than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

Of course, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise "illegitimate." See, e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984); *Rawlings v. Kentucky*, 448 U.S. 98 (1980). To receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is "prepared to recognize as legitimate." *Hudson v. Palmer*, *supra*, at 526. The State of New Jersey has argued that because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property "unnecessarily" carried into a school. This argument has two factual premises: (1) the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment; and (2) the minimal interest of the child in bringing any items of personal property into the school. Both premises are severely flawed.

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham v. Wright*, *supra*, at 669. We are not [469 U.S. 325, 339] yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. See generally 1 NIE, U.S. Dept. of Health, Education and Welfare, Violent Schools—Safe Schools: The Safe School Study Report to the Congress (1978). Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment

requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss v. Lopez*, 419 U.S., at 580. Accordingly, we have recognized [469 U.S. 325, 340] that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. See *id.*, at 582-583; *Ingraham v. Wright*, 430 U.S., at 680-682.

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara v. Municipal Court*, 387 U.S., at 532-533, we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *Sibron v. New York*, 392 U.S. 40, 62-66 (1968). However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required." *Almeida-Sanchez v. United States*, *supra*, at 277 (POWELL, [469 U.S. 325, 341] J., concurring). Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *cf. Camara v. Municipal Court*, *supra*, at 534-539. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

We join the majority of courts that have examined this issue 1.6 in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has

violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," *Terry v. Ohio*, 392 U.S., at 20; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official 1.7 will be [469 U.S. 325, 342] "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. 1.8 Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. 1.9

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools [469 U.S. 325, 343] nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

IV

There remains the question of the legality of the search in this case. We recognize that the "reasonable grounds" standard applied by the New Jersey Supreme Court in its consideration of this question is not substantially different from the standard that we have adopted today. Nonetheless, we believe that the New Jersey court's application of that standard to strike down the search of T. L. O.'s purse reflects a somewhat crabbed notion of reasonableness. Our review of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes. 1.10

The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second [469 U.S. 325, 344]—the search for marihuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T. L. O. possessed marihuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention.

The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T. L. O.'s purse would therefore have "no direct bearing on the infraction" of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse. 1.11 Second, even assuming that a search of T. L. O.'s purse might under some circumstances be reasonable in light of the accusation made

against T. L. O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that T. L. O. had cigarettes in her purse. At best, according [469 U.S. 325, 345] to the court, Mr. Choplick had "a good hunch." 94 N. J., at 347, 463 A. 2d, at 942.

Both these conclusions are implausible. T. L. O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T. L. O.'s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T. L. O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T. L. O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule Evid. 401. The relevance of T. L. O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary "nexus" between the item searched for and the infraction under investigation. See *Warden v. Hayden*, 387 U.S. 294, 306-307 (1967). Thus, if Mr. Choplick in fact had a reasonable suspicion that T. L. O. had cigarettes in her purse, the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation. *Ibid.*

Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T. L. O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T. L. O. was carrying cigarettes with her; and [469 U.S. 325, 346] if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was not an "inchoate and unparticularized suspicion or 'hunch,'" *Terry v. Ohio*, 392 U.S., at 27; rather, it was the sort of "common-sense conclusio[n] about human behavior" upon which "practical people"—including government officials—are entitled to rely. *United States v. Cortez*, 449 U.S. 411, 418 (1981). Of course, even if the teacher's report were true, T. L. O. might not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student. But the requirement of reasonable suspicion is not a requirement of absolute certainty: "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . . ." *Hill v. California*, 401 U.S. 797, 804 (1971). Because the hypothesis that T. L. O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also consistent with the teacher's accusation. Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T. L. O.'s purse to see if it contained cigarettes. 1.12
[469 U.S. 325, 347]

Our conclusion that Mr. Choplick's decision to open T. L. O.'s purse was reasonable brings us to the question of the further search for marihuana once the pack of cigarettes was located. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T. L. O. does not dispute the reasonableness of Mr. Choplick's belief that the rolling papers indicated the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T. L. O. in drug dealing. This argument, too, is unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T. L. O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T. L. O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T. L. O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T. L. O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence [469 U.S. 325, 348] from T. L. O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is

Reversed.

Footnotes

[1.1] T. L. O. also received a 3-day suspension from school for smoking cigarettes in a nonsmoking area and a 7-day suspension for possession of marihuana. On T. L. O.'s motion, the Superior Court of New Jersey, Chancery Division, set aside the 7-day suspension on the ground that it was based on evidence seized in violation of the Fourth Amendment. *(T. L. O.) v. Piscataway Bd. of Ed.*, No. C. 2865-79 (Super. Ct. N. J., Ch. Div., Mar. 31, 1980). The Board of Education apparently did not appeal the decision of the Chancery Division.

[1.2] State and federal courts considering these questions have struggled to accommodate the interests protected by the Fourth Amendment and the interest of the States in providing a safe environment conducive to education in the public schools. Some courts have resolved the tension between these interests by giving full force to one or the other side of the balance. Thus, in a number of cases courts have held that school officials conducting in-school searches of students are private parties acting *in loco parentis* and are therefore not subject to the constraints of the Fourth Amendment. See, e.g., *D. R. C. v. State*, 646 P.2d 252 (Alaska App. 1982); In re G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); *R. C. M. v. State*, 660 S. W. 2d 552 (Tex. App.

1983); *Mercer v. State*, 450 S. W. 2d 715 (Tex. Civ. App. 1970). At least one court has held, on the other hand, that the Fourth Amendment applies in full to in-school searches by school officials and that a search conducted without probable cause is unreasonable, see *State v. Mora*, 307 So.2d 317 (La.), vacated, 423 U.S. 809 (1975), on remand, 330 So.2d 900 (La. 1976); others have held or suggested that the probable-cause standard is applicable at least where the police are involved in a search, see *M. v. Board of Ed. Ball-Chatham Community Unit School Dist. No. 5*, 429 F. Supp. 288, 292 (SD Ill. 1977); *Picha v. Wielgos*, 410 F. Supp. 1214, 1219-1221 (ND Ill. 1976); *State v. Young*, 234 Ga. 488, 498, 216 S. E. 2d 586, 594 (1975); or where the search is highly intrusive, see *M. M. v. Anker*, 607 F.2d 588, 589 (CA2 1979).

The majority of courts that have addressed the issue of the Fourth Amendment in the schools have, like the Supreme Court of New Jersey in this case, reached a middle position: the Fourth Amendment applies to searches conducted by school authorities, but the special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause. These courts have, by and large, upheld warrantless searches by school authorities provided that they are supported by a reasonable suspicion that the search will uncover evidence of an infraction of school disciplinary rules or a violation of the law. See, e.g., *Tarter v. Raybuck*, No. 83-3174 (CA6, Aug. 31, 1984); *Bilbrey v. Brown*, 738 F.2d 1462 (CA9 1984); *Horton v. Goose Creek* [469 U.S. 325, 333] *Independent School Dist.*, 690 F.2d 470 (CA5 1982); *Bellnier v. Lund*, 438 F. Supp. 47 (NDNY 1977); *M. v. Board of Ed. Ball-Chatham Community Unit School Dist. No. 5*, *supra*; *In re W.*, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); *State v. Baccino*, 282 A. 2d 869 (Del. Super. 1971); *State v. D. T. W.*, 425 So.2d 1383 (Fla. App. 1983); *State v. Young*, *supra*; *In re J. A.*, 85 Ill. App. 3d 567, 406 N. E. 2d 958 (1980); *People v. Ward*, 62 Mich. App. 46, 233 N. W. 2d 180 (1975); *Doe v. State*, 88 N. M. 347, 540 P.2d 827 (App. 1975); *People v. D.*, 34 N. Y. 2d 483, 315 N. E. 2d 466 (1974); *State v. McKinnon*, 88 Wash. 2d 75, 558 P.2d 781 (1977); *In re L. L.*, 90 Wis. 2d 585, 280 N. W. 2d 343 (App. 1979).

Although few have considered the matter, courts have also split over whether the exclusionary rule is an appropriate remedy for Fourth Amendment violations committed by school authorities. The Georgia courts have held that although the Fourth Amendment applies to the schools, the exclusionary rule does not. See, e.g., *State v. Young*, *supra*; *State v. Lamb*, 137 Ga. App. 437, 224 S. E. 2d 51 (1976). Other jurisdictions have applied the rule to exclude the fruits of unlawful school searches from criminal trials and delinquency proceedings. See *State v. Mora*, *supra*; *People v. D.*, *supra*.

[1.3] In holding that the search of T. L. O.'s purse did not violate the Fourth Amendment, we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities. The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation. Neither question is logically antecedent to the other, for a negative answer to either question is sufficient to dispose of the case. Thus, our determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule.

[1.4] *Cf. Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that the Eighth Amendment's prohibition of cruel and unusual punishment applies only to [469 U.S. 325, 335] punishments imposed after criminal convictions and hence does not apply to the punishment of schoolchildren by public school officials).

[1.5] We do not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies. Nor do we express any opinion on the standards (if any) governing searches of such areas by school officials or by other public authorities acting at the request of school officials. Compare *Zamora v. Pomeroy*, 639 F.2d 662, 670 (CA10 1981) ("Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have a right to inspect it"), and *People v. Overton*, 24 N. Y. 2d 522, 249 N. E. 2d 366 (1969) (school administrators have power to consent to search of a [469 U.S. 325, 338] student's locker), with *State v. Engerud*, 94 N. J. 331, 348, 463 A. 2d 934, 943 (1983) ("We are satisfied that in the context of this case the student had an expectation of privacy in the contents of his locker. . . . For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal 'effects' protected by the Fourth Amendment").

[1.6] See cases cited in n. 2, *supra*.

[1.7] We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question. *Cf. Picha v. Wielgos*, 410 F. Supp. 1214, 1219-1221 (ND Ill. 1976) (holding probable cause standard applicable to searches involving the police).

[1.8] We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976). See also *Camara v. Municipal Court*, 387 U.S. 523 (1967). Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979) (citation omitted). Because the search of T. L. O.'s purse was based upon an individualized suspicion that she had violated school rules, see *infra*, at 343-347, we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.

[1.9] Our reference to the nature of the infraction is not intended as an endorsement of JUSTICE STEVENS' suggestion that some rules regarding student conduct are by nature too "trivial" to justify a search based upon reasonable suspicion. See *post*, at 377-382. We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. We have "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 [469 U.S. 325, 343] (1969). The promulgation of a rule forbidding specified conduct presumably reflects a

judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

[1.10] Of course, New Jersey may insist on a more demanding standard under its own Constitution or statutes. In that case, its courts would not purport to be applying the Fourth Amendment when they invalidate a search.

[1.11] JUSTICE STEVENS interprets these statements as a holding that enforcement of the school's smoking regulations was not sufficiently related to the goal of maintaining discipline or order in the school to justify a search under the standard adopted by the New Jersey court. See *post*, at 382-384. We do not agree that this is an accurate characterization of the New Jersey Supreme Court's opinion. The New Jersey court did not hold that the school's smoking rules were unrelated to the goal of maintaining discipline or order, nor did it suggest that a search that would produce evidence bearing directly on an accusation that a student had violated the smoking rules would be impermissible under the court's reasonable-suspicion standard; rather, the court concluded that any evidence a search of T. L. O.'s purse was likely to produce would not have a sufficiently direct bearing on the infraction to justify a search—a conclusion with which we cannot agree for the reasons set forth *infra*, at 345. JUSTICE STEVENS' suggestion that the New Jersey Supreme Court's decision rested on the perceived triviality of the smoking infraction appears to be a reflection of his own views rather than those of the New Jersey court.

[1.12] T. L. O. contends that even if it was reasonable for Mr. Choplick to open her purse to look for cigarettes, it was not reasonable for him to reach in and take the cigarettes out of her purse once he found them. Had he not removed the cigarettes from the purse, she asserts, he would not have observed the rolling papers that suggested the presence of marihuana, and the search for marihuana could not have taken place. T. L. O.'s argument is based on the fact that the cigarettes were not "contraband," as no school rule forbade her to have them. Thus, according to T. L. O., the cigarettes were not subject to seizure or confiscation by school authorities, and Mr. Choplick was not entitled to take them out of T. L. O.'s purse regardless of whether he was entitled to peer into the purse to see if they were there. Such hairsplitting argumentation has no place in an inquiry addressed to the issue of reasonableness. If Mr. Choplick could permissibly search T. L. O.'s purse for cigarettes, it hardly seems reasonable to suggest that his natural reaction to finding them—picking them up—could [469 U.S. 325, 347] be a constitutional violation. We find that neither in opening the purse nor in reaching into it to remove the cigarettes did Mr. Choplick violate the Fourth Amendment.

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, concurring.

I agree with the Court's decision, and generally with its opinion. I would place greater emphasis, however, on the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting.

In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally. They spend the school hours in close association with each other, both in the classroom and during recreation periods. The students in a particular class often know each other and their teachers quite well. Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child. It is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally. But for purposes of deciding this case, I can assume that children in school—no less than adults—have privacy interests that society is prepared to recognize as legitimate.

However one may characterize their privacy expectations, students properly are afforded some constitutional protections. In an often quoted statement, the Court said that students do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). The Court also has "emphasized the need for affirming the comprehensive authority of the states and of school officials . . . [469 U.S. 325, 349] to prescribe and control conduct in the schools." *Id.*, at 507. See also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The Court has balanced the interests of the student against the school officials' need to maintain discipline by recognizing qualitative differences between the constitutional remedies to which students and adults are entitled.

In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court recognized a constitutional right to due process, and yet was careful to limit the exercise of this right by a student who challenged a disciplinary suspension. The only process found to be "due" was notice and a hearing described as "rudimentary"; it amounted to no more than "the disciplinarian . . . informally discuss[ing] the alleged misconduct with the student minutes after it has occurred." *Id.*, at 581-582. In *Ingraham v. Wright*, 430 U.S. 651 (1977), we declined to extend the Eighth Amendment to prohibit the use of corporal punishment of schoolchildren as authorized by Florida law. We emphasized in that opinion that familiar constraints in the school, and also in the community, provide substantial protection against the violation of constitutional rights by school authorities. "[A]t the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment." *Id.*, at 670. The *Ingraham* Court further pointed out that the "openness of the public school and its supervision by the community afford significant safeguards" against the violation of constitutional rights. *Ibid.*

The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial [469 U.S. 325, 350] relationship exist between school authorities and pupils. 2.1 Instead,

there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws. 2.2

In sum, although I join the Court's opinion and its holding, 2.3 my emphasis is somewhat different.

[2.1] Unlike police officers, school authorities have no law enforcement responsibility or indeed any obligation to be familiar with the criminal laws. Of course, as illustrated by this case, school authorities have a layman's familiarity with the types of crimes that occur frequently in our schools: the distribution and use of drugs, theft, and even violence against teachers as well as fellow students.

[2.2] As noted above, decisions of this Court have never held to the contrary. The law recognizes a host of distinctions between the rights and duties of children and those of adults. See *Goss v. Lopez*, 419 U.S. 565, 591 (1975) (POWELL, J., dissenting.)

[2.3] The Court's holding is that "when there are reasonable grounds for suspecting that [a] search will turn up evidence that the student has violated or is violating either the law or the rules of the school," a search of the student's person or belongings is justified. *Ante*, at 342. This is in accord with the Court's summary of the views of a majority of the state and federal courts that have addressed this issue. See *ante*, at 332-333, n. 2. [469 U.S. 325, 351]

JUSTICE BLACKMUN, concurring in the judgment.

I join the judgment of the Court and agree with much that is said in its opinion. I write separately, however, because I believe the Court omits a crucial step in its analysis of whether a school search must be based upon probable cause. The Court correctly states that we have recognized limited exceptions to the probable-cause requirement "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served" by a lesser standard. *Ante*, at 341. I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with "a special law enforcement need for greater flexibility." *Florida v. Royer*, 460 U.S. 491, 514 (1983) (BLACKMUN, J., dissenting). I pointed out in *United States v. Place*, 462 U.S. 696 (1983):

> "While the Fourth Amendment speaks in terms of freedom from unreasonable [searches], the Amendment does not leave the reasonableness of most [searches] to the judgment of courts or government officers; the Framers of the Amendment balanced the interests involved and decided

> that a [search] is reasonable only if supported by a judicial warrant based on probable cause. See *Texas v. Brown*, 460 U.S. 730, 744-745 (1983) (POWELL, J., concurring); *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting)." *Id.*, at 722 (opinion concurring in judgment).

See also *Dunaway v. New York*, 442 U.S. 200, 213-214 (1979); *United States v. United States District Court*, 407 U.S. 297, 315-316 (1972). Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers. [469 U.S. 325, 352]

Thus, for example, in determining that police can conduct a limited "stop and frisk" upon less than probable cause, this Court relied upon the fact that "as a practical matter" the stop and frisk could not be subjected to a warrant and probable-cause requirement, because a law enforcement officer must be able to take immediate steps to assure himself that the person he has stopped to question is not armed with a weapon that could be used against him. *Terry v. Ohio*, 392 U.S. 1, 20-21, 23-24 (1968). Similarly, this Court's holding that a roving Border Patrol may stop a car and briefly question its occupants upon less than probable cause was based in part upon "the absence of practical alternatives for policing the border." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). See also *Michigan v. Long*, 463 U.S. 1032, 1049, n. 14 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967).

The Court's implication that the balancing test is the rule rather than the exception is troubling for me because it is unnecessary in this case. The elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers. As JUSTICE POWELL notes, "[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students." *Ante*, at 350. Maintaining order in the classroom can be a difficult task. A single teacher often must watch over a large number of students, and, as any parent knows, children at certain ages are inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a peer if that misbehavior is not dealt with quickly. Every adult remembers from his own schooldays the havoc a water pistol or peashooter can wreak until it is taken away. Thus, the Court has recognized that "[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss v. Lopez*, 419 U.S. 565, 580 (1975). Indeed, because drug use and possession of weapons have become increasingly common [469 U.S. 325, 353] among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.

Such immediate action obviously would not be possible if a teacher were required to secure a warrant before searching a student. Nor would it be possible if a teacher could not conduct a necessary search until the teacher thought there was probable cause for the search. A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer

possesses, and is ill-equipped to make a quick judgment about the existence of probable cause. The time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education. A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker.

Education "is perhaps the most important function" of government, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and government has a heightened obligation to safeguard students whom it compels to attend school. The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests. I agree with the standard the Court has announced, and with its application of the standard to the facts of this case. I therefore concur in its judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I fully agree with Part II of the Court's opinion. Teachers, like all other government officials, must conform their [469 U.S. 325, 354] conduct to the Fourth Amendment's protections of personal privacy and personal security. As JUSTICE STEVENS points out, *post*, at 373-374, 385-386, this principle is of particular importance when applied to schoolteachers, for children learn as much by example as by exposition. It would be incongruous and futile to charge teachers with the task of embuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections. See *Board of Education v. Pico*, 457 U.S. 853, 864-865 (1982) (plurality opinion); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

I do not, however, otherwise join the Court's opinion. Today's decision sanctions school officials to conduct fullscale searches on a "reasonableness" standard whose only definite content is that it is not the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor even by a fair application of the "balancing test" it proclaims in this very opinion.

I

Three basic principles underly this Court's Fourth Amendment jurisprudence. First, warrantless searches are per se unreasonable, subject only to a few specifically delineated and well-recognized exceptions. See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967); accord, *Welsh v. Wisconsin*, 466 U.S. 740, 748-749 (1984); *United States v. Place*, 462 U.S. 696, 701 (1983); *Steagald v. United States*,

451 U.S. 204, 211-212 (1981); *Mincey v. Arizona*, 437 U.S. 385 (1978); *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Second, full-scale searches—whether conducted in accordance with the warrant [469 U.S. 325, 355] requirement or pursuant to one of its exceptions—are "reasonable" in Fourth Amendment terms only on a showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Wong Sun v. United States*, 371 U.S. 471, 479 (1963); *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949). Third, categories of intrusions that are substantially less intrusive than full-scale searches or seizures may be justifiable in accordance with a balancing test even absent a warrant or probable cause, provided that the balancing test used gives sufficient weight to the privacy interests that will be infringed. *Dunaway v. New York*, 442 U.S. 200, 210 (1979); *Terry v. Ohio*, *supra*.

Assistant Vice Principal Choplick's thorough excavation of T. L. O.'s purse was undoubtedly a serious intrusion on her privacy. Unlike the searches in *Terry v. Ohio*, *supra*, or *Adams v. Williams*, 407 U.S. 143 (1972), the search at issue here encompassed a detailed and minute examination of respondent's pocketbook, in which the contents of private papers and letters were thoroughly scrutinized. 3.1 Wisely, neither petitioner nor the Court today attempts to justify the search of T. L. O.'s pocketbook as a minimally intrusive search in the *Terry* line. To be faithful to the Court's settled doctrine, the inquiry therefore must focus on the warrant and probable-cause requirements.

A

I agree that schoolteachers or principals, when not acting as agents of law enforcement authorities, generally may conduct a search of their students' belongings without first [469 U.S. 325, 356] obtaining a warrant. To agree with the Court on this point is to say that school searches may justifiably be held to that extent to constitute an exception to the Fourth Amendment's warrant requirement. Such an exception, however, is not to be justified, as the Court apparently holds, by assessing net social value through application of an unguided "balancing test" in which "the individual's legitimate expectations of privacy and personal security" are weighed against "the government's need for effective methods to deal with breaches of public order." *Ante*, at 337. The Warrant Clause is something more than an exhortation to this Court to maximize social welfare as *we* see fit. It requires that the authorities must obtain a warrant before conducting a full-scale search. The undifferentiated governmental interest in law enforcement is insufficient to justify an exception to the warrant requirement. Rather, some *special* governmental interest beyond the need merely to apprehend lawbreakers is necessary to justify a categorical exception to the warrant requirement. For the most part, special governmental needs sufficient to override the warrant requirement flow from "exigency"—that is, from the press of time that makes obtaining a warrant either impossible or hopelessly infeasible. See *United States v. Place*, *supra*, at 701-702; *Mincey v. Arizona*, *supra*, at 393-394; *Johnson v. United States*, *supra*, at 15. Only after finding an extraordinary governmental interest of this kind do we—or ought we—engage in a balancing test to determine if a warrant should nonetheless be required. 3.2 [469 U.S. 325, 357]

To require a showing of some extraordinary governmental interest before dispensing with the warrant requirement is not to undervalue society's need to apprehend violators of the criminal law. To be sure, forcing law enforcement personnel to obtain a warrant before engaging in a search will predictably deter the police from conducting some searches that they would otherwise like to conduct. But this is not an unintended *result* of the Fourth Amendment's protection of privacy; rather, it is the very *purpose* for which the Amendment was thought necessary. Only where the governmental interests at stake exceed those implicated in any ordinary law enforcement context—that is, only where there is some extraordinary governmental interest involved—is it legitimate to engage in a balancing test to determine whether a warrant is indeed necessary.

In this case, such extraordinary governmental interests do exist and are sufficient to justify an exception to the warrant requirement. Students are necessarily confined for most of the schoolday in close proximity to each other and to the school staff. I agree with the Court that we can take judicial notice of the serious problems of drugs and violence that plague our schools. As JUSTICE BLACKMUN notes, teachers must not merely "maintain an environment conducive to learning" among children who "are inclined to test the outer boundaries of acceptable conduct," but must also "protect the very safety of students and school personnel." *Ante*, at 352-353. A teacher or principal could neither carry out essential teaching functions nor adequately protect students' safety if required to wait for a warrant before conducting a necessary search.

B

I emphatically disagree with the Court's decision to cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search. The Court's decision jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth [469 U.S. 325, 358] Amendment—on the basis of its Rohrschach-like "balancing test." Use of such a "balancing test" to determine the standard for evaluating the validity of a full-scale search represents a sizable innovation in Fourth Amendment analysis. This innovation finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens. Moreover, even if this Court's historic understanding of the Fourth Amendment were mistaken and a balancing test of some kind were appropriate, any such test that gave adequate weight to the privacy and security interests protected by the Fourth Amendment would not reach the preordained result the Court's conclusory analysis reaches today. Therefore, because I believe that the balancing test used by the Court today is flawed both in its inception and in its execution, I respectfully dissent.

1

An unbroken line of cases in this Court have held that probable cause is a prerequisite for a full-scale search. In *Carroll v. United States*, 267 U.S. 132, 149 (1925), the Court held that "[o]n reason and authority the true rule is that if the search and seizure . . . are made upon probable cause . . . the

search and seizure are valid." Under our past decisions probable cause—which exists where "the facts and circumstances within [the officials'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that a criminal offense had occurred and the evidence would be found in the suspected place, *id.*, at 162—is the constitutional minimum for justifying a full-scale search, regardless of whether it is conducted pursuant to a warrant or, as in *Carroll*, within one of the exceptions to the warrant requirement. *Henry v. United States*, 361 U.S. 98, 104 (1959) (*Carroll* "merely relaxed the requirements for a warrant on grounds of practicality," but "did not dispense [469 U.S. 325, 359] with the need for probable cause"); accord, *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) ("In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution"). 3.3

Our holdings that probable cause is a prerequisite to a full-scale search are based on the relationship between the two Clauses of the Fourth Amendment. The first Clause ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .") states the purpose of the Amendment and its coverage. The second Clause (". . . and no Warrants shall issue but upon probable cause . . .") gives content to the word "unreasonable" in the first Clause. "For all but . . . narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York*, 442 U.S., at 214.

I therefore fully agree with the Court that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable." *Ante*, at 337. But this "underlying command" is not directly interpreted in each category of cases by some amorphous "balancing test." Rather, the provisions of the Warrant Clause—a warrant and probable cause—provide the yardstick against which official searches [469 U.S. 325, 360] and seizures are to be measured. The Fourth Amendment neither requires nor authorizes the conceptual free-for-all that ensues when an unguided balancing test is used to assess specific categories of searches. If the search in question is more than a minimally intrusive *Terry* stop, the constitutional probable-cause standard determines its validity.

To be sure, the Court recognizes that probable cause "ordinarily" is required to justify a full-scale search and that the existence of probable cause "bears on" the validity of the search. *Ante*, at 340-341. Yet the Court fails to cite any case in which a full-scale intrusion upon privacy interests has been justified on less than probable cause. The line of cases begun by *Terry v. Ohio*, 392 U.S. 1 (1968), provides no support, for they applied a balancing test only in the context of minimally intrusive searches that served crucial law enforcement interests. The search in *Terry* itself, for instance, was a "limited search of the outer clothing." *Id.*, at 30. The type of border stop at issue in *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975), usually "consume[d] no more than a minute"; the Court explicitly noted that "any further detention . . . must be based on consent or probable cause." *Id.*, at 882. See also *United States v. Hensley*, *ante*, at 224 (momentary stop); *United States v. Place*, 462 U.S., at 706-707 (brief detention of luggage for canine "sniff"); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)

(per curiam) (brief frisk after stop for traffic violation); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (characterizing intrusion as "minimal"); *Adams v. Williams*, 407 U.S. 143 (1972) (stop and frisk). In short, all of these cases involved "'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." Dunaway, *supra*, at 210.

Nor do the "administrative search" cases provide any comfort for the Court. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court held that the probable-cause standard governed even administrative searches. Although [469 U.S. 325, 361] the *Camara* Court recognized that probable-cause standards themselves may have to be somewhat modified to take into account the special nature of administrative searches, the Court did so only after noting that "because [housing code] inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." *Id.*, at 537. Subsequent administrative search cases have similarly recognized that such searches intrude upon areas whose owners harbor a significantly decreased expectation of privacy, see, e.g., *Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981), thus circumscribing the injury to Fourth Amendment interests caused by the search.

Considerations of the deepest significance for the freedom of our citizens counsel strict adherence to the principle that no search may be conducted where the official is not in possession of probable cause—that is, where the official does not know of "facts and circumstances [that] warrant a prudent man in believing that the offense has been committed." *Henry v. United States*, 361 U.S., at 102; see also *id.*, at 100-101 (discussing history of probable-cause standard). The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some "balancing test" than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the "reasonable" requirements of the probable-cause standard were met. Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. 3.4 But the Fourth Amendment [469 U.S. 325, 362] rests on the principle that a true balance between the individual and society depends on the recognition of "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). That right protects the privacy and security of the individual unless the authorities can cross a specific threshold of need, designated by the term "probable cause." I cannot agree with the Court's assertions today that a "balancing test" can replace the constitutional threshold with one that is more convenient for those enforcing the laws but less protective of the citizens' liberty; the Fourth Amendment's protections should not be defaced by "a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify the search and seizure." *United States v. Martinez-Fuerte*, *supra*, at 570 (BRENNAN, J., dissenting).

2

I thus do not accept the majority's premise that "[t]o hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches." *Ante*, at 337. For me, the finding that the Fourth Amendment applies, coupled with the observation that what is at issue is a full-scale search, is the end of the inquiry. But even if I believed that a "balancing test" appropriately replaces the judgment of the Framers of the Fourth Amendment, I would nonetheless object to the cursory and shortsighted "test" that the Court employs to justify its predictable weakening of Fourth Amendment protections. In particular, the test employed by the Court vastly overstates the social costs that a probable-cause standard entails and, though it plausibly articulates the serious privacy interests at stake, inexplicably fails to accord them adequate weight in striking the balance. [469 U.S. 325, 363]

The Court begins to articulate its "balancing test" by observing that "the government's need for effective methods to deal with breaches of public order" is to be weighed on one side of the balance. *Ibid.* Of course, this is not correct. It is not the government's need for effective enforcement methods that should weigh in the balance, for ordinary Fourth Amendment standards—including probable cause—may well permit methods for maintaining the public order that are perfectly effective. If that were the case, the governmental interest in having effective standards would carry no weight at all as a justification for departing from the probable-cause standard. Rather, it is the costs of applying probable cause as opposed to applying some lesser standard that should be weighed on the government's side. 3.5

In order to tote up the costs of applying the probable-cause standard, it is thus necessary first to take into account the nature and content of that standard, and the likelihood that it would hamper achievement of the goal—vital not just to "teachers and administrators," see *ante*, at 339—of maintaining an effective educational setting in the public schools. The seminal statement concerning the nature of the probable-cause standard is found in *Carroll v. United States*, 267 U.S. 132 (1925). *Carroll* held that law enforcement authorities have probable cause to search where "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to [469 U.S. 325, 364] warrant a man of reasonable caution in the belief" that a criminal offense had occurred. *Id.*, at 162. In *Brinegar v. United States*, 338 U.S. 160 (1949), the Court amplified this requirement, holding that probable cause depends upon "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.*, at 175.

Two Terms ago, in *Illinois v. Gates*, 462 U.S. 213 (1983), this Court expounded at some length its view of the probable-cause standard. Among the adjectives used to describe the standard were "practical," "fluid," "flexible," "easily applied," and "nontechnical." See *id.*, at 232, 236, 239. The probable-cause standard was to be seen as a "common-sense" test whose application depended on an evaluation of the "totality of the circumstances." *Id.*, at 238.

Ignoring what *Gates* took such great pains to emphasize, the Court today holds that a new "reasonableness" standard is appropriate because it "will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Ante*, at 343. I had never thought that our pre-*Gates* understanding of probable cause defied either reason or common sense. But after *Gates*, I would have thought that there could be no doubt that this "nontechnical," "practical," and "easily applied" concept was eminently serviceable in a context like a school, where teachers require the flexibility to respond quickly and decisively to emergencies.

A consideration of the likely operation of the probable-cause standard reinforces this conclusion. Discussing the issue of school searches, Professor LaFave has noted that the cases that have reached the appellate courts "strongly suggest that in most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test." 3 W. LaFave, Search and Seizure § 10.11, [469 U.S. 325, 365] pp. 459-460 (1978). 3.6 The problems that have caused this Court difficulty in interpreting the probable-cause standard have largely involved informants, see, e.g., *Illinois v. Gates*, *supra*; *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Draper v. United States*, 358 U.S. 307 (1959). However, three factors make it likely that problems involving informants will not make it difficult for teachers and school administrators to make probable-cause decisions. This Court's decision in *Gates* applying a "totality of the circumstances" test to determine whether an informant's tip can constitute probable cause renders the test easy for teachers to apply. The fact that students and teachers interact daily in the school building makes it more likely that teachers will get to know students who supply information; the problem of informants who remain anonymous even to the teachers—and who are therefore unavailable for verification or further questioning—is unlikely to arise. Finally, teachers can observe the behavior of students under suspicion to corroborate any doubtful tips they do receive.

As compared with the relative ease with which teachers can apply the probable-cause standard, the amorphous "reasonableness under all the circumstances" standard freshly coined by the Court today will likely spawn increased litigation and greater uncertainty among teachers and administrators. Of course, as this Court should know, an essential purpose of developing and articulating legal norms is to enable individuals to conform their conduct to those norms. A school system conscientiously attempting to obey the Fourth Amendment's dictates under a probable-cause standard could, for example, consult decisions and other legal materials and prepare a booklet expounding the rough outlines of the concept. Such a booklet could be distributed to [469 U.S. 325, 366] teachers to provide them with guidance as to when a search may be lawfully conducted. I cannot but believe that the same school system faced with interpreting what is permitted under the Court's new "reasonableness" standard would be hopelessly adrift as to when a search may be permissible. The sad result of this uncertainty may well be that some teachers will be reluctant to conduct searches that are fully permissible and even necessary under the constitutional probable-cause standard, while others may intrude arbitrarily and unjustifiably on the privacy of students. 3.7

One further point should be taken into account when considering the desirability of replacing the constitutional probable-cause standard. The question facing the Court is not whether the probable-cause standard should be replaced by a test of "reasonableness under all the circumstances." Rather, it is whether traditional Fourth Amendment standards should recede before the Court's new standard. Thus, although the Court today paints with a broad brush and holds its undefined "reasonableness" standard applicable to *all* school searches, I would approach the question with considerably more reserve. I would not think it necessary to develop a single standard to govern all school searches, any more [469 U.S. 325, 367] than traditional Fourth Amendment law applies even the probable-cause standard to *all* searches and seizures. For instance, just as police officers may conduct a brief stop and frisk on something less than probable cause, so too should teachers be permitted the same flexibility. A teacher or administrator who had reasonable suspicion that a student was carrying a gun would no doubt have authority under ordinary Fourth Amendment doctrine to conduct a limited search of the student to determine whether the threat was genuine. The "costs" of applying the traditional probable-cause standard must therefore be discounted by the fact that, where additional flexibility is necessary and where the intrusion is minor, traditional Fourth Amendment jurisprudence itself displaces probable cause when it determines the validity of a search.

A legitimate balancing test whose function was something more substantial than reaching a predetermined conclusion acceptable to this Court's impressions of what authority teachers need would therefore reach rather a different result than that reached by the Court today. On one side of the balance would be the costs of applying traditional Fourth Amendment standards—the "practical" and "flexible" probable-cause standard where a full-scale intrusion is sought, a lesser standard in situations where the intrusion is much less severe and the need for greater authority compelling. Whatever costs were toted up on this side would have to be discounted by the costs of applying an unprecedented and ill-defined "reasonableness under all the circumstances" test that will leave teachers and administrators uncertain as to their authority and will encourage excessive fact-based litigation.

On the other side of the balance would be the serious privacy interests of the student, interests that the Court admirably articulates in its opinion, *ante*, at 337-339, but which the Court's new ambiguous standard places in serious jeopardy. I have no doubt that a fair assessment of the two [469 U.S. 325, 368] sides of the balance would necessarily reach the same conclusion that, as I have argued above, the Fourth Amendment's language compels—that school searches like that conducted in this case are valid only if supported by probable cause.

II

Applying the constitutional probable-cause standard to the facts of this case, I would find that Mr. Choplick's search violated T. L. O.'s Fourth Amendment rights. After escorting T. L. O. into his private office, Mr. Choplick demanded to see her purse. He then opened the purse to find evidence of

whether she had been smoking in the bathroom. When he opened the purse, he discovered the pack of cigarettes. At this point, his search for evidence of the smoking violation was complete.

Mr. Choplick then noticed, below the cigarettes, a pack of cigarette rolling papers. Believing that such papers were "associated," see *ante*, at 328, with the use of marihuana, he proceeded to conduct a detailed examination of the contents of her purse, in which he found some marihuana, a pipe, some money, an index card, and some private letters indicating that T. L. O. had sold marihuana to other students. The State sought to introduce this latter material in evidence at a criminal proceeding, and the issue before the Court is whether it should have been suppressed.

On my view of the case, we need not decide whether the initial search conducted by Mr. Choplick—the search for evidence of the smoking violation that was completed when Mr. Choplick found the pack of cigarettes—was valid. For Mr. Choplick at that point did not have probable cause to continue to rummage through T. L. O.'s purse. Mr. Choplick's suspicion of marihuana possession at this time was based *solely* on the presence of the package of cigarette papers. The mere presence without more of such a staple item of commerce is insufficient to warrant a person of reasonable caution in inferring both that T. L. O. had violated the law [469 U.S. 325, 369] by possessing marihuana and that evidence of that violation would be found in her purse. Just as a police officer could not obtain a warrant to search a home based solely on his claim that he had seen a package of cigarette papers in that home, Mr. Choplick was not entitled to search possibly the most private possessions of T. L. O. based on the mere presence of a package of cigarette papers. Therefore, the fruits of this illegal search must be excluded and the judgment of the New Jersey Supreme Court affirmed.

III

In the past several Terms, this Court has produced a succession of Fourth Amendment opinions in which "balancing tests" have been applied to resolve various questions concerning the proper scope of official searches. The Court has begun to apply a "balancing test" to determine whether a particular category of searches intrudes upon expectations of privacy that merit Fourth Amendment protection. See *Hudson v. Palmer*, 468 U.S. 517, 527 (1984) ("Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests"). It applies a "balancing test" to determine whether a warrant is necessary to conduct a search. See *ante*, at 340; *United States v. Martinez-Fuerte*, 428 U.S., at 564-566. In today's opinion, it employs a "balancing test" to determine what standard should govern the constitutionality of a given category of searches. See *ante*, at 340-341. Should a search turn out to be unreasonable after application of all of these "balancing tests," the Court then applies an additional "balancing test" to decide whether the evidence resulting from the search must be excluded. See *United States v. Leon*, 468 U.S. 897 (1984).

All of these "balancing tests" amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely [469 U.S. 325, 370] a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences. Compare *ante*,

p. 327 (WHITE, J., delivering the opinion of the Court), with *ante*, p. 348 (POWELL, J., joined by O'CONNOR, J., concurring), and *ante*, p. 351 (BLACKMUN, J., concurring in judgment). And it may be that the real force underlying today's decision is the belief that the Court purports to reject—the belief that the unique role served by the schools justifies an exception to the Fourth Amendment on their behalf. If so, the methodology of today's decision may turn out to have as little influence in future cases as will its result, and the Court's departure from traditional Fourth Amendment doctrine will be confined to the schools.

On my view, the presence of the word "unreasonable" in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good. Full-scale searches unaccompanied by probable cause violate the Fourth Amendment. I do not pretend that our traditional Fourth Amendment doctrine automatically answers all of the difficult legal questions that occasionally arise. I do contend, however, that this Court has an obligation to provide some coherent framework to resolve such questions on the basis of more than a conclusory recitation of the results of a "balancing test." The Fourth Amendment itself supplies that framework and, because the Court today fails to heed its message, I must respectfully dissent.

[3.1] A purse typically contains items of highly personal nature. Especially for shy or sensitive adolescents, it could prove extremely embarrassing for a teacher or principal to rummage through its contents, which could include notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene.

[3.2] Administrative search cases involving inspection schemes have recognized that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection. . . ." *United States v. Biswell*, 406 U.S. 311, 316 (1972); accord, *Donovan v. Dewey*, 452 U.S. 594, 603 (1981). *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (holding that a warrant is nonetheless necessary in some administrative search contexts).

[3.3] In fact, despite the somewhat diminished expectation of privacy that this Court has recognized in the automobile context, see *South Dakota v. Opperman*, 428 U.S. 364, 367-368 (1976), we have required probable cause even to justify a warrantless automobile search, see *United States v. Ortiz*, 422 U.S. 891, 896 (1975) ("A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search") (footnote omitted); *Chambers v. Maroney*, 399 U.S., at 51.

[3.4] As Justice Stewart said in *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971): "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts."

[3.5] I speak of the "government's side" only because it is the terminology used by the Court. In my view, this terminology itself is seriously misleading. The government is charged with protecting the privacy and security of the citizen, just as it is charged with apprehending those who violate the criminal law.

Consequently, the government has no legitimate interest in conducting a search that unduly intrudes on the privacy and security of the citizen. The balance is not between the rights of the government and the rights of the citizen, but between opposing conceptions of the constitutionally legitimate means of carrying out the government's varied responsibilities.

[3.6] It should be noted that Professor LaFave reached this conclusion in 1978, *before* this Court's decision in *Gates* made clear the "flexibility" of the probable-cause concept.

[3.7] A comparison of the language of the standard ("reasonableness under all the circumstances") with the traditional language of probable cause ("facts sufficient to warrant a person of reasonable caution in believing that a crime had been committed and the evidence would be found in the designated place") suggests that the Court's new standard may turn out to be probable cause under a new guise. If so, the additional uncertainty caused by this Court's innovation is surely unjustifiable; it would be naive to expect that the addition of this extra dose of uncertainty would do anything other than "burden the efforts of school authorities to maintain order in their schools," *ante*, at 342. If, on the other hand, the new standard permits searches of students in instances when probable cause is absent—instances, according to this Court's consistent formulations, when a person of reasonable caution would not think it likely that a violation existed or that evidence of that violation would be found—the new standard is genuinely objectionable and impossible to square with the premise that our citizens have the right to be free from arbitrary intrusions on their privacy.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BRENNAN joins as to Part I, concurring in part and dissenting in part.

Assistant Vice Principal Choplick searched T. L. O.'s purse for evidence that she was smoking in the girls' restroom. Because T. L. O.'s suspected misconduct was not illegal and did not pose a serious threat to school discipline, the New Jersey Supreme Court held that Choplick's search [469 U.S. 325, 371] of her purse was an unreasonable invasion of her privacy and that the evidence which he seized could not be used against her in criminal proceedings. The New Jersey court's holding was a careful response to the case it was required to decide.

The State of New Jersey sought review in this Court, first arguing that the exclusionary rule is wholly inapplicable to searches conducted by school officials, and then contending that the Fourth Amendment itself provides no protection at all to the student's privacy. The Court has accepted neither of these frontal assaults on the Fourth Amendment. It has, however, seized upon this "no smoking" case to announce "the proper standard" that should govern searches by school officials who are confronted with disciplinary problems far more severe than smoking in the restroom. Although I join Part II of the Court's opinion, I continue to believe that the Court has unnecessarily and inappropriately reached out to decide a constitutional question. See 468 U.S. 1214 (1984) (STEVENS, J., dissenting from reargument order). More importantly, I fear that the concerns that motivated the Court's activism have produced a holding that will permit school administrators to search students suspected of violating only the most trivial school regulations and guidelines for behavior.

I

The question the Court decides today—whether Mr. Choplick's search of T. L. O.'s purse violated the Fourth Amendment—was not raised by the State's petition for writ of certiorari. That petition only raised one question: "Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school." 4.1 The State quite properly declined to submit the former question because "[it] did not wish to present what might appear to be solely a factual dispute to this Court." 4.2 [469 U.S. 325, 372] Since this Court has twice had the threshold question argued, I believe that it should expressly consider the merits of the New Jersey Supreme Court's ruling that the exclusionary rule applies.

The New Jersey Supreme Court's holding on this question is plainly correct. As the state court noted, this case does not involve the use of evidence in a school disciplinary proceeding; the juvenile proceedings brought against T. L. O. involved a charge that would have been a criminal offense if committed by an adult. 4.3 Accordingly, the exclusionary rule issue decided by that court and later presented to this Court concerned only the use in a criminal proceeding of evidence obtained in a search conducted by a public school administrator.

Having confined the issue to the law enforcement context, the New Jersey court then reasoned that this Court's cases have made it quite clear that the exclusionary rule is equally applicable "whether the public official who illegally obtained the evidence was a municipal inspector, *See v. Seattle* 387 U.S. 541 (1967); *Camara [v. Municipal Court,]* 387 U.S. 523 (1967); a firefighter, *Michigan v. Tyler*, 436 U.S. 499, 506 (1978); or a school administrator or law enforcement official." 4.4 It correctly concluded "that if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings." 4.5

When a defendant in a criminal proceeding alleges that she was the victim of an illegal search by a school administrator, the application of the exclusionary rule is a simple corollary of the principle that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The practical basis for this principle is, in part, its deterrent effect, see *id.*, at 656, and as a general [469 U.S. 325, 373] matter it is tolerably clear to me, as it has been to the Court, that the existence of an exclusionary remedy does deter the authorities from violating the Fourth Amendment by sharply reducing their incentive to do so. 4.6 In the case of evidence obtained in school searches, the "overall educative effect" 4.7 of the exclusionary rule adds important symbolic force to this utilitarian judgment.

Justice Brandeis was both a great student and a great teacher. It was he who wrote:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting opinion).

Those of us who revere the flag and the ideals for which it stands believe in the power of symbols. We cannot ignore that rules of law also have a symbolic power that may vastly exceed their utility.

Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. 4.8 If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have [469 U.S. 325, 374] been dealt with unfairly. 4.9 The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that "our society attaches serious consequences to a violation of constitutional rights," 4.10 and that this is a principle of "liberty and justice for all." 4.11

Thus, the simple and correct answer to the question presented by the State's petition for certiorari would have required affirmance of a state court's judgment suppressing evidence. That result would have been dramatically out of character for a Court that not only grants prosecutors relief from suppression orders with distressing regularity, 4.12 but [469 U.S. 325, 375] also is prone to rely on grounds not advanced by the parties in order to protect evidence from exclusion. 4.13 In characteristic disregard of the doctrine of judicial restraint, the Court avoided that result in this case by ordering reargument and directing the parties to address a constitutional question that the parties, with good reason, had not asked the Court to decide. Because judicial activism undermines the Court's power to perform its central mission in a legitimate way, I dissented from the reargument order. See 468 U.S. 1214 (1984). I have not modified the views expressed in that dissent, but since the majority has brought the question before us, I shall explain why I believe the Court has misapplied the standard of reasonableness embodied in the Fourth Amendment.

II

The search of a young woman's purse by a school administrator is a serious invasion of her legitimate expectations of privacy. A purse "is a common repository for one's personal effects and therefore is inevitably associated with the expectation of privacy." *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979). Although such expectations must sometimes yield to the legitimate requirements of government, in assessing the constitutionality of a warrantless search, our decision must be guided by the language of the Fourth Amendment: "The right of the people to be secure in their persons, houses, [469 U.S. 325, 376] papers and effects, against *unreasonable* searches and seizures, shall not be violated. . . ." In order to evaluate the reasonableness of such searches, "it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or size] against the invasion which the search [or seizure] entails.'" *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528, 534-537 (1967)). 4.14

The "limited search for weapons" in *Terry* was justified by the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed

with a weapon that could unexpectedly and fatally be used against him." 392 U.S., at 23, 25. When viewed from the institutional perspective, "the substantial need of teachers and administrators for freedom to maintain order in the schools," *ante*, at 341 (majority opinion), is no less acute. Violent, unlawful, or seriously disruptive conduct is fundamentally inconsistent with the principal function of teaching institutions which is to educate young people and prepare them for citizenship. 4.15 When such conduct occurs amidst a sizable group of impressionable young people, it creates an explosive atmosphere that requires a prompt and effective response.

Thus, warrantless searches of students by school administrators are reasonable when undertaken for those purposes. [469 U.S. 325, 377] But the majority's statement of the standard for evaluating the reasonableness of such searches is not suitably adapted to that end. The majority holds that "a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence *that the student has violated or is violating* either the law or *the rules of the school*." *Ante*, at 341-342. This standard will permit teachers and school administrators to search students when they suspect that the search will reveal evidence of even the most trivial school regulation or precatory guideline for student behavior. The Court's standard for deciding whether a search is justified "at its inception" treats all violations of the rules of the school as though they were fungible. For the Court, a search for curlers and sunglasses in order to enforce the school dress code 4.16 is apparently just as important as a search for evidence of heroin addiction or violent gang activity.

The majority, however, does not contend that school administrators have a compelling need to search students in [469 U.S. 325, 378] order to achieve optimum enforcement of minor school regulations. 4.17 To the contrary, when minor violations are involved, there is every indication that the informal school disciplinary process, with only minimum requirements of due process, 4.18 can function effectively without the power to search for enough evidence to prove a criminal case. In arguing that teachers and school administrators need the power to search students based on a lessened standard, the United States as *amicus curiae* relies heavily on empirical evidence of a contemporary crisis of violence and unlawful behavior that is seriously undermining the process of education in American schools. 4.19 A standard better attuned to this concern would permit teachers and school administrators to search a student when they have reason to believe that the search will uncover *evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process*.

This standard is properly directed at "[t]he sole justification for the [warrantless] search." 4.20 In addition, a standard [469 U.S. 325, 379] that varies the extent of the permissible intrusion with the gravity of the suspected offense is also more consistent with common-law experience and this Court's precedent. Criminal law has traditionally recognized a distinction between essentially regulatory offenses and serious violations of the peace, and graduated the response of the criminal justice system depending on the character of the violation. 4.21 The application of a similar distinction in evaluating

the reasonableness of warrantless searches and seizures "is not a novel idea." *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984). 4.22

In *Welsh*, police officers arrived at the scene of a traffic accident and obtained information indicating that the driver of the automobile involved was guilty of a first offense of [469 U.S. 325, 380] driving while intoxicated—a civil violation with a maximum fine of $200. The driver had left the scene of the accident, and the officers followed the suspect to his home where they arrested him without a warrant. Absent exigent circumstances, the warrantless invasion of the home was a clear violation of *Payton v. New York*, 445 U.S. 573 (1980). In holding that the warrantless arrest for the "noncriminal, traffic offense" in *Welsh* was unconstitutional, the Court noted that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed." 466 U.S., at 753.

The logic of distinguishing between minor and serious offenses in evaluating the reasonableness of school searches is almost too clear for argument. In order to justify the serious intrusion on the persons and privacy of young people that New Jersey asks this Court to approve, the State must identify "some real immediate and serious consequences." *McDonald v. United States*, 335 U.S. 451, 460 (1948) (Jackson, J., concurring, joined by Frankfurter, J.). 4.23 While school administrators have entirely legitimate reasons for adopting school regulations and guidelines for student behavior, the authorization of searches to enforce them "displays a shocking lack of all sense of proportion." *Id.*, 459. 4.24 [469 U.S. 325, 381]

The majority offers weak deference to these principles of balance and decency by announcing that school searches will only be reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student *and the nature of the infraction*." *Ante*, at 342 (emphasis added). The majority offers no explanation why a two-part standard is necessary to evaluate the reasonableness of the ordinary school search. Significantly, in the balance of its opinion the Court pretermits any discussion of the nature of T. L. O.'s infraction of the "no smoking" rule.

The "rider" to the Court's standard for evaluating the reasonableness of the initial intrusion apparently is the Court's perception that its standard is overly generous and does not, by itself, achieve a fair balance between the administrator's right to search and the student's reasonable expectations of privacy. The Court's standard for evaluating the "scope" of reasonable school searches is obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses. The Court's effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults' privacy only creates uncertainty in the extent of its resolve to prohibit the latter. Moreover, the majority's application of its standard in this case—to permit a male administrator to rummage through the purse of a female high school student in order to obtain evidence that she was smoking [469 U.S. 325, 382] in a bathroom—raises grave doubts in my

mind whether its effort will be effective. 4.25 Unlike the Court, I believe the nature of the suspected infraction is a matter of first importance in deciding whether any invasion of privacy is permissible.

III

The Court embraces the standard applied by the New Jersey Supreme Court as equivalent to its own, and then deprecates the state court's application of the standard as reflecting "a somewhat crabbed notion of reasonableness." *Ante*, at 343. There is no mystery, however, in the state court's finding that the search in this case was unconstitutional; the decision below was not based on a manipulation of reasonable suspicion, but on the trivial character of the activity that promoted the official search. The New Jersey Supreme Court wrote:

> "We are satisfied that when a school official has reasonable grounds to believe that a student possesses evidence of *illegal activity or activity that would interfere with school discipline and order*, the school official has the right to conduct a reasonable search for such evidence.
>
> "In determining whether the school official has reasonable grounds, courts should consider 'the child's age, history, and school record, *the prevalence and seriousness of the problem in the school to which the search was* [469 U.S. 325, 383] *directed*, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search.'" 4.26

The emphasized language in the state court's opinion focuses on the character of the rule infraction that is to be the object of the search.

In the view of the state court, there is a quite obvious and material difference between a search for evidence relating to violent or disruptive activity, and a search for evidence of a smoking rule violation. This distinction does not imply that a no-smoking rule is a matter of minor importance. Rather, like a rule that prohibits a student from being tardy, its occasional violation in a context that poses no threat of disrupting school order and discipline offers no reason to believe that an immediate search is necessary to avoid unlawful conduct, violence, or a serious impairment of the educational process.

A correct understanding of the New Jersey court's standard explains why that court concluded in T. L. O.'s case that "the assistant principal did not have reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that *would seriously interfere with school discipline or order*." 4.27 The importance of the nature of the rule infraction to the New Jersey Supreme Court's holding is evident from its brief explanation of the principal basis for its decision:

> "A student has an expectation of privacy in the contents of her purse. Mere possession of cigarettes did not violate school rule or policy, since the school allowed smoking in designated areas. The contents of the handbag had no direct bearing on the infraction.

> "The assistant principal's desire, legal in itself, to gather evidence to impeach the student's credibility at a [469 U.S. 325, 384] hearing on the disciplinary infraction does not validate the search." 4.28

Like the New Jersey Supreme Court, I would view this case differently if the Assistant Vice Principal had reason to believe T. L. O.'s purse contained evidence of criminal activity, or of an activity that would seriously disrupt school discipline. There was, however, absolutely no basis for any such assumption—not even a "hunch."

In this case, Mr. Choplick overreacted to what appeared to be nothing more than a minor infraction—a rule prohibiting smoking in the bathroom of the freshmen's and sophomores' building. 4.29 It is, of course, true that he actually found evidence of serious wrongdoing by T. L. O., but no one claims that the prior search may be justified by his unexpected discovery. As far as the smoking infraction is concerned, the search for cigarettes merely tended to corroborate a teacher's eyewitness account of T. L. O.'s violation of a minor regulation designed to channel student smoking behavior into designated locations. Because this conduct was neither unlawful nor significantly disruptive of school order or the educational process, the invasion of privacy associated with the forcible opening of T. L. O.'s purse was entirely unjustified at its inception.

A review of the sampling of school search cases relied on by the Court demonstrates how different this case is from those [469 U.S. 325, 385] in which there was indeed a valid justification for intruding on a student's privacy. In most of them the student was suspected of a criminal violation; 4.30 in the remainder either violence or substantial disruption of school order or the integrity of the academic process was at stake. 4.31 Few involved matters as trivial as the no-smoking rule violated by T. L. O. 4.32 The rule the Court adopts today is so open-ended that it may make the Fourth Amendment virtually meaningless in the school context. Although I agree that school administrators must have broad latitude to maintain order and discipline in our classrooms, that authority is not unlimited.

IV

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to [469 U.S. 325, 386] policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth. Although the search of T. L. O.'s purse does not trouble today's majority, I submit that we are not dealing with "matters relatively trivial to the welfare of the Nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

I respectfully dissent.

[4.1] Pet. for Cert. i.

[4.2] Supplemental Brief for Petitioner 6.

[4.3] *State ex rel. T. L. O.*, 94 N. J. 331, 337, nn. 1 and 2, 342, n. 5, 463 A. 2d 934, 937, nn. 1 and 2, 939, n. 5 (1983).

[4.4] *Id.*, at 341, 463 A. 2d, at 939.

[4.5] *Id.*, at 341-342, 463 A. 2d, at 939.

[4.6] See, e.g., *Stone v. Powell*, 428 U.S. 465, 492 (1976); *United States v. Janis*, 428 U.S. 433, 453 (1976); *United States v. Calandra*, 414 U.S. 338, 347-348 (1974); *Alderman v. United States*, 394 U.S. 165, 174-175 (1969).

[4.7] *Stone v. Powell*, 428 U.S., at 493.

[4.8] See *Board of Education v. Pico*, 457 U.S. 853, 864-865 (1982) (BRENNAN, J., joined by MARSHALL and STEVENS, JJ.); *id.*, at 876, 880 (BLACKMUN, J., concurring in part and concurring in judgment); *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507, 511-513 (1969); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

[4.9] *Cf. In re Gault*, 387 U.S. 1, 26-27 (1967). JUSTICE BRENNAN has written of an analogous case:

> "We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'. . . . Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." *Doe v. Renfrow*, 451 U.S. 1022, 1027-1028 (1981) (dissenting from denial of certiorari).

[4.10] *Stone v. Powell*, 428 U.S., at 492.

[4.11] 36 U.S.C. § 172 (pledge of allegiance to the flag).

[4.12] A brief review of the Fourth Amendment cases involving criminal prosecutions since the October Term, 1982, supports the proposition. Compare *Florida v. Rodriguez*, *ante*, p. 1 (per curiam); *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Segura v. United States*, 468 U.S. 796 (1984); *United States v. Karo*, 468 U.S. 705 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Jacobsen*, 466 U.S. 109 (1984); *Massachusetts v. Upton*, 466 U.S. 727 (1984) (per curiam); *Florida v. Meyers*, 466 U.S. 380 (1984) (per curiam); *Michigan v. Long*, 463 U.S. 1032 (1983); *Illinois v. Andreas*, 463 U.S. 765 (1983); *Illinois v. Lafayette*, 462 U.S. 640 (1983); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Illinois v. Gates*, 462 U.S. 213 (1983); *Texas v. Brown*, 460 U.S. 730 (1983); *United States v. Knotts*, [469 U.S. 325, 375] 460 U.S. 276 (1983); *Illinois v. Batchelder*, 463 U.S. 1112 (1983) (per curiam); *Cardwell v. Taylor*, 461 U.S. 571 (1983) (per curiam), with *Thompson v. Louisiana*, *ante*, p. 17 (per

curiam); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Michigan v. Clifford*, 464 U.S. 287 (1984); *United States v. Place*, 462 U.S. 696 (1983); *Florida v. Royer*, 460 U.S. 491 (1983).

[4.13] E.g. *United States v. Karo*, 468 U.S., at 719-721; see also *Segura v. United States*, 468 U.S., at 805-813 (opinion of BURGER, C. J., joined by O'CONNOR, J.); *cf. Illinois v. Gates*, 459 U.S. 1028 (1982) (STEVENS, J., dissenting from reargument order, joined by BRENNAN and MARSHALL, JJ.)

[4.14] See also *United States v. Brigoni-Ponce*, 422 U.S. 873, 881-882 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543, 567 (1976).

[4.15] *Cf. ante*, at 353 (BLACKMUN, J., concurring in judgment) ("The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement"); *ante*, at 350 (POWELL, J., concurring, joined by O'CONNOR, J.) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students").

[4.16] Parent-Student Handbook of Piscataway [N. J.] H. S. (1979), Record Doc. S-1, p. 7. A brief survey of school rule books reveals that, under the majority's approach, teachers and school administrators may also search students to enforce school rules regulating:

> "(i) secret societies; (ii) students driving to school; (iii) parking and use of parking lots during school hours; (iv) smoking on campus; (v) the direction of traffic in the hallways; (vi) student presence in the hallways during class hours without a pass; (vii) profanity; (viii) school attendance of interscholastic athletes on the day of a game, meet or match; (ix) cafeteria use and cleanup; (x) eating lunch off-campus; and (xi) unauthorized absence."

See *id.*, at 7-18; Student Handbook of South Windsor [Conn.] H. S. (1984); Fairfax County [Va.] Public Schools, Student Responsibilities and Rights (1980); Student Handbook of Chantilly [Va.] H. S. (1984).

[4.17] *Cf. Camara v. Municipal Court*, 387 U.S. 523, 535-536 (1967) ("There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures. . . . [I]f the probable cause standard . . . is adopted, . . . the reasonable goals of code enforcement will be dealt a crushing blow").

[4.18] See *Goss v. Lopez*, 419 U.S. 565, 583-584 (1975).

[4.19] "The sad truth is that many classrooms across the country are not temples of learning teaching the lessons of good will, civility, and wisdom that are central to the fabric of American life. To the contrary, many schools are in such a state of disorder that not only is the educational atmosphere polluted, but the very safety of students and teachers is imperiled." Brief for United States as *Amicus Curiae* 23.

See also Brief for National Education Association as *Amicus Curiae* 21 ("If a suspected violation of a rule threatens to disrupt the school or threatens to harm students, school officials should be free to search for evidence of it").

[4.20] *Terry v. Ohio*, 392 U.S. 1, 29 (1968); *United States v. Brignoni-Ponce*, 422 U.S., at 881-882.

[4.21] Throughout the criminal law this dichotomy has been expressed by classifying crimes as misdemeanors or felonies, *malum prohibitum* or *malum in se*, crimes that do not involve moral turpitude or those that do, and major or petty offenses. See generally W. LaFave, *Handbook on Criminal Law* § 6 (1972).

Some codes of student behavior also provide a system of graduated response by distinguishing between violent, unlawful, or seriously disruptive conduct, and conduct that will only warrant serious sanctions when the student engages in repetitive offenses. See, e.g., Parent-Student Handbook of Piscataway [N. J.] H. S. (1979), Record Doc. S-1, pp. 15-16; Student Handbook of South Windsor [Conn.] H. S. ¶ E (1984); Rules of the Board of Education of the District of Columbia, Ch. IV, §§ 431.1-.10 (1982). Indeed, at Piscataway High School a violation of smoking regulations that is "[a] student's first offense will result in assignment of up to three (3) days of after school classes concerning hazards of smoking." Record Doc. S-1, *supra*, at 15.

[4.22] In *Goss v. Lopez*, 419 U.S., at 582-583 (emphasis added), the Court noted that similar considerations require some variance in the requirements of due process in the school disciplinary context:

> "[A]s a general rule notice and hearing should precede removal of the student from school. We agree . . ., however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. *Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school*. In such cases the necessary notice and rudimentary hearing should follow as soon as practicable. . . ."

[4.23] In *McDonald* police officers made a warrantless search of the office of an illegal "numbers" operation. Justice Jackson rejected the view that the search could be supported by exigent circumstances:

> "Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. . . . *Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress* as well as the hazards of the method of attempting to reach it. . . . [The defendant's] criminal operation, while a shabby swindle that the police are quite right in suppressing, was not one which endangered life or limb or the peace and good order of the community. . . ." 335 U.S., at 459-460.

[4.24] While a policeman who sees a person smoking in an elevator in violation of a city ordinance may conduct a full-blown search for evidence of the [469 U.S. 325, 381] smoking violation in the unlikely event of a custodial arrest, *United States v. Robinson*, 414 U.S. 218, 236 (1973); *Gustafson v. Florida*, 414 U.S. 260, 265-266 (1973), it is more doubtful whether a search of this kind would be reasonable if the officer only planned to issue a citation to the offender and depart, see *Robinson*, 414 U.S., at 236, n. 6. In any case, the majority offers no rationale supporting its conclusion that a student detained by school officials for questioning, on reasonable suspicion that she has violated a school rule, is entitled to no more protection under the Fourth Amendment than a criminal suspect under custodial arrest.

[4.25] One thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse. See *Doe v. Renfrow*, 631 F.2d 91, 92-93 (CA7 1980) ("It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude"), cert. denied, 451 U.S. 1022 (1981); *Bellnier v. Lund*, 438 F. Supp.

47 (NDNY 1977); *People v. D.*, 34 N. Y. 2d 483, 315 N. E. 2d 466 (1974); *M. J. v. State*, 399 So.2d 996 (Fla. App. 1981). To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm.

[4.26] 94 N. J., at 346, 463 A. 2d, at 941-942 (quoting *State v. McKinnon*, 88 Wash. 2d 75, 81, 558 P.2d 781, 784 (1977)) (emphasis added).

[4.27] 94 N. J., at 347, 463 A. 2d, at 942 (emphasis added).

[4.28] *Ibid.* The court added:

> "Moreover, there were not reasonable grounds to believe that the purse contained cigarettes, if they were the object of the search. No one had furnished information to that effect to the school official. He had, at best, a good hunch. No doubt good hunches would unearth much more evidence of crime on the persons of students and citizens as a whole. But more is required to sustain a search." *Id.*, at 347, 463 A. 2d, at 942-943.

It is this portion of the New Jersey Supreme Court's reasoning—a portion that was not necessary to its holding—to which this Court makes its principal response. See *ante*, at 345-346.

[4.29] See Parent-Student Handbook of Piscataway [N. J.] H. S. 15, 18 (1979), Record Doc. S-1. See also Tr. of Mar. 31, 1980, Hearing 13-14.

[4.30] See, e.g., *Tarter v. Raybuck*, 742 F.2d 977 (CA6 1984) (search for marihuana); *M. v. Board of Education Ball-Chatham Community Unit School Dist. No. 5*, 429 F. Supp. 288 (SD Ill. 1977) (drugs and large amount of money); *D. R. C. v. State*, 646 P.2d 252 (Alaska App. 1982) (stolen money); *In re W.*, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973) (marihuana); *In re G.*, 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970) (amphetamine pills); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969) (methedrine pills); *State v. Baccino*, 282 A. 2d 869 (Del. Super. 1971) (drugs); *State v. D. T. W.*, 425 So.2d 1383 (Fla. App. 1983) (drugs); *In re J. A.*, 85 Ill. App. 3d 567, 406 N. E. 2d 958 (1980) (marihuana); *People v. Ward*, 62 Mich. App. 46, 233 N. W. 2d 180 (1975) (drug pills); *Mercer v. State*, 450 S. W. 2d 715 (Tex. Civ. App. 1970) (marihuana); *State v. McKinnon*, 88 Wash. 2d 75, 558 P.2d 781 (1977) ("speed").

[4.31] See, e.g., *In re L. L.*, 90 Wis. 2d 585, 280 N. W. 2d 343 (App. 1979) (search for knife or razor blade); *R. C. M. v. State*, 660 S. W. 2d 552 (Tex. App. 1983) (student with bloodshot eyes wandering halls in violation of school rule requiring students to remain in examination room or at home during midterm examinations).

[4.32] See, e.g., *State v. Young*, 234 Ga. 488, 216 S. E. 2d 586 (three students searched when they made furtive gestures and displayed obvious consciousness of guilt), cert. denied, 423 U.S. 1039 (1975); *Doe v. State*, 88 N. M. 347, 540 P.2d 827 (1975) (student searched for pipe when a teacher saw him using it to violate smoking regulations). [469 U.S. 325, 387]

What Does the Fourth Amendment Mean?

The Constitution, through the Fourth Amendment, protects people from unreasonable searches and seizures by the government. The Fourth Amendment, however, is not a guarantee against all searches and seizures, but only those that are deemed unreasonable under the law.

Whether a particular type of search is considered reasonable in the eyes of the law, is determined by balancing two important interests. On one side of the scale is the intrusion on an individual's Fourth Amendment rights. On the other side of the scale are legitimate government interests, such as public safety.

The extent to which an individual is protected by the Fourth Amendment depends, in part, on the location of the search or seizure.
Minnesota v. Carter, 525 U.S. 83 (1998)

Home

Searches and seizures inside a home without a warrant are presumptively unreasonable.
Payton v. New York, 445 U.S. 573 (1980).

However, there are some exceptions. A warrantless search may be lawful:

- If an officer is given consent to search
  Davis v. United States, 328 U.S. 582 (1946)
- If the search is incident to a lawful arrest
  United States v. Robinson, 414 U.S. 218 (1973)
- If there is probable cause to search and exigent circumstances
  Payton v. New York, 445 U.S. 573 (1980)
- If the items are in plain view
  Maryland v. Macon, 472 U.S. 463 (1985).

A Person

When an officer observes unusual conduct which leads him reasonably to conclude that criminal activity may be afoot, the officer may briefly stop the suspicious person and make reasonable inquiries aimed at confirming or dispelling the officer's suspicions.
Terry v. Ohio, 392 U.S. 1 (1968)
Minnesota v. Dickerson, 508 U.S. 366 (1993)

Schools

School officials need not obtain a warrant before searching a student who is under their authority; rather, a search of a student need only be reasonable under all the circumstances.
New Jersey v. TLO, 469 U.S. 325 (1985)

Cars

Where there is probable cause to believe that a vehicle contains evidence of a criminal activity, an officer may lawfully search any area of the vehicle in which the evidence might be found.
Arizona v. Gant, 129 S. Ct. 1710 (2009),

An officer may conduct a traffic stop if he has reasonable suspicion that a traffic violation has occurred or that criminal activity is afoot.
Berekmer v. McCarty, 468 U.S. 420 (1984)
United States v. Arvizu, 534 U.S. 266 (2002).

An officer may conduct a pat-down of the driver and passengers during a lawful traffic stop; the police need not believe that any occupant of the vehicle is involved in a criminal activity.
Arizona v. Johnson, 555 U.S. 323 (2009).

The use of a narcotics detection dog to walk around the exterior of a car subject to a valid traffic stop does not require reasonable, explainable suspicion.
Illinois v. Cabales, 543 U.S. 405 (2005).

Special law enforcement concerns will sometimes justify highway stops without any individualized suspicion.
Illinois v. Lidster, 540 U.S. 419 (2004).

An officer at an international border may conduct routine stops and searches.
United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

A state may use highway sobriety checkpoints for the purpose of combating drunk driving.
Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

A state may set up highway checkpoints where the stops are brief and seek voluntary cooperation in the investigation of a recent crime that has occurred on that highway.
Illinois v. Lidster, 540 U.S. 419 (2004).

However, a state may not use a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics.
City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

The above text is from:

https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does-0

Missouri's Search and Seizure Pamphlet

https://ago.mo.gov/docs/default-source/publications/searchandseizurelaws.pdf?sfvrsn=4

PART 3

The Eighth Amendment

AMENDMENT VIII (1791)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. ▪

Ingraham v. Wright

430 U.S. 651 (1977)

United States Supreme Court, Docket No. 75-6527

Argued: November 2-3, 1976 ***Decided:*** April 19, 1977

Petitioners, pupils in a Dade County, Fla., junior high school, filed this action in Federal District Court pursuant to 42 U.S.C. §§ 1981-1988 for damages and injunctive and declaratory relief against respondent school officials, alleging that petitioners and other students had been subjected to disciplinary corporal punishment in violation of their constitutional rights. The Florida statute then in effect authorized corporal punishment after the teacher had consulted with the principal or teacher in charge of the school, specifying that the punishment was not to be "degrading or unduly severe." A School Board regulation contained specific directions and limitations, authorizing punishment administered to a recalcitrant student's buttocks with a wooden paddle. The evidence showed that the paddling of petitioners was exceptionally harsh. The District Court granted respondents' motion to dismiss the complaint, finding no basis for constitutional relief. The Court of Appeals affirmed.

Held:

1. The Cruel and Unusual Punishments Clause of the Eighth Amendment does not apply to disciplinary corporal punishment in public schools. Pp. 664-671.

(a) The history of the Eighth Amendment and the decisions of this Court make it clear that the prohibition against cruel and unusual punishment was designed to protect those convicted of crime. Pp. 664-668.

(b) There is no need to wrench the Eighth Amendment from its historical context and extend it to public school disciplinary practices. The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which that Amendment protects convicted criminals. These safeguards are reinforced by the legal constraints of the common law, whereby any punishment going beyond that which is reasonably necessary for the proper education and discipline of the child may result in both civil and criminal liability. Pp. 668-671.

2. The Due Process Clause of the Fourteenth Amendment does not require notice and hearing prior to imposition of corporal punishment as that practice is authorized and limited by the common law. Pp. 672-682. [430 U.S. 651, 652]

(a) Liberty within the meaning of the Fourteenth Amendment is implicated where public school authorities, acting under color of state law, deliberately punish a child for misconduct by restraint and infliction of appreciable physical pain. Freedom from bodily restraint and punishment is within the liberty interest in personal security that has historically been protected from state deprivation without due process of law. Pp. 672-674.

(b) Under the longstanding accommodation between the child's interest in personal security and the traditional common-law privilege, there can be no deprivation of substantive rights as long as the corporal punishment remains within the limits of that privilege. The child nonetheless has a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification. Pp. 675-676.

(c) The Florida scheme, considered in light of the openness of the school environment, affords significant protection against unjustified corporal punishment of schoolchildren. The teacher and principal must exercise prudence and restraint when they decide that corporal punishment is necessary for disciplinary purposes. If the punishment is later found to be excessive, they may be held liable in damages or be subject to criminal penalties. Where the State has thus preserved what "has always been the law of the land," *United States v. Barnett*, 376 U.S. 681, 692, the case for administrative safeguards is significantly less compelling than it would otherwise be. Pp. 676-680.

(d) Imposing additional administrative safeguards as a constitutional requirement would significantly intrude into the area of educational responsibility that lies primarily with the public school authorities. Prior procedural safeguards require a diversion of educational resources, and school authorities may abandon corporal punishment as a disciplinary measure rather than incur the burdens of complying with procedural requirements. The incremental benefit of invoking the Constitution to impose prior notice and a hearing cannot justify the costs. Pp. 680-682.

525 F.2d 909, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 683. STEVENS, J., filed a dissenting opinion, *post*, p. 700.

Bruce S. Rogow argued the cause for petitioners. With him on the briefs were Howard W. Dixon and Peter M. Siegel. [430 U.S. 651, 653]

Frank A. Howard, Jr., argued the cause and filed a brief for respondents. [*]

[*] Michael Nussbaum, Lucien Hilmer, Ronald G. Precup, and David Rubin filed a brief for the National Education Assn. as amicus curiae urging reversal. Briefs of amici curiae urging affirmance were filed by Leon Fieldman for the National School Boards Assn.: and by Tobias Simon and Elizabeth J. du Fresne for the United Teachers of Dade, Local 1974, AFT, AFL-CIO. Gertrude M. Bacon filed a brief for the American Psychological Association Task Force on the Rights of Children and Youths as amicus curiae.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents questions concerning the use of corporal punishment in public schools: First, whether the paddling of students as a means of maintaining school discipline constitutes cruel and

unusual punishment in violation of the Eighth Amendment; and, second, to the extent that paddling is constitutionally permissible, whether the Due Process Clause of the Fourteenth Amendment requires prior notice and an opportunity to be heard.

I

Petitioners James Ingraham and Roosevelt Andrews filed the complaint in this case on January 7, 1971, in the United States District Court for the Southern District of Florida. 1.1 At the time both were enrolled in the Charles R. Drew Junior High School in Dade County, Fla., Ingraham in the eighth grade and Andrews in the ninth. The complaint contained three counts, each alleging a separate cause of action for deprivation of constitutional rights, under 42 U.S.C. §§ 1981-1988. Counts one and two were individual actions for damages by Ingraham and Andrews based on paddling incidents that allegedly occurred in October 1970 at Drew Junior High School. Count three was a class action for declaratory and [430 U.S. 651, 654] injunctive relief filed on behalf of all students in the Dade County schools. 1.2 Named as defendants in all counts were respondents Willie J. Wright (principal at Drew Junior High School), Lemmie Deliford (an assistant principal), Solomon Barnes (an assistant to the principal), and Edward L. Whigham (superintendent of the Dade County School System). 1.3

Petitioners presented their evidence at a week-long trial before the District Court. At the close of petitioners' case, respondents moved for dismissal of count three "on the ground that upon the facts and the law the plaintiff has shown no right to relief," Fed. Rule Civ. Proc. 41 (b), and for a ruling that the evidence would be insufficient to go to a jury on counts one and two. 1.4 The District Court granted the motion as to all three counts, and dismissed the complaint without hearing evidence on behalf of the school authorities. App. 142-150. [430 U.S. 651, 655]

Petitioners' evidence may be summarized briefly. In the 1970-1971 school year many of the 237 schools in Dade County used corporal punishment as a means of maintaining discipline pursuant to Florida legislation and a local School Board regulation. 1.5 The statute then in effect authorized limited corporal punishment by negative inference, proscribing punishment which was "degrading or unduly severe" or which was inflicted without prior consultation with the principal or the teacher in charge of the school. Fla. Stat. Ann. § 232.27 (1961). 1.6 The regulation, Dade County School Board Policy [430 U.S. 651, 656] 5144, contained explicit directions and limitations. 1.7 The authorized punishment consisted of paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick. The normal punishment was limited to one to five "licks" or blows with the paddle and resulted in [430 U.S. 651, 657] no apparent physical injury to the student. School authorities viewed corporal punishment as a less drastic means of discipline than suspension or expulsion. Contrary to the procedural requirements of the statute and regulation, teachers often paddled students on their own authority without first consulting the principal. 1.8

Petitioners focused on Drew Junior High School, the school in which both Ingraham and Andrews were enrolled in the fall of 1970. In an apparent reference to Drew, the District Court found that "[t]he instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school." App. 147. The evidence, consisting mainly of the testimony of 16 students, suggests that the regime at Drew was exceptionally harsh. The testimony of Ingraham and Andrews, in support of their individual claims for damages, is illustrative. Because he was slow to respond to his teacher's instructions, Ingraham was subjected to more than 20 licks with a paddle while being held over a table in the principal's office. The paddling was so severe that he suffered a hematoma 1.9 requiring medical attention and keeping him out of school for several days. 1.10 Andrews was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week. 1.11 [430 U.S. 651, 658]

The District Court made no findings on the credibility of the students' testimony. Rather, assuming their testimony to be credible, the court found no constitutional basis for relief. With respect to count three, the class action, the court concluded that the punishment authorized and practiced generally in the county schools violated no constitutional right. *Id.*, at 143, 149. With respect to counts one and two, the individual damages actions, the court concluded that while corporal punishment could in some cases violate the Eighth Amendment, in this case a jury could not lawfully find "the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring 'punishment' to the constitutional level of 'cruel and unusual punishment.'" *Id.*, at 143.

A panel of the Court of Appeals voted to reverse. 498 F.2d 248 (CA5 1974). The panel concluded that the punishment was so severe and oppressive as to violate the Eighth and Fourteenth Amendments, and that the procedures outlined in Policy 5144 failed to satisfy the requirements of the Due Process Clause. Upon rehearing, the en banc court rejected these conclusions and affirmed the judgment of the District Court. 525 F.2d 909 (1976). The full court held that the Due Process Clause did not require notice or an opportunity to be heard:

> "In essence, we refuse to set forth, as constitutionally mandated, procedural standards for an activity which is not substantial enough, on a constitutional level, to justify the time and effort which would have to be expended by the school in adhering to those procedures or to justify further interference by federal courts into the internal affairs of public schools." *Id.*, at 919.

The court also rejected the petitioners' substantive contentions. The Eighth Amendment, in the court's view, was simply inapplicable to corporal punishment in public [430 U.S. 651, 659] schools. Stressing the likelihood of civil and criminal liability in state law, if petitioners' evidence were believed, the court held that "[t]he administration of corporal punishment in public schools, whether or not excessively administered, does not come within the scope of Eighth Amendment protection." *Id.*, at 915. Nor was there any substantive violation of the Due Process Clause. The court noted that "[p]addling of recalcitrant children has long been an accepted method of promoting good behavior

and instilling notions of responsibility and decorum into the mischievous heads of school children." *Id.*, at 917. The court refused to examine instances of punishment individually:

> "We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. . . ." *Ibid.*

We granted certiorari, limited to the questions of cruel and unusual punishment and procedural due process. 425 U.S. 990. 1.12

II

In addressing the scope of the Eighth Amendment's prohibition on cruel and unusual punishment, this Court has found it useful to refer to "[t]raditional common-law concepts," *Powell v. Texas*, 392 U.S. 514, 535 (1968) (plurality opinion), and to the "attitude[s] which our society has traditionally taken." *Id.*, at 531. So, too, in defining the requirements [430 U.S. 651, 660] of procedural due process under the Fifth and Fourteenth Amendments, the Court has been attuned to what "has always been the law of the land," *United States v. Barnett*, 376 U.S. 681, 692 (1964), and to "traditional ideas of fair procedure." *Greene v. McElroy*, 360 U.S. 474, 508 (1959). We therefore begin by examining the way in which our traditions and our laws have responded to the use of corporal punishment in public schools.

The use of corporal punishment in this country as a means of disciplining schoolchildren dates back to the colonial period. 1.13 It has survived the transformation of primary and secondary education from the colonials' reliance on optional private arrangements to our present system of compulsory education and dependence on public schools. 1.14 Despite the general abandonment of corporal punishment as a means of punishing criminal offenders, 1.15 the practice continues to play a role in the public education of schoolchildren in most parts of the country. 1.16 Professional and public opinion is sharply divided on the practice, 1.17 and has been for more than [430 U.S. 651, 661] a century. 1.18 Yet we can discern no trend toward its elimination.

At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child. 1.19 Blackstone catalogued among the "absolute rights of individuals" the right "to security from the corporal insults of menaces, assaults, beating, and wounding," 1 W. Blackstone, Commentaries *134, but he did not regard it a "corporal insult" for a teacher to inflict "moderate correction" on a child in his care. To the extent that force was "necessary to answer the purposes for which [the teacher] is employed," Blackstone viewed it as "justifiable or lawful." *Id.*, at *453; 3 *id.*, at *120. The basic doctrine has not changed. The prevalent rule in this country today privileges such force as a teacher or administrator "reasonably believes to be necessary for [the child's] proper control, training, or education." Restatement (Second) of Torts § 147 (2) (1965); see *id.*, § 153 (2). To the extent that the

force is excessive or unreasonable, the educator in virtually all States is subject to possible civil and criminal liability. 1.20 [430 U.S. 651, 662]

Although the early cases viewed the authority of the teacher as deriving from the parents, 1.21 the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary "for the proper education of the child and for the maintenance of group discipline." 1 F. Harper & F. James, Law of Torts § 3.20, p. 292 (1956). 1.22 All of the circumstances are to be taken into account in determining whether the punishment is reasonable in a particular case. Among the most important considerations are the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline. *Id.*, at 290-291; Restatement (Second) of Torts § 150, Comments c-e, p. 268 (1965).

Of the 23 States that have addressed the problem through legislation, 21 have authorized the moderate use of corporal punishment in public schools. 1.23 Of these States only a few [430 U.S. 651, 663] have elaborated on the common-law test of reasonableness, typically providing for approval or notification of the child's parents, 1.24 or for infliction of punishment only by the principal 1.25 or in the presence of an adult witness. 1.26 Only two States, Massachusetts and New Jersey, have prohibited all corporal punishment in their public schools. 1.27 Where the legislatures have not acted, the state courts have uniformly preserved the common-law rule permitting teachers to use reasonable force in disciplining children in their charge. 1.28

Against this background of historical and contemporary approval of reasonable corporal punishment, we turn to the constitutional questions before us. [430 U.S. 651, 664]

III

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this long-standing limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools.

A

The history of the Eighth Amendment is well known. 1.29 The text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689. The English version, adopted after the accession of William and Mary, was

intended to curb the excesses of English judges under the reign of James II. Historians have viewed the English provision as a reaction either to the "Bloody Assize," the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, 1.30 or to the perjury prosecution of Titus Oates in the same year. 1.31 In [430 U.S. 651, 665] either case, the exclusive concern of the English version was the conduct of judges in enforcing the criminal law. The original draft introduced in the House of Commons provided: 1.32

> "The requiring excessive bail of persons committed in criminal cases and imposing excessive fines, and illegal punishments, to be prevented."

Although the reference to "criminal cases" was eliminated from the final draft, the preservation of a similar reference in the preamble 1.33 indicates that the deletion was without substantive significance. Thus, Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments. 1.34

The Americans who adopted the language of this part of the English Bill of Rights in framing their own State and Federal Constitutions 100 years later feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured. *Weems v. United States*, 217 U.S. 349, 371-373 (1910). Indeed, the principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments. *In re Kemmler*, 136 U.S. 436, 446-447 (1890); [430 U.S. 651, 666] *Furman v. Georgia*, 408 U.S. 238, 263 (1972) (BRENNAN, J., concurring). But if the American provision was intended to restrain government more broadly than its English model, the subject to which it was intended to apply—the criminal process—was the same.

At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. 1.35 This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights. When the Eighth Amendment was debated in the First Congress, it was met by the objection that the Cruel and Unusual Punishments Clause might have the effect of outlawing what were then the common criminal punishments of hanging, whipping, and earcropping. 1 Annals of Cong. 754 (1789). The objection was not heeded, "precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes." *Furman v. Georgia*, *supra*, at 263.

B

In light of this history, it is not surprising to find that every decision of this Court considering whether a punishment is "cruel and unusual" within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment. [430 U.S. 651, 667] See *Estelle v. Gamble*, 429 U.S. 97 (1976) (incarceration without medical care); *Gregg v. Georgia*, 428 U.S. 153 (1976) (execution for murder); *Furman v. Georgia*, *supra* (execution for murder); *Powell v. Texas*, 392 U.S. 514 (1968) (plurality opinion) ($20 fine for public drunkenness); *Robinson v. California*, 370 U.S. 660 (1962)

(incarceration as a criminal for addiction to narcotics); *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (expatriation for desertion); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (execution by electrocution after a failed first attempt); *Weems v. United States*, *supra* (15 years' imprisonment and other penalties for falsifying an official document); *Howard v. Fleming*, 191 U.S. 126 (1903) (10 years' imprisonment for conspiracy to defraud); *In re Kemmler*, *supra* (execution by electrocution); *Wilkerson v. Utah*, 99 U.S. 130 (1879) (execution by firing squad); *Pervear v. Commonwealth*, 5 Wall. 475 (1867) (fine and imprisonment at hard labor for bootlegging).

These decisions recognize that the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes, e.g., *Estelle v. Gamble supra*; *Trop v. Dulles*, *supra*; second, it proscribes punishment grossly disproportionate to the severity of the crime, e.g., *Weems v. United States*, *supra*; and third, it imposes substantive limits on what can be made criminal and punished as such, e.g., *Robinson v. California*, *supra*. We have recognized the last limitation as one to be applied sparingly. "The primary purpose of [the Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes. . . ." *Powell v. Texas*, *supra*, at 531-532 (plurality opinion).

In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty [430 U.S. 651, 668] finding the Eighth Amendment inapplicable. Thus, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Court held the Eighth Amendment inapplicable to the deportation of aliens on the ground that "deportation is not a punishment for crime." *Id.*, at 730; see *Mahler v. Eby*, 264 U.S. 32 (1924); *Bugajewitz v. Adams*, 228 U.S. 585 (1913). And in *Uphaus v. Wyman*, 360 U.S. 72 (1959), the Court sustained a judgment of civil contempt, resulting in incarceration pending compliance with a subpoena, against a claim that the judgment imposed cruel and unusual punishment. It was emphasized that the case involved "'essentially a civil remedy designed for the benefit of other parties . . . exercised for centuries to secure compliance with judicial decrees.'" *Id.*, at 81, quoting *Green v. United States*, 356 U.S. 165, 197 (1958) (dissenting opinion). 1.36

C

Petitioners acknowledge that the original design of the Cruel and Unusual Punishments Clause was to limit criminal punishments, but urge nonetheless that the prohibition should be extended to ban the paddling of schoolchildren. Observing that the Framers of the Eighth Amendment could not have envisioned our present system of public and compulsory education, with its opportunities for noncriminal punishments, petitioners contend that extension of the prohibition against cruel punishments is necessary lest we afford greater protection [430 U.S. 651, 669] to criminals than to schoolchildren. It would be anomalous, they say, if schoolchildren could be beaten without constitutional redress, while hardened criminals suffering the same beatings at the hands of their jailers might have a valid claim under the Eighth Amendment. See *Jackson v. Bishop*, 404 F.2d 571

(CA8 1968); *cf. Estelle v. Gamble*, *supra*. Whatever force this logic may have in other settings, 1.37 we find it an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools.

The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); see *Meachum v. Fano*, 427 U.S. 215, 224-225 (1976). Prison brutality, as the Court of Appeals observed in this case, is "part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny." 525 F.2d, at 915. 1.38 Even so, the protection afforded [430 U.S. 651, 670] by the Eighth Amendment is limited. After incarceration, only the "'unnecessary and wanton infliction of pain,'" *Estelle v. Gamble*, 429 U.S., at 103, quoting *Gregg v. Georgia*, 428 U.S., at 173, constitutes cruel and unusual punishment forbidden by the Eighth Amendment.

The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.

The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner. In virtually every community where corporal punishment is permitted in the schools, these safeguards are reinforced by the legal constraints of the common law. Public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in both civil and criminal liability. See Part II, *supra*. As long as the schools are open to public scrutiny, there is no reason to believe that the common-law constraints will not effectively remedy and deter excesses such as those alleged in this case. 1.39 [430 U.S. 651, 671]

We conclude that when public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable. The pertinent constitutional question is whether the imposition is consonant with the requirements of due process. 1.40 [430 U.S. 651, 672]

IV

The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual interest are encompassed within the Fourteenth Amendment's

protection of "life, liberty or property"; if protected interests are implicated, we then must decide what procedures constitute "due process of law." *Morrissey v. Brewer*, 408 U.S., at 481; *Board of Regents v. Roth*, 408 U.S. 564, 569-572 (1972). See Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). Following that analysis here, we find that corporal punishment in public schools implicates a constitutionally protected liberty interest, but we hold that the traditional common-law remedies are fully adequate to afford due process.

A

> "[T]he range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth*, *supra*, at 570. We have repeatedly rejected "the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum v. Fano*, 427 U.S., at 224. Due process is required only when a decision of the State implicates an interest within the protection of the Fourteenth Amendment. And "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." *Roth*, *supra*, at 570-571.

The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans [430 U.S. 651, 673] at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see *Dent v. West Virginia*, 129 U.S. 114, 123-124 (1889). Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. 1.41

While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, 1.42 they always have been thought to encompass [430 U.S. 651, 674] freedom from bodily restraint and punishment. See *Rochin v. California*, 342 U.S. 165 (1952). It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.

This constitutionally protected liberty interest is at stake in this case. There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned. But at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated. 1.43

B

> "[T]he question remains what process is due." *Morrissey v. Brewer*, *supra*, at 481. Were it not for the common-law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for

requiring advance procedural safeguards would be strong indeed. 1.44 But here we deal with a punishment—paddling—within that tradition, [430 U.S. 651, 675] and the question is whether the common-law remedies are adequate to afford due process.

> "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Representing a profound attitude of fairness . . . 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . . ." *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring).

Whether in this case the common-law remedies for excessive corporal punishment constitute due process of law must turn on an analysis of the competing interests at stake, viewed against the background of "history, reason, [and] the past course of decisions." The analysis requires consideration of three distinct factors: "First, the private interest that will be affected . . .; second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Cf. Arnett v. Kennedy*, 416 U.S. 134, 167-168 (1974) (POWELL, J., concurring).

1

Because it is rooted in history, the child's liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations. Under the common law, an invasion of personal security gave rise to a right to recover damages in a subsequent judicial proceeding. 3 W. Blackstone, Commentaries *120-121. But the right of recovery was qualified by the concept of justification. Thus, there could be no recovery against a teacher who gave only "moderate correction" to a child. *Id.*, at *120. To the [430 U.S. 651, 676] extent that the force used was reasonable in light of its purpose, it was not wrongful, but rather "justifiable or lawful." *Ibid.*

The concept that reasonable corporal punishment in school is justifiable continues to be recognized in the laws of most States. See Part II, *supra*. It represents "the balance struck by this country," *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting), between the child's interest in personal security and the traditional view that some limited corporal punishment may be necessary in the course of a child's education. Under that longstanding accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege.

This is not to say that the child's interest in procedural safeguards is insubstantial. The school disciplinary process is not "a totally accurate, unerring process, never mistaken and never unfair. . . ." *Goss v. Lopez*, 419 U.S. 565, 579-580 (1975). In any deliberate infliction of corporal punishment on a child who is restrained for that purpose, there is some risk that the intrusion on the child's liberty

will be unjustified and therefore unlawful. In these circumstances the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification.

We turn now to a consideration of the safeguards that are available under applicable Florida law.

2

Florida has continued to recognize, and indeed has strengthened by statute, the common-law right of a child not to be subjected to excessive corporal punishment in school. Under Florida law the teacher and principal of the school decide in the first instance whether corporal punishment is reasonably necessary under the circumstances in order to discipline [430 U.S. 651, 677] a child who has misbehaved. But they must exercise prudence and restraint. For Florida has preserved the traditional judicial proceedings for determining whether the punishment was justified. If the punishment inflicted is later found to have been excessive—not reasonably believed at the time to be necessary for the child's discipline or training—the school authorities inflicting it may be held liable in damages to the child and, if malice is shown, they may be subject to criminal penalties. 1.45

Although students have testified in this case to specific instances of abuse, there is every reason to believe that such mistreatment is an aberration. The uncontradicted evidence suggests that corporal punishment in the Dade County schools was, "[w]ith the exception of a few cases, . . . unremarkable in physical severity." App. 147. Moreover, because paddlings are usually inflicted in response to conduct directly [430 U.S. 651, 678] observed by teachers in their presence, the risk that a child will be paddled without cause is typically insignificant. In the ordinary case, a disciplinary paddling neither threatens seriously to violate any substantive rights nor condemns the child "to suffer grievous loss of any kind." *Anti-Fascist Comm. v. McGrath*, 341 U.S., at 168 (Frankfurter, J., concurring).

In those cases where severe punishment is contemplated, the available civil and criminal sanctions for abuse—considered in light of the openness of the school environment—afford significant protection against unjustified corporal punishment. See *supra*, at 670. Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them. 1.46

It still may be argued, of course, that the child's liberty interest would be better protected if the common-law remedies were supplemented by the administrative safeguards of prior notice and a hearing. We have found frequently that some kind of prior hearing is necessary to guard against arbitrary impositions on interests protected by the Fourteenth Amendment. [430 U.S. 651, 679] See, e.g., *Board of Regents v. Roth*, 408 U.S., at 569-570; *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974); *cf.* Friendly, 123 U. Pa. L. Rev., at 1275-1277. But where the State has preserved what "has always been the law of the land," *United States v. Barnett*, 376 U.S. 681 (1964), the case for administrative safeguards is significantly less compelling. 1.47

There is a relevant analogy in the criminal law. Although the Fourth Amendment specifically proscribes "seizure" of a person without probable cause, the risk that police will act unreasonably in arresting a suspect is not thought to require an advance determination of the facts. In *United States v. Watson*, 423 U.S. 411 (1976), we reaffirmed the traditional common-law rule that police officers may make warrantless public arrests on probable cause. Although we observed that an advance determination of probable cause by a magistrate would be desirable, we declined "to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause. . . ." *Id.*, at 423; see *id.*, at 429 (POWELL, J., concurring). Despite the distinct possibility that a police officer may improperly assess the facts and thus unconstitutionally deprive an individual of [430 U.S. 651, 680] liberty, we declined to depart from the traditional rule by which the officer's perception is subjected to judicial scrutiny only after the fact. 1.48 There is no more reason to depart from tradition and require advance procedural safeguards for intrusions on personal security to which the Fourth Amendment does not apply.

3

But even if the need for advance procedural safeguards were clear, the question would remain whether the incremental benefit could justify the cost. Acceptance of petitioners' claims would work a transformation in the law governing corporal punishment in Florida and most other States. Given the impracticability of formulating a rule of procedural due process that varies with the severity of the particular imposition, 1.49 the prior hearing petitioners seek would have to precede any paddling, however moderate or trivial.

Such a universal constitutional requirement would significantly burden the use of corporal punishment as a disciplinary measure. Hearings—even informal hearings—require time, personnel, and a diversion of attention from normal school pursuits. School authorities may well choose to abandon corporal punishment rather than incur the burdens of complying with the procedural requirements. Teachers, properly concerned with maintaining authority in the classroom, may well prefer to rely on other disciplinary measures—which they may view as less effective—rather than confront the [430 U.S. 651, 681] possible disruption that prior notice and a hearing may entail. 1.50 Paradoxically, such an alteration of disciplinary policy is most likely to occur in the ordinary case where the contemplated punishment is well within the common-law privilege. 1.51

Elimination or curtailment of corporal punishment would be welcomed by many as a societal advance. But when such a policy choice may result from this Court's determination of an asserted right to due process, rather than from the normal processes of community debate and legislative action, the societal costs cannot be dismissed as insubstantial. 1.52 We are reviewing here a legislative judgment, rooted in history and reaffirmed in the laws of many States, that corporal punishment serves important educational interests. This judgment must be viewed in light of the disciplinary problems common-place in the schools. As noted in *Goss v. Lopez*, 419 U.S., at 580: "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." 1.53

Assessment [430 U.S. 651, 682] of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969). 1.54

> "At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews v. Eldridge*, 424 U.S., at 348. We think that point has been reached in this case. In view of the low incidence of abuse, the openness of our schools, and the common-law safeguards that already exist, the risk of error that may result in violation of a schoolchild's substantive rights can only be regarded as minimal. Imposing additional administrative safeguards as a constitutional requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility. We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law. 1.55 [430 U.S. 651, 683]

V

Petitioners cannot prevail on either of the theories before us in this case. The Eighth Amendment's prohibition against cruel and unusual punishment is inapplicable to school paddlings, and the Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's preservation of common-law constraints and remedies. We therefore agree with the Court of Appeals that petitioners' evidence affords no basis for injunctive relief, and that petitioners cannot recover damages on the basis of any Eighth Amendment or procedural due process violation.

Affirmed.

Footnotes

[1.1] As Ingraham and Andrews were minors, the complaint was filed in the names of Eloise Ingraham, James' mother, and Willie Everett, Roosevelt's father.

[1.2] The District Court certified the class, under Fed. Rules Civ. Proc. 23 (b) (2) and (c) (1), as follows: "'All students of the Dade County School system who are subject to the corporal punishment policies issued by the Defendant, Dade County School Board. . . .'" App. 17. One student was specifically excepted from the class by request.

[1.3] The complaint also named the Dade County School Board as a defendant, but the Court of Appeals held that the Board was not amenable to suit under 42 U.S.C. §§ 1981-1988 and dismissed the suit against the Board for want of jurisdiction. 525 F.2d 909, 912 (CA5 1976). This aspect of the Court of Appeals' judgment is not before us.

[1.4] Petitioners had waived their right to jury trial on the claims for damages in counts one and two, but respondents had not. The District Court proceeded initially to hear evidence only on count three, the

claim for injunctive relief. At the close of petitioners' case, however, the parties agreed that the evidence offered on count three (together with certain stipulated testimony) would be considered, for purposes of a motion for directed verdict, as if it had also been offered on counts one and two. It was understood that respondents could reassert a right to jury trial if the motion were denied. App. 142.

[1.5] The evidence does not show how many of the schools actually employed corporal punishment as a means of maintaining discipline. The authorization of the practice by the School Board extended to 231 of the schools in the 1970-1971 school year, but at least 10 of those schools did not administer corporal punishment as a matter of school policy. *Id.*, at 137-139.

[1.6] In the 1970-1971 school year, § 232.27 provided:

> "Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature. . . ."

Effective July 1, 1976, the Florida Legislature amended the law governing corporal punishment. Section 232.27 now reads:

> "Subject to law and to the rules of the district school board, each teacher or other member of the staff of any school shall have such authority for the control and discipline of students as may be assigned to him by the principal or his designated representative and shall keep good order in the classroom and in other places in which he is assigned to be in charge of students. If a teacher feels that corporal punishment is necessary, at least the following procedures shall be followed: (1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used. (2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment. (3) A teacher or principal who has administered punishment shall, [430 U.S. 651, 656] upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other [adult] who was present." Fla. Stat. Ann. § 232.27 (1977) (codifier's notation omitted).

Corporal punishment is now defined as "the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules." § 228.041 (28). The local school boards are expressly authorized to adopt rules governing student conduct and discipline and are directed to make available codes of student conduct. § 230.23 (6). Teachers and principals are given immunity from civil and criminal liability for enforcing disciplinary rules, "[e]xcept in the case of excessive force or cruel and unusual punishment. . . ." § 232.275.

[1.7] In the 1970-1971 school year, Policy 5144 authorized corporal punishment where the failure of other means of seeking cooperation from the student made its use necessary. The regulation specified that the principal should determine the necessity for corporal punishment, that the student should understand the seriousness of the offense and the reason for the punishment, and that the punishment should be administered in the presence of another adult in circumstances not calculated to hold the student up to

shame or ridicule. The regulation cautioned against using corporal punishment against a student under psychological or medical treatment, and warned that the person administering the punishment "must realize his own personal liabilities" in any case of physical injury. App. 15.

While this litigation was pending in the District Court, the Dade County School Board amended Policy 5144 to standardize the size of the paddles used in accordance with the description in the text, to proscribe striking a child with a paddle elsewhere than on the buttocks, to limit the permissible number of "licks" (five for elementary and intermediate grades and seven for junior and senior grades), and to require a contemporaneous explanation of the need for the punishment to the student and a subsequent notification to the parents. App. 126-128.

[1.8] 498 F.2d 248, 255, and n. 7 (1974) (original panel opinion), vacated on rehearing, 525 F.2d 909 (1976); App. 48, 138, 146; Exhibits 14, 15.

[1.9] Stedman's Medical Dictionary (23d ed. 1976) defines "hematoma" as "[a] localized mass of extravasated blood that is relatively or completely confined within an organ or tissue . . .; the blood is usually clotted (or partly clotted), and, depending on how long it has been there, may manifest various degrees of organization and decolorization."

[1.10] App. 3-4, 18-20, 68-85, 129-136.

[1.11] *Id.*, at 4-5, 104-113. The similar experiences of several other students at Drew, to which they individually testified in the District Court, are summarized in the original panel opinion in the Court of Appeals, 498 F.2d, at 257-259.

[1.12] We denied review of a third question presented in the petition for certiorari:

> "Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?" Pet. for Cert. 2.

[1.13] See H. Falk, Corporal Punishment 11-48 (1941); N. Edwards & H. Richey, The School in the American Social Order 115-116 (1947).

[1.14] Public and compulsory education existed in New England before the Revolution, see *id.*, at 50-68, 78-81, 97-113, but the demand for free public schools as we now know them did not gain momentum in the country as a whole until the mid-1800's, and it was not until 1918 that compulsory school attendance laws were in force in all the States. See *Brown v. Board of Education*, 347 U.S. 483, 489 n. 4 (1954), citing Cubberley, Public Education in the United States 408-423, 563-565 (1934 ed.); *cf. Wisconsin v. Yoder*, 406 U.S. 205, 226, and n. 15 (1972).

[1.15] See *Jackson v. Bishop*, 404 F.2d 571, 580 (CA8 1968); Falk, *supra*, at 85-88.

[1.16] See K. Larson & M. Karpas, Effective Secondary School Discipline 146 (1963); A. Reitman, J. Follman, & E. Ladd, Corporal Punishment in the Public Schools 2-5 (ACLU Report 1972).

[1.17] For samplings of scholarly opinion on the use of corporal punishment in the schools, see F. Reardon & R. Reynolds, Corporal Punishment in [430 U.S. 651, 661] Pennsylvania 1-2, 34 (1975); National Education

Association, Report of the Task Force on Corporal Punishment (1972); K. James, Corporal Punishment in the Public Schools 8-16 (1963). Opinion surveys taken since 1970 have consistently shown a majority of teachers and of the general public favoring moderate use of corporal punishment in the lower grades. See Reardon & Reynolds, *supra*, at 2, 23-26; Delaware Department of Public Instruction, Report on the Corporal Punishment Survey 48 (1974); Reitman, Follman, & Ladd, *supra*, at 34-35; National Education Association, *supra*, at 7.

[1.18] See Falk, *supra*, 66-69; *cf. Cooper v. McJunkin*, 4 Ind. 290 (1853).

[1.19] See 1 F. Harper & F. James, Law of Torts § 3.20, pp. 288-292 (1956); Proehl, Tort Liability of Teachers, 12 Vand. L. Rev. 723, 734-738 (1959); W. Prosser, Law of Torts 136-137 (4th ed. 1971).

[1.20] See cases cited n. 28, *infra*. The criminal codes of many States include provisions explicitly recognizing the teacher's common-law privilege [430 U.S. 651, 662] to inflict reasonable corporal punishment. E.g., Ariz. Rev. Stat. Ann. § 13-246 (A) (1) (1956); Conn. Gen. Stat. § 53a-18 (1977); Neb. Rev. Stat. § 28-840 (2) (1975); N. Y. Penal Law § 35.10 (McKinney 1975 and Supp. 1976); Ore. Rev. Stat. § 161.205 (1) (1975).

[1.21] See Proehl, *supra*, at 726, and n. 13.

[1.22] Today, corporal punishment in school is conditioned on parental approval only in California. Cal. Educ. Code § 49001 (West Supp. 1977). *Cf. Morrow v. Wood*, 35 Wis. 59 (1874). This Court has held in a summary affirmance that parental approval of corporal punishment is not constitutionally required. *Baker v. Owen*, 423 U.S. 907 (1975), aff'g 395 F. Supp. 294 (MDNC).

[1.23] Cal. Educ. Code §§ 49000-49001 (West Supp. 1977); Del. Code Ann., Tit. 14, § 701 (Supp. 1976); Fla. Stat. Ann. § 232.27 (1977); Ga. Code Ann. §§ 32-835, 32-836 (1976); Haw. Rev. Stat. §§ 298-16 (1975 Supp.), 703-309 (2) (Spec. Pamphlet 1975); Ill. Ann. Stat., c. 122, §§ 24-24, 34-84a (1977 Supp.); Ind. Code Ann. § 20-8.1-5-2 (1975); Md. Ann. Code, Art. 77, § 98B (1975) (in specified counties); Mich. Comp. Laws Ann., § 340.756 [430 U.S. 651, 663] (1970); Mont. Rev. Codes Ann. § 75-6109 (1971); Nev. Rev. Stat. § 392.465 (1973); N. C. Gen. Stat. § 115-146 (1975); Ohio Rev. Code Ann. § 3319.41 (1972); Okla. Stat. Ann., Tit. 70, § 6-114 (1972); Pa. Stat. Ann., Tit. 24, § 13-1317 (Supp. 1976); S. C. Code § 59-63-260 (1977); S. D. Compiled Laws Ann. § 13-32-2 (1975); Vt. Stat. Ann., Tit. 16, § 1161 (Supp. 1976); Va. Code Ann. § 22-231.1 (1973); W. Va. Code, § 18A-5-1 (1977); Wyo. Stat. § 21.1-64 (Supp. 1975).

[1.24] Cal. Educ. Code § 49001 (West Supp. 1977) (requiring prior parental approval in writing); Fla. Stat. Ann. § 232.27 (3) (1977) (requiring a written explanation on request); Mont. Rev. Codes Ann. § 75-6109 (1971) (requiring prior parental notification).

[1.25] Md. Ann. Code, Art. 77, § 98B (1975).

[1.26] Fla. Stat. Ann. § 232.27 (1977); Haw. Rev. Stats. § 298-16 (1975 Supp.); Mont. Rev. Codes Ann. § 75-6109 (1971).

[1.27] Mass. Gen. Laws Ann., c. 71, § 37G (Supp. 1976); N. J. Stat. Ann. § 18A: 6-1 (1968).

[1.28] E.g., *Suits v. Glover*, 260 Ala. 449, 71 So.2d 49 (1954); *La Frentz v. Gallagher*, 105 Ariz. 255, 462 P.2d 804 (1969); *Berry v. Arnold School Dist.*, 199 Ark. 1118, 137 S. W. 2d 256 (1940); *Andreozzi v. Rubano*, 145

Conn. 280, 141 A. 2d 639 (1958); *Tinkham v. Kole*, 252 Iowa 1303, 110 N. W. 2d 258 (1961); *Carr v. Wright*, 423 S. W. 2d 521 (Ky. 1968); *Christman v. Hickman*, 225 Mo. App. 828, 37 S. W. 2d 672 (1931); *Simms v. School Dist. No. 1*, 13 Ore. App. 119, 508 P.2d 236 (1973); *Marlar v. Bill*, 181 Tenn. 100, 178 S. W. 2d 634 (1944); *Prendergast v. Masterson*, 196 S. W. 246 (Tex. Civ. App. 1917). See generally sources cited n. 19, *supra*.

[1.29] See *Gregg v. Georgia*, 428 U.S. 153, 168-173 (1976) (joint opinion of STEWART, POWELL, and STEVENS, JJ.) (hereinafter joint opinion); *Furman v. Georgia*, 408 U.S. 238, 316-328 (1972) (MARSHALL, J., concurring); Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839 (1969).

[1.30] See I. Brant, The Bill of Rights 155 (1965).

[1.31] See Granucci, *supra*, at 852-860.

[1.32] *Id.*, at 855.

[1.33] The preamble reads in part:

> "WHEREAS the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate . . . the laws and liberties of this kingdom. . . . 10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. 11. And excessive fines have been imposed; and illegal and cruel punishments inflicted. . . ." R. Perry & J. Cooper, Sources of Our Liberties 245-246 (1959).

[1.34] 4 W. Blackstone, Commentaries *297 (bail), *379 (fines and other punishments).

[1.35] Abraham Holmes of Massachusetts complained specifically of the absence of a provision restraining Congress in its power to determine "what kind of punishments shall be inflicted on persons convicted of crimes." 2 J. Elliot, Debates on the Federal Constitution 111 (1876). Patrick Henry was of the same mind:

> "What says our [Virginia] bill of rights?—'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more—you depart from the genius of your country. . . ." 3 *id.*, at 447.

[1.36] In urging us to extend the Eighth Amendment to ban school paddlings, petitioners rely on the many decisions in which this Court has held that the prohibition against "cruel and unusual" punishments is not "'fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Gregg v. Georgia*, 428 U.S., at 171 (joint opinion); see, e.g., *Trop v. Dulles*, 356 U.S., 86, 100-101 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 373, 378 (1910). This reliance is misplaced. Our Eighth Amendment decisions have referred to "evolving standards of decency," *Trop v. Dulles*, *supra*, at 101, only in determining whether criminal punishments are "cruel and unusual" under the Amendment.

[1.37] Some punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. *Cf. In re Gault*, 387 U.S. 1 (1967). We have no occasion in this case, for example,

to consider whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment.

[1.38] Judge Friendly similarly has observed that the Cruel and Unusual Punishments Clause "can fairly be deemed to be applicable to the manner in which an otherwise constitutional sentence . . . is carried out by an executioner, see *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 . . . (1947), or to cover conditions of confinement which may make intolerable an otherwise constitutional term of imprisonment." *Johnson v. Glick*, 481 F.2d 1028, 1032 (CA2), cert. denied, 414 U.S. 1033 (1973) (citation omitted).

[1.39] Putting history aside as irrelevant, the dissenting opinion of MR. JUSTICE WHITE argues that a "purposive analysis" should control the reach of the Eighth Amendment. *Post*, at 686-688. There is no support whatever for this approach in the decisions of this Court. Although an imposition must be "punishment" for the Cruel and Unusual Punishments Clause to apply, the Court has never held that *all* punishments are subject to Eighth Amendment scrutiny. See n. 40, *infra*. The [430 U.S. 651, 671] applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation. See *Gregg v. Georgia*, 428 U.S., at 169-173 (joint opinion); *Furman v. Georgia*, 408 U.S., at 315-328 (MARSHALL, J., concurring).

The dissenting opinion warns that as a consequence of our decision today, teachers may "cut off a child's ear for being late to class." *Post*, at 684. This rhetoric bears no relation to reality or to the issues presented in this case. The laws of virtually every State forbid the excessive physical punishment of schoolchildren. Yet the logic of the dissent would make the judgment of which disciplinary punishments are reasonable and which are excessive a matter of constitutional principle in every case, to be decided ultimately by this Court. The hazards of such a broad reading of the Eighth Amendment are clear. "It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary—it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow." *Powell v. Texas*, 392 U.S. 514, 547-548 (1968) (opinion of Black, J.).

[1.40] Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. See *United States v. Lovett*, 328 U.S. 303, 317-318 (1946). Thus, in *Trop v. Dulles*, 356 U.S. 86 (1958), the plurality appropriately took the view that denationalization was an impermissible punishment for wartime desertion under the Eighth Amendment, because desertion already had been established at a criminal trial. But in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), where the Court considered denationalization as a punishment for evading the draft, the Court refused to reach the Eighth Amendment issue, holding instead that the punishment could be imposed only through the criminal process. *Id.*, at 162-167, 186, and n. 43. As these cases demonstrate, the State does not acquire the power to punish with which the Eighth Amendment is concerned until after [430 U.S. 651, 672] it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.

[1.41] See 1 W. Blackstone, Commentaries *134. Under the 39th Article of the Magna Carta, an individual could not be deprived of this right of personal security "except by the legal judgment of his peers or by the law of the land." Perry & Cooper, *supra*, n. 33, at 17. By subsequent enactments of Parliament during the time of Edward III, the right was protected from deprivation except "by due process of law." See Shattuck, The True Meaning of the Term "Liberty," 4 Harv. L. Rev. 365, 372-373 (1891).

[1.42] See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (sterilization); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251-252 (1891) (physical examinations); *cf. ICC v. Brimson*, 154 U.S. 447, 479 (1894).

The right of personal security is also protected by the Fourth Amendment, which was made applicable to the States through the Fourteenth because its protection was viewed as "implicit in 'the concept of ordered liberty' . . . enshrined in the history and the basic constitutional documents of English-speaking peoples." *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). It has been said of the Fourth Amendment that its "overriding function . . . is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). But the principal concern of that Amendment's prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations. See *Whalen v. Roe*, 429 U.S. 589, 604 n. 32 (1977). Petitioners do not contend that the Fourth Amendment applies, according to its terms, to corporal punishment in public school.

[1.43] Unlike *Goss v. Lopez*, 419 U.S. 565 (1975), this case does not involve the state-created property interest in public education. The purpose of corporal punishment is to correct a child's behavior without interrupting his education. That corporal punishment may, in a rare case, have the unintended effect of temporarily removing a child from school affords no basis for concluding that the practice itself deprives students of property protected by the Fourteenth Amendment.

Nor does this case involve any state-created interest in liberty going beyond the Fourteenth Amendment's protection of freedom from bodily restraint and corporal punishment. *Cf. Meachum v. Fano*, 427 U.S. 215, 225-227 (1976).

[1.44] If the common-law privilege to inflict reasonable corporal punishment in school were inapplicable, it is doubtful whether any procedure short of a trial in a criminal or juvenile court could satisfy the requirements of procedural due process for the imposition of such punishment. See *United States v. Lovett*, 328 U.S., at 317-318; *cf. Breed v. Jones*, 421 U.S. 519, 528-529 (1975).

[1.45] See *supra*, at 655-657, 661. The statutory prohibition against "degrading" or unnecessarily "severe" corporal punishment in former § 232.27 has been construed as a statement of the common-law principle. See 1937 Op. Fla. Atty. Gen., Biennial Report of the Atty. Gen. 169 (1937-1938); *cf.* 1957 Op. Fla. Atty. Gen., Biennial Report of the Atty. Gen. 7, 8 (1957-1958). Florida Stat. Ann. § 827.03 (3) (1976) makes malicious punishment of a child a felony. Both the District Court, App. 144, and the Court of Appeals, 525 F.2d, at 915, expressed the view that the common-law tort remedy was available to the petitioners in this case. And petitioners conceded in this Court that a teacher who inflicts excessive punishment on a child may be held both civilly and criminally liable under Florida law. Brief for Petitioners 33 n. 11, 34; Tr. of Oral Arg. 17, 52-53.

In view of the statutory adoption of the common-law rule, and the unanimity of the parties and the courts below, the doubts expressed in MR. JUSTICE WHITE's dissenting opinion as to the availability of tort

remedies in Florida can only be viewed as chimerical. The dissent makes much of the fact that no Florida court has ever "recognized" a damages remedy for unreasonable corporal punishment. *Post*, at 694 n. 11, 700. But the absence of reported Florida decisions hardly suggests that no remedy is available. Rather, it merely confirms the commonsense judgment that excessive corporal punishment is exceedingly rare in the public schools.

[1.46] The low incidence of abuse, and the availability of established judicial remedies in the event of abuse, distinguish this case from *Goss v. Lopez*, 419 U.S. 565 (1975). The Ohio law struck down in Goss provided for suspensions from public school of up to 10 days without "any written procedure applicable to suspensions." *Id.*, at 567. Although Ohio law provided generally for administrative review, Ohio Rev. Code Ann. § 2506.01 (Supp. 1973), the Court assumed that the short suspensions would not be stayed pending review, with the result that the review proceeding could serve neither a deterrent nor a remedial function. 419 U.S., at 581 n. 10. In these circumstances, the Court held the law authorizing suspensions unconstitutional for failure to require "that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension. . . ." *Id.*, at 584. The subsequent civil and criminal proceedings available in this case may be viewed as affording substantially greater protection to the child than the informal conference mandated by Goss.

[1.47] "[P]rior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law." Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 431 (1977) (footnote omitted). See *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (CA7 1975), modified en banc, 545 F.2d 565 (1976), cert. pending, No. 76-6204.

We have no occasion in this case, see *supra*, at 659, and n. 12, to decide whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause.

[1.48] See also *Terry v. Ohio*, 392 U.S. 1 (1968). The reasonableness of a warrantless public arrest may be subjected to subsequent judicial scrutiny in a civil action against the law enforcement officer or in a suppression hearing to determine whether any evidence seized in the arrest may be used in a criminal trial.

[1.49] "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. . . ." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976).

[1.50] If a prior hearing, with the inevitable attendant publicity within the school, resulted in rejection of the teacher's recommendation, the consequent impairment of the teacher's ability to maintain discipline in the classroom would not be insubstantial.

[1.51] The effect of interposing prior procedural safeguards may well be to make the punishment more severe by increasing the anxiety of the child. For this reason, the school authorities in Dade County found it desirable that the punishment be inflicted as soon as possible after the infraction. App. 48-49.

[1.52] "It may be true that procedural regularity in disciplinary proceedings promotes a sense of institutional rapport and open communication, a perception of fair treatment, and provides the offender and his fellow students a showcase of democracy at work. But . . . [r]espect for democratic institutions will equally dissipate if they are thought too ineffectual to provide their students an environment of order in which the educational process may go forward. . . ." Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 Sup. Ct. Rev. 25, 71-72.

[1.53] The seriousness of the disciplinary problems in the Nation's public schools has been documented in a recent congressional report, Senate Committee on the Judiciary, Subcommittee to Investigate Juvenile [430 U.S. 651, 682] Delinquency, *Challenge for the Third Century: Education in a Safe Environment—Final Report on the Nature and Prevention of School Violence and Vandalism*, 95th Cong., 1st Sess. (Comm. Print 1977).

[1.54] The need to maintain order in a trial courtroom raises similar problems. In that context, this Court has recognized the power of the trial judge "to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him." *Taylor v. Hayes*, 418 U.S. 488, 497 (1974), citing *Ex parte Terry*, 128 U.S. 289 (1888). The punishment so imposed may be as severe as six months in prison. See *Codispoti v. Pennsylvania*, 418 U.S. 506, 513-515 (1974); *cf. Muniz v. Hoffman*, 422 U.S. 454, 475-476 (1975).

[1.55] MR. JUSTICE WHITE's dissenting opinion offers no manageable standards for determining what process is due in any particular case. The [430 U.S. 651, 683] dissent apparently would require, as a general rule, only "an informal give-and-take between student and disciplinarian." *Post*, at 693. But the dissent would depart from these "minimal procedures"—requiring even witnesses, counsel, and cross-examination—in cases where the punishment reaches some undefined level of severity. *Post*, at 700 n. 18. School authorities are left to guess at the degree of punishment that will require more than an "informal give-and-take" and at the additional process that may be constitutionally required. The impracticality of such an approach is self-evident, and illustrates the hazards of ignoring the traditional solution of the common law.

We agree with the dissent that the *Goss* procedures will often be, "if anything, less than a fair-minded school principal would impose upon himself." *Post*, at 700, quoting *Goss*, 419 U.S., at 583. But before this Court invokes the Constitution to impose a procedural requirement, it should be reasonably certain that the effect will be to afford protection appropriate to the constitutional interests at stake. The dissenting opinion's reading of the Constitution suggests no such beneficial result and, indeed, invites a lowering of existing constitutional standards.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

Today the Court holds that corporal punishment in public schools, no matter how severe, can never be the subject of the protections afforded by the Eighth Amendment. It also holds [430 U.S. 651, 684] that students in the public school systems are not constitutionally entitled to a hearing of any sort before beatings can be inflicted on them. Because I believe that these holdings are inconsistent with the prior decisions of this Court and are contrary to a reasoned analysis of the constitutional provisions involved, I respectfully dissent.

I

A

The Eighth Amendment places a flat prohibition against the infliction of "cruel and unusual punishments." This reflects a societal judgment that there are some punishments that are so barbaric and inhumane that we will not permit them to be imposed on anyone, no matter how opprobrious the offense. See *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring). If there are some punishments that are so barbaric that they may not be imposed for the commission of crimes, designated by our social system as the most thoroughly reprehensible acts an individual can commit, then, *a fortiori*, similar punishments may not be imposed on persons for less culpable acts, such as breaches of school discipline. Thus, if it is constitutionally impermissible to cut off someone's ear for the commission of murder, it must be unconstitutional to cut off a child's ear for being late to class. 2.1 Although there were no ears cut off in this case, the [430 U.S. 651, 685] record reveals beatings so severe that if they were inflicted on a hardened criminal for the commission of a serious crime, they might not pass constitutional muster.

Nevertheless, the majority holds that the Eighth Amendment "was designed to protect [only] those convicted of crimes," *ante*, at 664, relying on a vague and inconclusive recitation of the history of the Amendment. Yet the constitutional prohibition is against cruel and unusual punishments; nowhere is that prohibition limited or modified by the language of the Constitution. Certainly, the fact that the Framers did not choose to insert the word "criminal" into the language of the Eighth Amendment is strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed.

No one can deny that spanking of schoolchildren is "punishment" under any reasonable reading of the word, for the similarities between spanking in public schools and other forms of punishment are too obvious to ignore. Like other forms of punishment, spanking of schoolchildren involves an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed [430 U.S. 651, 686] for the purpose of rehabilitating the offender, deterring the offender and others like him from committing the violation in the future, and inflicting some measure of social retribution for the harm that has been done.

B

We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process. 2.2 The effect has been that "every decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." *Ante*, at 666. The Court would have us believe from this fact that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong. "[E]ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." *Trop v. Dulles*, 356 U.S. 86, 95 (1958) (plurality opinion). The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated [430 U.S. 651, 687] with punishment, such as retribution, rehabilitation, or deterrence. 2.3 *Id.*, at 96. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

If this purposive approach were followed in the present case, it would be clear that spanking in the Florida public schools is punishment within the meaning of the Eighth Amendment. The District Court found that "[c]orporal punishment is one of a variety of measures employed in the school system for the correction of pupil behavior and the preservation of order." App. 146. Behavior correction and [430 U.S. 651, 688] preservation of order are purposes ordinarily associated with punishment.

Without even mentioning the purposive analysis applied in the prior decisions of this Court, the majority adopts a rule that turns on the label given to the offense for which the punishment is inflicted. Thus, the record in this case reveals that one student at Drew Junior High School received 50 licks with a paddle for allegedly making an obscene telephone call. Brief for Petitioners 13. The majority holds that the Eighth Amendment does not prohibit such punishment since it was only inflicted for a breach of school discipline. However, that same conduct is punishable as a misdemeanor under Florida law, Fla. Stat. Ann. § 365.16 (Supp. 1977), and there can be little doubt that if that same "punishment" had been inflicted by an officer of the state courts for violation of § 365.16, it would have had to satisfy the requirements of the Eighth Amendment.

C

In fact, as the Court recognizes, the Eighth Amendment has never been confined to criminal punishments. 2.4 Nevertheless, the majority adheres to its view that any protections afforded by the Eighth Amendment must have something to do with [430 U.S. 651, 689] criminals, and it would therefore confine any exceptions to its general rule that only criminal punishments are covered by the Eighth Amendment to abuses inflicted on prisoners. Thus, if a prisoner is beaten mercilessly for a breach of discipline, he is entitled to the protection of the Eighth Amendment, while a schoolchild who commits the same breach of discipline and is similarly beaten is simply not covered.

The purported explanation of this anomaly is the assertion that schoolchildren have no need for the Eighth Amendment. We are told that schools are open institutions, subject to constant public scrutiny; that schoolchildren have adequate remedies under state law; 2.5 and that prisoners suffer the social stigma of being labeled as criminals. How any of these policy considerations got into the Constitution is difficult to discern, for the Court has never considered any of these factors in determining the scope of the Eighth Amendment. 2.6 [430 U.S. 651, 690]

The essence of the majority's argument is that schoolchildren do not need Eighth Amendment protection because corporal punishment is less subject to abuse in the public schools than it is in the prison system. 2.7 However, it cannot be reasonably suggested that just because cruel and unusual punishments may occur less frequently under public scrutiny, they will not occur at all. The mere fact that a public flogging or a public execution would be available for all to see would not render the punishment constitutional if it were otherwise impermissible. Similarly, the majority would not suggest that a prisoner who is placed in a minimum-security prison and permitted to go home to his family on the weekends should be any less entitled to Eighth Amendment protections than his counterpart in a maximum-security prison. In short, if a punishment is so barbaric and inhumane that it goes beyond the tolerance of a civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity.

Nor is it an adequate answer that schoolchildren may have other state and constitutional remedies available to them. Even assuming that the remedies available to public school students are adequate under Florida law, 2.8 the availability of state remedies has never been determinative of the coverage or of the protections afforded by the Eighth Amendment. The reason is obvious. The fact that a person may have a [430 U.S. 651, 691] state-law cause of action against a public official who tortures him with a thumbscrew for the commission of an antisocial act has nothing to do with the fact that such official conduct is cruel and unusual punishment prohibited by the Eighth Amendment. Indeed, the majority's view was implicitly rejected this Term in *Estelle v. Gamble*, 429 U.S. 97 (1976), when the Court held that failure to provide for the medical needs of prisoners could constitute cruel and unusual punishment even though a medical malpractice remedy in tort was available to prisoners under state law. *Id.*, at 107 n. 15.

D

By holding that the Eighth Amendment protects only criminals, the majority adopts the view that one is entitled to the protections afforded by the Eighth Amendment only if he is punished for acts that are sufficiently opprobrious for society to make them "criminal." This is a curious holding in view of the fact that the more culpable the offender the more likely it is that the punishment will not be disproportionate to the offense, and consequently, the less likely it is that the punishment will be cruel and unusual. 2.9 Conversely, a public school student who is spanked for a mere breach of discipline may sometimes have a strong argument that the punishment does not fit the offense, depending upon the severity of the beating, and therefore that it is cruel and unusual. Yet

the majority would afford the student no protection no matter how inhumane and barbaric the punishment inflicted on him might be.

The issue presented in this phase of the case is limited to whether corporal punishment in public schools can ever be prohibited by the Eighth Amendment. I am therefore not [430 U.S. 651, 692] suggesting that spanking in the public schools is in every instance prohibited by the Eighth Amendment. My own view is that it is not. I only take issue with the extreme view of the majority that corporal punishment in public schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment. Where corporal punishment becomes so severe as to be unacceptable in a civilized society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools.

II

The majority concedes that corporal punishment in the public schools implicates an interest protected by the Due Process Clause—the liberty interest of the student to be free from "bodily restraint and punishment" involving "appreciable physical pain" inflicted by persons acting under color of state law. *Ante*, at 674. The question remaining, as the majority recognizes, is what process is due.

The reason that the Constitution requires a State to provide "due process of law" when it punishes an individual for misconduct is to protect the individual from erroneous or mistaken punishment that the State would not have inflicted had it found the facts in a more reliable way. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335, 344 (1976). In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court applied this principle to the school disciplinary process, holding that a student must be given an informal opportunity to be heard before he is finally suspended from public school.

> "*Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others*, and the controlling facts and the nature of the conduct under challenge are often disputed. *The risk of error is not at all trivial*, and it should be guarded against if that may be done without prohibitive cost or interference [430 U.S. 651, 693] with the educational process." *Id.*, at 580. (Emphasis added.)

To guard against this risk of punishing an innocent child, the Due Process Clause requires, not an "elaborate hearing" before a neutral party, but simply "an informal give-and-take between student and disciplinarian" which gives the student "an opportunity to explain his version of the facts." *Id.*, at 580, 582, 584.

The Court now holds that these "rudimentary precautions against unfair or mistaken findings of misconduct," *id.*, at 581, are not required if the student is punished with "appreciable physical pain" rather than with a suspension, even though both punishments deprive the student of a constitutionally protected interest. Although the respondent school authorities provide absolutely no process to the student before the punishment is finally inflicted, the majority concludes that the

student is nonetheless given due process because he can later sue the teacher and recover damages if the punishment was "excessive."

This tort action is utterly inadequate to protect against erroneous infliction of punishment for two reasons. 2.10 First, under Florida law, a student punished for an act he did not commit cannot recover damages from a teacher "proceeding [430 U.S. 651, 694] in utmost good faith . . . on the reports and advice of others," *supra*, at 692; the student has no remedy at all for punishment imposed on the basis of mistaken facts, at least as long as the punishment was reasonable from the point of view of the disciplinarian, uninformed by any prior hearing. 2.11 The "traditional [430 U.S. 651, 695] common-law remedies" on which the majority relies, *ante*, at 672, thus do nothing to protect the student from the danger that concerned the Court in Goss—the risk of reasonable, good-faith mistake in the school disciplinary process.

Second, and more important, even if the student could sue for good-faith error in the infliction of punishment, the lawsuit occurs after the punishment has been finally imposed. The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding. There is every reason to require, as the Court did in Goss, a few minutes of "informal give-and-take between student and disciplinarian" [430 U.S. 651, 696] as a "meaningful hedge" against the erroneous infliction of irreparable injury. 419 U.S., at 583-584. 2.12

The majority's conclusion that a damages remedy for excessive corporal punishment affords adequate process rests on the novel theory that the State may punish an individual without giving him any opportunity to present his side of the story, as long as he can later recover damages from a state official if he is innocent. The logic of this theory would permit a State that punished speeding with a one-day jail sentence to make a driver serve his sentence first without a trial and then sue to recover damages for wrongful imprisonment. 2.13 Similarly, the State could finally take away a prisoner's good-time credits for alleged disciplinary infractions and require him to bring a damages suit after he was eventually released. There is no authority for this theory, nor does the majority purport to find any, 2.14 in the procedural due process [430 U.S. 651, 697] decisions of this Court. Those cases have "consistently held that *some kind of hearing is required at some time before a person is finally deprived* of his property interests . . . , [and that] a person's liberty is equally protected. . . ." *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). (Emphasis added.)

The majority attempts to support its novel theory by drawing an analogy to warrantless arrests on probable cause, which the Court has held reasonable under the Fourth Amendment. *United States v. Watson*, 423 U.S. 411 (1976). This analogy fails for two reasons. First, the particular requirements of the Fourth Amendment, rooted in the "ancient common-law rule[s]" regulating police practices, *id.*, at 418, must be understood in the context of the criminal justice system for which that Amendment was explicitly tailored. Thus in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court, speaking through MR. JUSTICE POWELL, rejected the argument that procedural protections required in Goss and

other due process [430 U.S. 651, 698] cases should be afforded to a criminal suspect arrested without a warrant.

> "The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial. . . . Moreover, the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. *The relatively simple civil procedures (e.g., prior interview with school principal before suspension) presented in the [procedural due process] cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system*." *Id.*, at 125 n. 27. (Emphasis in last sentence added.)

While a case dealing with warrantless arrests is perhaps not altogether "inapposite and irrelevant in the wholly different context" of the school disciplinary process, such a case is far weaker authority than procedural due process cases such as *Goss v. Lopez*, 419 U.S. 565 (1975), that deal with deprivations of liberty outside the criminal context.

Second, contrary to the majority's suggestion, *ante*, at 680 n. 48, the reason that the Court has upheld warrantless arrests on probable cause is not because the police officer's assessment of the facts "may be subjected to subsequent judicial scrutiny in a civil action against the law enforcement officer or in a suppression hearing. . . ." The reason that the Court has upheld arrests without warrants is that they are the "first stage of an elaborate system" of procedural protections, *Gerstein v. Pugh*, *supra*, at 125 n. 27, and that the State is not free to continue the deprivation beyond this first stage without procedures. The Constitution requires the State to provide [430 U.S. 651, 699] "a fair and reliable determination of probable cause" by a judicial officer prior to the imposition of "*any significant pretrial restraint of liberty*" other than "a brief period of detention to take the administrative steps incident to [a warrantless] arrest." *Id.*, at 114, 125. (Footnote omitted; emphasis added.) This "practical compromise" is made necessary because "requiring a magistrate's review of the factual justification prior to any arrest . . . would constitute an intolerable handicap for legitimate law enforcement," *id.*, at 113; but it is the probable-cause determination prior to any significant period of pretrial incarceration, rather than a damages action or suppression hearing, that affords the suspect due process.

There is, in short, no basis in logic or authority for the majority's suggestion that an action to recover damages for excessive corporal punishment "afford[s] substantially greater protection to the child than the informal conference mandated by *Goss*." 2.15 The majority purports to follow the settled principle that what process is due depends on "'the risk of an erroneous deprivation of [the protected] interest . . . and the probable value, if any, of additional or substitute procedural safeguards'"; 2.16 it recognizes, as did *Goss*, the risk of error in the school disciplinary process 2.17 and concedes that "the child has a strong interest in procedural safeguards that minimize the risk

of wrongful punishment . . .," *ante*, at 676; [430 U.S. 651, 700] but it somehow concludes that this risk is adequately reduced by a damages remedy that never has been recognized by a Florida court, that leaves unprotected the innocent student punished by mistake, and that allows the State to punish first and hear the student's version of events later. I cannot agree.

The majority emphasizes, as did the dissenters in *Goss*, that even the "rudimentary precautions" required by that decision would impose some burden on the school disciplinary process. But those costs are no greater if the student is paddled rather than suspended; the risk of error in the punishment is no smaller; and the fear of "a significant intrusion" into the disciplinary process, *ante*, at 682 (*cf. Goss*, *supra*, at 585 (POWELL, J., dissenting)), is just as exaggerated. The disciplinarian need only take a few minutes to give the student "notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S., at 581. In this context the Constitution requires, "if anything, less than a fair-minded school principal would impose upon himself" in order to avoid injustice. 2.18 *Id.*, at 583.

I would reverse the judgment below.

[2.1] There is little reason to fear that if the Eighth Amendment is held to apply at all to corporal punishment of schoolchildren, all paddlings, however moderate, would be prohibited. *Jackson v. Bishop*, 404 F.2d 571 (CA8 1968), held that any paddling or flogging of prisoners, convicted of crime and serving prison terms, violated the cruel and unusual punishment ban of the Eighth Amendment. But aside from the fact that *Bishop* has never been embraced by this Court, the theory of that case was not that bodily punishments are intrinsically barbaric or excessively severe but that paddling of prisoners is "degrading to the punisher and to the punished alike." *Id.*, at 580. That approach may be acceptable in the criminal justice system, but it has little if any relevance to corporal [430 U.S. 651, 685] punishment in the schools, for it can hardly be said that the use of moderate paddlings in the discipline of children is inconsistent with the country's evolving standards of decency.

On the other hand, when punishment involves a cruel, severe beating or chopping off an ear, something more than merely the dignity of the individual is involved. Whenever a given criminal punishment is "cruel and unusual" because it is inhumane or barbaric, I can think of no reason why it would be any less inhumane or barbaric when inflicted on a schoolchild, as punishment for classroom misconduct.

The issue in this case is whether spankings inflicted on public school children for breaking school rules is "punishment," not whether such punishment is "cruel and unusual." If the Eighth Amendment does not bar moderate spanking in public schools, it is because moderate spanking is not "cruel and unusual," not because it is not "punishment" as the majority suggests.

[2.2] By no means is it suggested that just because spanking of schoolchildren is "punishment" within the meaning of the Cruel and Unusual Punishments Clause, the school disciplinary process is in any way "criminal" and therefore subject to the full panoply of criminal procedural guarantees. See Part II, *infra*. Ordinarily, the conduct for which schoolchildren are punished is not sufficiently opprobrious to be called "criminal" in our society, and even violations of school disciplinary rules that might also constitute a crime, see *infra*, at 688, are not subject to the criminal process. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976),

where the Court held that persons who violate prison disciplinary rules are not entitled to the full panoply of criminal procedural safeguards, even if the rule violation might also constitute a crime.

[2.3] The majority cites *Trop* as one of the cases that "dealt with a criminal punishment" but neglects to follow the analysis mandated by that decision. In *Trop* the petitioner was convicted of desertion by a military court-martial and sentenced to three years at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge. After he was punished for the offense he committed, petitioner's application for a passport was turned down. Petitioner was told that he had been deprived of the "rights of citizenship" under § 401 (g) of the Nationality Act of 1940 because he had been dishonorably discharged from the Armed Forces. The plurality took the view that denationalization in this context was cruel and unusual punishment prohibited by the Eighth Amendment.

The majority would have us believe that the determinative factor in *Trop* was that the petitioner had been convicted of desertion; yet there is no suggestion in *Trop* that the disposition of the military court-martial had anything to do with the decision in that case. Instead, while recognizing that the Eighth Amendment extends only to punishments that are penal in nature, the plurality adopted a purposive approach for determining when punishment is penal.

> "In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." 356 U.S., at 96 (footnotes omitted).

Although the quoted passage is taken from the plurality opinion of Mr. Chief Justice Warren, joined by three other Justices, MR. JUSTICE BRENNAN, in a concurring opinion, adopted a similar approach in concluding that § 401 (g) was beyond the power of Congress to enact.

[2.4] *Ante*, at 669. In *Estelle v. Gamble*, 429 U.S. 97 (1976), a case decided this Term, the Court held that "deliberate indifference to the medical needs of prisoners" by prison officials constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Such deliberate indifference to a prisoner's medical needs clearly is not punishment inflicted for the commission of a crime; it is merely misconduct by a prison official. Similarly, the Eighth Circuit has held that whipping a prisoner with a strap in order to maintain discipline is prohibited by the Eighth Amendment. *Jackson v. Bishop*, 404 F.2d 571 (1968) (Blackmun, J.). See also *Knecht v. Gillman*, 488 F.2d 1136, 1139-1140 (CA8 1973) (injection of vomit-inducing drugs as part of aversion therapy held to be cruel and unusual); *Vann v. Scott*, 467 F.2d 1235, 1240-1241 (CA7 1972) (Stevens, J.) (Eighth Amendment protects runaway children against cruel and inhumane treatment, regardless of whether such treatment is labeled "rehabilitation" or "punishment").

[2.5] By finding that bodily punishment invades a constitutionally protected liberty interest within the meaning of the Due Process Clause, the majority suggests that the Clause might also afford a remedy for excessive spanking independently of the Eighth Amendment. If this were the case, the Court's present thesis would have little practical significance. If rather than holding that the Due Process Clause affords a remedy by way of the express commands of the Eighth Amendment, the majority would recognize a

cause of action under 42 U.S.C. § 1983 for a deprivation of "liberty" flowing from an excessive paddling, the Court's opinion is merely a lengthy word of advice with respect to the drafting of civil complaints.

Petitioners in this case did raise the substantive due process issue in their petition for certiorari, *ante*, at 659 n. 12, but consideration of that question was foreclosed by our limited grant of certiorari. If it is probable that schoolchildren would be entitled to protection under some theory of substantive due process, the Court should not now affirm the judgment below, but should amend the grant of certiorari and set this case for reargument.

[2.6] In support of its policy considerations, the only cases from this Court cited by the majority are *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Meachum v. Fano*, 427 U.S. 215 (1976), both cases involving prisoners' rights to procedural due process.

[2.7] There is no evidence in the record that corporal punishment has been abused in the prison systems more often than in the public schools. Indeed, corporal punishment is seldom authorized in state prisons. See *Jackson v. Bishop*, *supra*, at 580, where MR. JUSTICE (then Judge) BLACKMUN noted: "[O]nly two states still permit the use of the strap [in prisons]. Thus almost uniformly has it been abolished." By relying on its own view of the nature of these two public institutions, without any evidence being heard on the question below, the majority today predicates a constitutional principle on mere armchair speculation.

[2.8] There is some doubt that the state-law remedies available to public school children are adequate. See n. 11, *infra*.

[2.9] For a penalty to be consistent with the Eighth Amendment "the punishment must not be grossly out of proportion to the severity of the crime." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of STEWART, POWELL, and STEVENS, JJ.).

[2.10] Here, as in *Goss v. Lopez*, 419 U.S. 565, 580-581, n. 9 (1975), the record suggests that there may be a substantial risk of error in the discipline administered by respondent school authorities. Respondents concede that some of the petitioners who were punished "denied misconduct" and that "in some cases the punishments may have been mistaken. . . ." Brief for Respondents 60-61. The Court of Appeals panel below noted numerous instances of students punished despite claims of innocence, 498 F.2d 248, 256-258 (CA5 1974), and was "particularly disturbed by the testimony that whole classes of students were corporally punished for the misconduct of a few." *Id.*, at 268 n. 36. To the extent that the majority focuses on the incidence of and remedies for unduly severe punishments, it fails to address petitioners' claim that procedural safeguards are required to reduce the risk of punishments that are simply mistaken.

[2.11] The majority's assurances to the contrary, it is unclear to me whether and to what extent Florida law provides a damages action against school officials for excessive corporal punishment. Giving the majority the benefit of every doubt, I think it is fair to say that the most a student punished on the basis of mistaken allegations of misconduct can hope for in Florida is a recovery for unreasonable or bad-faith error. But I strongly suspect that even this remedy is not available.

Although the majority does not cite a single case decided under Florida law that recognizes a student's right to sue a school official to recover damages for excessive punishment, I am willing to assume that such a tort action does exist in Florida. I nevertheless have serious doubts about whether it would ever

provide a recovery to a student simply because he was punished for an offense he did not commit. All the cases in other jurisdictions cited by the majority, *ante*, at 663 n. 28, involved allegations of punishment disproportionate to the misconduct with which the student was charged; none of the decisions even suggest that a student could recover by showing that the teacher incorrectly imposed punishment for something the student had not done. The majority appears to agree that the damages remedy is available only in cases of punishment unreasonable in light of the misconduct charged. It states: "*In those cases where severe punishment is contemplated*, the available civil and criminal sanctions for abuse . . . afford significant protection against unjustified corporal punishment." *Ante*, at 678. (Emphasis added.)

Even if the common-law remedy for excessive punishment extends to punishment that is "excessive" only in the sense that it is imposed on the basis of mistaken facts, the school authorities are still protected from personal liability by common-law immunity. (They are protected by statutory immunity for liability for enforcing disciplinary rules "[e]xcept in the case of excessive force or cruel and unusual punishment." Fla. Stat. Ann. § 232.275 (1976).) At a minimum, this immunity would protect school officials from damages liability for reasonable mistakes made in good faith. "Although there have been differing emphases and formulations of the common-law immunity of public school officials in cases of student expulsion or suspension, state courts have generally recognized that such [430 U.S. 651, 696] officers should be protected from tort liability under state law for all goodfaith, nonmalicious action taken to fulfill their official duties." *Wood v. Strickland*, 420 U.S. 308, 318 (1975) (adopting this rule for § 1983 suits involving school discipline) (footnote omitted); see *id.*, at 318 n. 9 (citing state cases). Florida has applied this rule to a police officer's determination of probable cause to arrest; the officer is not liable in damages for an arrest not based on probable cause if the officer reasonably believed that probable cause existed. *Miami v. Albro*, 120 So.2d 23, 26 (Fla. Dist. Ct. App. 1960); *cf. Middleton v. Fort Walton Beach*, 113 So.2d 431 (Fla. Dist. Ct. App. 1959) (police officer would be personally liable for intentional tort of making an arrest pursuant to warrant he knew to be void); *Wilson v. O'Neal*, 118 So.2d 101 (Fla. Dist. Ct. App. 1960) (law enforcement officer not liable in damages for obtaining an arrest warrant on the basis of an incorrect identification). There is every reason to think that the Florida courts would apply a similar immunity standard in a hypothetical damages suit against a school disciplinarian.

A final limitation on the student's damages remedy under Florida law is that the student can recover only from the personal assets of the official; the school board's treasury is absolutely protected by sovereign immunity from damages for the torts of its agents. *Buck v. McLean*, 115 So.2d 764 (Fla. Dist. Ct. App. 1959). A teacher's limited resources may deter the jury from awarding, or prevent the student from collecting, the full amount of damages to which he is entitled. *Cf. Bonner v. Coughlin*, 517 F.2d 1311, 1319 n. 23 (CA7 1975), modified en banc, 545 F.2d 565 (1976), cert. pending, No. 76-6204 (state-law remedy affords due process where no sovereign or official immunity bars tort suit for negligence by prison guard).

[2.12] *Cf. G. M. Leasing Corp. v. United States*, 429 U.S. 338, 351-359 (1977). The Court there held that, in levying on a taxpayer's assets pursuant to a jeopardy assessment, revenue agents must obtain a warrant before searching the taxpayer's office but not before seizing his property in a manner that involves no invasion of privacy. *G. M. Leasing* thus reflects the principle that the case for advance procedural safeguards (such as a magistrate's determination of probable cause) is more compelling when the Government finally inflicts an injury that cannot be repaired in a subsequent judicial proceeding (invasion of

privacy) than when it inflicts a temporary injury which can be undone (seizure of property). The infliction of bodily punishment, like the invasion of privacy, presents this most compelling case for advance procedural safeguards.

[2.13] To the extent that the majority attempts to find "a relevant analogy in the criminal law"—warrantless arrests on probable cause—to its holding here, *ante*, at 679-680 (and see *infra*, at 697-699), it has chosen the wrong analogy. If the majority forthrightly applied its present due process analysis to the area of criminal prosecutions, the police officer not only could arrest a suspect without a warrant but also could convict the suspect without a trial and sentence him to a short jail term. The accused would get his due process in a tort suit for false imprisonment.

[2.14] For the proposition that the need for a prior hearing is "significantly [430 U.S. 651, 697] less compelling" where the State has preserved "common-law remedies," *ante*, at 679, 678, the majority cites only one case, *Bonner v. Coughlin*, *supra*, dismissing an allegation by a prisoner that prison guards acting under color of state law had deprived him of property without due process of law by negligently failing to close the door of his cell after a search, with the foreseeable consequence that his trial transcript was stolen. The panel held that the right to recover under state law for the negligence of state employees provided the prisoner with due process of law. The decision is distinguishable from the instant case on two grounds. First, recovery was not barred by sovereign or official immunity, and the state remedy ensured that the prisoner would be "made whole for any loss of property." 517 F.2d, at 1319, and n. 23. *Cf. Regional Rail Reorganization Act Cases*, 419 U.S. 102, 156 (1974). The point here, of course, is that the student cannot be made whole for the infliction of wrongful punishment. Second, the State cannot hold a pre-deprivation hearing where it does not intend to inflict the deprivation; the best it can do to protect the individual from an unauthorized and inadvertent act is to provide a damages remedy. 517 F.2d, at 1319 n. 25. Here the deprivation is intentional and a prior hearing altogether feasible.

[2.15] *Ante*, at 678 n. 46.

[2.16] *Ante*, at 675, quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[2.17] *Ante*, at 676, quoting *Goss*, 419 U.S., at 579-580. Elsewhere in its opinion the majority asserts that the risk of error is "typically insignificant" because "paddlings are usually inflicted in response to conduct directly observed by teachers in their presence." *Ante*, at 677-678. But it cites no finding or evidence in the record for this assertion, and there is no such restriction in the statute or regulations authorizing corporal punishment. See *ante*, at 655 n. 6, 656 n. 7. Indeed, the panel below noted specific instances in which students were punished by an assistant to the principal who was not present when the alleged offenses were committed. 498 F.2d, at 257, 259.

[2.18] My view here expressed that the minimal procedures of Goss are required for any corporal punishment implicating the student's liberty interest is, of course, not meant to imply that this minimum would be constitutionally sufficient no matter how severe the punishment inflicted. The Court made this reservation explicit in Goss by suggesting that more elaborate procedures such as witnesses, counsel, and cross-examination might well be required for suspensions longer than the 10-day maximum involved in that case. 419 U.S., at 583-584. A similar caveat is appropriate here.

MR. JUSTICE STEVENS, dissenting.

MR. JUSTICE WHITE's analysis of the Eighth Amendment issue is, I believe, unanswerable. I am also persuaded that his analysis of the procedural due process issue is correct. Notwithstanding my disagreement with the Court's holding [430 U.S. 651, 701] on the latter question, my respect for MR. JUSTICE POWELL's reasoning in Part IV-B of his opinion for the Court prompts these comments.

The constitutional prohibition of state deprivations of life, liberty, or property without due process of law does not, by its express language, require that a hearing be provided before any deprivation may occur. To be sure, the timing of the process may be a critical element in determining its adequacy—that is, in deciding what process is due in a particular context. Generally, adequate notice and a fair opportunity to be heard in advance of any deprivation of a constitutionally protected interest are essential. The Court has recognized, however, that the wording of the command that there shall be no deprivation "without" due process of law is consistent with the conclusion that a postdeprivation remedy is sometimes constitutionally sufficient. 3.1

When only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. In the property context, therefore, frequently a postdeprivation state remedy may be all the process that the Fourteenth Amendment requires. It may also be true—although I do not express an opinion on the point—that an adequate state remedy for defamation may satisfy the due process requirement when a State has impaired an individual's interest in his reputation. On that hypothesis, the Court's analysis today gives rise to the thought that *Paul v. Davis*, 424 U.S. 693, may have been correctly decided on an incorrect rationale. Perhaps the Court will one day [430 U.S. 651, 702] agree with MR. JUSTICE BRENNAN's appraisal of the importance of the constitutional interest at stake in *id.*, at 720-723, 734 (dissenting opinion), and nevertheless conclude that an adequate state remedy may prevent every state-inflicted injury to a person's reputation from violating 42 U.S.C. § 1983. 3.2

[3.1] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663; *Fuentes v. Shevin*, 407 U.S. 67, 82, 90-92; *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 598-600; *Phillips v. Commissioner*, 283 U.S. 589, 595-599; *Lawton v. Steele*, 152 U.S. 133, 140-142; *cf. Gerstein v. Pugh*, 420 U.S. 103, 113-114.

[3.2] *Cf. Bonner v. Coughlin*, 517 F.2d 1311, 1318-1320 (CA7 1975), modified en banc, 545 F.2d 565 (1976), cert. pending, No. 76-6204; see also Judge Swygert's thoughtful opinion, *id.*, at 569-578. [430 U.S. 651, 703]

PART 4
The Fourteenth Amendment

AMENDMENT XIV (1868)

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall

*Changed by Section 1 of the Twenty-Sixth Amendment (1971) to eighteen years of age.

not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. ▪

Goss v. Lopez

419 U.S. 565 (1975)

United States Supreme Court, Docket No. 73-898

Argued: October 16, 1974 ***Decided:*** January 22, 1975

Appellee Ohio public high school students, who had been suspended from school for misconduct for up to 10 days without a hearing, brought a class action against appellant school officials seeking a declaration that the Ohio statute permitting such suspensions was unconstitutional and an order enjoining the officials to remove the references to the suspensions from the students' records. A three-judge District Court declared that appellees were denied due process of law in violation of the Fourteenth Amendment because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," and that the statute and implementing regulations were unconstitutional, and granted the requested injunction.

Held:

1. Students facing temporary suspension from a public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment. Pp. 572-576.

(a) Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred, and must recognize a student's legitimate entitlement to a public education as a property interest that is protected by the Due Process Clause, and that may not be taken away for misconduct without observing minimum procedures required by that Clause. Pp. 573-574.

(b) Since misconduct charges if sustained and recorded could seriously damage the students' reputation as well as interfere with later educational and employment opportunities, the State's claimed right to determine unilaterally and without process whether that misconduct has occurred immediately collides with the Due Process Clause's prohibition against arbitrary deprivation of liberty. Pp. 574-575.

(c) A 10-day suspension from school is not *de minimis* and may not be imposed in complete disregard of the Due Process [419 U.S. 565, 566] Clause. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary. Pp. 575-576.

2. Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version. Generally, notice

and hearing should precede the student's removal from school, since the hearing may almost immediately follow the misconduct, but if prior notice and hearing are not feasible, as where the student's presence endangers persons or property or threatens disruption of the academic process, thus justifying immediate removal from school, the necessary notice and hearing should follow as soon as practicable. Pp. 577-584.

372 F. Supp. 1279, affirmed.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 584.

Thomas A. Bustin argued the cause for appellants. With him on the briefs were James J. Hughes, Jr., Robert A. Bell, and Patrick M. McGrath.

Peter D. Roos argued the cause for appellees. With him on the brief were Denis Murphy and Kenneth C. Curtin. *

[*] John F. Lewis filed a brief for the Buckeye Association of School Administrators et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by David Bonderman, Peter Van N. Lockwood, Paul L. Tractenberg, David Rubin, and W. William Hodes for the National Committee for Citizens in Education et al.; by Alan H. Levine, Melvin L. Wulf, and Joel M. Gora for the American Civil Liberties Union; by Robert H. Kapp, R. Stephen Browning, and Nathaniel R. Jones for the National Association for the Advancement of Colored People et al.; and by Marian Wright Edelman for the Children's Defense Fund of the Washington Research Project, Inc., et al. [419 U.S. 565, 567]

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal by various administrators of the Columbus, Ohio, Public School System (CPSS) challenges the judgment of a three-judge federal court, declaring that appellees—various high school students in the CPSS—were denied due process of law contrary to the command of the Fourteenth Amendment in that they were temporarily suspended from their high schools without a hearing either prior to suspension or within a reasonable time thereafter, and enjoining the administrators to remove all references to such suspensions from the students' records.

I

Ohio law, Rev. Code Ann. § 3313.64 (1972), provides for free education to all children between the ages of six and 21. Section 3313.66 of the Code empowers the principal of an Ohio public school to suspend a pupil for misconduct for up to 10 days or to expel him. In either case, he must notify the student's parents within 24 hours and state the reasons for his action. A pupil who is expelled, or his parents, may appeal the decision to the Board of Education and in connection therewith shall be

permitted to be heard at the board meeting. The Board may reinstate the pupil following the hearing. No similar procedure is provided in § 3313.66 or any other provision of state law for a suspended student. Aside from a regulation tracking the statute, at the time of the imposition of the suspensions in this case the CPSS itself had not issued any written procedure applicable to suspensions. 1.1 Nor, so far as the record reflects, had any of [419 U.S. 565, 568] the individual high schools involved in this case. 1.2 Each, however, had formally or informally described the conduct for which suspension could be imposed.

The nine named appellees, each of whom alleged that he or she had been suspended from public high school in Columbus for up to 10 days without a hearing pursuant to § 3313.66, filed an action under 42 U.S.C. § 1983 against the Columbus Board of Education and various administrators of the CPSS. The complaint sought a [419 U.S. 565, 569] declaration that § 3313.66 was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their rights to an education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment. It also sought to enjoin the public school officials from issuing future suspensions pursuant to § 3313.66 and to require them to remove references to the past suspensions from the records of the students in question. 1.3

The proof below established that the suspensions arose out of a period of widespread student unrest in the CPSS during February and March 1971. Six of the named plaintiffs, Rudolph Sutton, Tyrone Washington, Susan Cooper, Deborah Fox, Clarence Byars, and Bruce Harris, were students at the Marion-Franklin High School and were each suspended for 10 days 1.4 on account of disruptive or disobedient conduct committed in the presence of the school administrator who ordered the suspension. One of these, Tyrone Washington, was among a group of students demonstrating in the school auditorium while a class was being conducted there. He was ordered by the school principal to leave, refused [419 U.S. 565, 570] to do so, and was suspended. Rudolph Sutton, in the presence of the principal, physically attacked a police officer who was attempting to remove Tyrone Washington from the auditorium. He was immediately suspended. The other four Marion-Franklin students were suspended for similar conduct. None was given a hearing to determine the operative facts underlying the suspension, but each, together with his or her parents, was offered the opportunity to attend a conference, subsequent to the effective date of the suspension, to discuss the student's future.

Two named plaintiffs, Dwight Lopez and Betty Crome, were students at the Central High School and McGuffey Junior High School, respectively. The former was suspended in connection with a disturbance in the lunchroom which involved some physical damage to school property. 1.5 Lopez testified that at least 75 other students were suspended from his school on the same day. He also testified below that he was not a party to the destructive conduct but was instead an innocent bystander. Because no one from the school testified with regard to this incident, there is no evidence in the record indicating the official basis for concluding otherwise. Lopez never had a hearing.

Betty Crome was present at a demonstration at a high school other than the one she was attending. There she was arrested together with others, taken to the police station, and released without being formally charged. Before she went to school on the following day, she was [419 U.S. 565, 571] notified that she had been suspended for a 10-day period. Because no one from the school testified with respect to this incident, the record does not disclose how the McGuffey Junior High School principal went about making the decision to suspend Crome, nor does it disclose on what information the decision was based. It is clear from the record that no hearing was ever held.

There was no testimony with respect to the suspension of the ninth named plaintiff, Carl Smith. The school files were also silent as to his suspension, although as to some, but not all, of the other named plaintiffs the files contained either direct references to their suspensions or copies of letters sent to their parents advising them of the suspension.

On the basis of this evidence, the three-judge court declared that plaintiffs were denied due process of law because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," and that Ohio Rev. Code Ann. § 3313.66 (1972) and regulations issued pursuant thereto were unconstitutional in permitting such suspensions. 1.6 It was ordered that all references to plaintiffs' suspensions be removed from school files.

Although not imposing upon the Ohio school administrators any particular disciplinary procedures and leaving them "free to adopt regulations providing for fair suspension procedures which are consonant with the educational goals of their schools and reflective of the characteristics of their school and locality," the District Court declared [419 U.S. 565, 572] that there were "minimum requirements of notice and a hearing prior to suspension, except in emergency situations." In explication, the court stated that relevant case authority would: (1) permit "[i]mmediate removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property"; (2) require notice of suspension proceedings to be sent to the student's parents within 24 hours of the decision to conduct them; and (3) require a hearing to be held, with the student present, within 72 hours of his removal. Finally, the court stated that, with respect to the nature of the hearing, the relevant cases required that statements in support of the charge be produced, that the student and others be permitted to make statements in defense or mitigation, and that the school need not permit attendance by counsel.

The defendant school administrators have appealed the three-judge court's decision. Because the order below granted plaintiffs' request for an injunction—ordering defendants to expunge their records—this Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1253. We affirm.

II

At the outset, appellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. The

Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules [419 U.S. 565, 573] entitling the citizen to certain benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Wieman v. Updegraff*, 344 U.S. 183, 191-192 (1952); *Arnett v. Kennedy*, 416 U.S. 134, 164 (POWELL, J., concurring), 171 (WHITE, J., concurring and dissenting) (1974). So may welfare recipients who have statutory rights to welfare as long as they maintain the specified qualifications. *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Morrissey v. Brewer*, 408 U.S. 471 (1972), applied the limitations of the Due Process Clause to governmental decisions to revoke parole, although a parolee has no constitutional right to that status. In like vein was *Wolff v. McDonnell*, 418 U.S. 539 (1974), where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good-time credits accumulated under state law, although those benefits were not mandated by the Constitution.

Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. Ohio Rev. Code Ann. §§ 3313.48 and 3313.64 (1972 and Supp. 1973) direct local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks. Ohio Rev. Code Ann. § 3321.04 (1972). It is true that § 3313.66 of the Code permits school principals to suspend students for up to 10 days; but suspensions may not be imposed without any grounds whatsoever. All of the schools had their own rules specifying the [419 U.S. 565, 574] grounds for expulsion or suspension. Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. *Arnett v. Kennedy*, *supra*, at 164 (POWELL, J., concurring), 171 (WHITE, J., concurring and dissenting), 206 (MARSHALL, J., dissenting).

Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not "shed their constitutional rights" at the schoolhouse door. *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969). "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which

is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.

The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Board of Regents v. Roth*, *supra*, at 573. School authorities here suspended appellees from school for periods of up to 10 days [419 U.S. 565, 575] based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. 1.7 It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

Appellants proceed to argue that even if there is a right to a public education protected by the Due Process Clause generally, the Clause comes into play only when the State subjects a student to a "severe detriment or grievous loss." The loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellants' argument is again refuted by our prior decisions; for in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest [419 U.S. 565, 576] at stake." *Board of Regents v. Roth*, *supra*, at 570-571. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971); *Board of Regents v. Roth*, *supra*, at 570 n. 8. A 10-day suspension from school is not *de minimis* in our view and may not be imposed in complete disregard of the Due Process Clause.

A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary. 1.8 [419 U.S. 565, 577]

III

"Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S., at 481. We turn to that question, fully [419 U.S. 565, 578] realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical

matters and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). We are also mindful of our own admonition:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

There are certain bench marks to guide us, however. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 [419 U.S. 565, 579] (1950), a case often invoked by later opinions, said that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313. "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane v. Central Hanover Trust Co.*, *supra*, at 314. See also *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168-169 (1951) (Frankfurter, J., concurring). At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded *some* kind of hearing. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 1 Wall. 223, 233 (1864).

It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. *Cafeteria Workers v. McElroy*, *supra*, at 895; *Morrissey v. Brewer*, *supra*, at 481. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never [419 U.S. 565, 580] unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many

school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. "[F]airness can rarely be obtained by secret, onesided determination of facts decisive of rights. . . ." "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Anti-Fascist Committee v. McGrath*, *supra*, at 170, 171-172 (Frankfurter, J., concurring). 1.9 [419 U.S. 565, 581]

We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school. 1.10 [419 U.S. 565, 582]

There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. Lower courts which have addressed the question of the nature of the procedures required in short suspension cases have reached the same conclusion. *Tate v. Board of Education*, 453 F.2d 975, 979 (CA8 1972); *Vail v. Board of Education*, 354 F. Supp. 592, 603 (NH 1973). Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow [419 U.S. 565, 583] as soon as practicable, as the District Court indicated.

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. Indeed, according to the testimony of the principal of Marion-Franklin High School, that school had an informal procedure, remarkably similar to that which we now require, applicable to suspensions generally but which was not followed in this case. Similarly, according to the most recent memorandum applicable to the entire CPSS, see n. 1, *supra*, school principals in the

CPSS are now required by local rule to provide at least as much as the constitutional minimum which we have described.

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments [419 U.S. 565, 584] about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

IV

The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is

Affirmed.

Footnotes

[1.1] At the time of the events involved in this case, the only administrative regulation on this subject was § 1010.04 of the Administrative Guide of the Columbus Public Schools which provided: "Pupils may be suspended or expelled from school in accordance with the provisions of Section 3313.66 of the Revised Code." Subsequent [419 U.S. 565, 568] to the events involved in this lawsuit, the Department of Pupil Personnel of the CPSS issued three memoranda relating to suspension procedures, dated August 16, 1971, February 21, 1973, and July 10, 1973, respectively. The first two are substantially similar to each other and require no factfinding hearing at any time in connection with a suspension. The third, which was apparently in effect when this case was argued, places upon the principal the obligation to "investigate" "before commencing suspension procedures"; and provides as part of the procedures that the principal shall discuss the case with the pupil, so that the pupil may "be heard with respect to the alleged offense," unless the pupil is "unavailable" for such a discussion or "unwilling" to participate in it. The suspensions involved in this case occurred, and records thereof were made, prior to the effective date of these memoranda. The District Court's judgment, including its expunction order, turns on the propriety of the procedures existing at the time the suspensions were ordered and by which they were imposed.

[1.2] According to the testimony of Phillip Fulton, the principal of one of the high schools involved in this case, there was an informal procedure applicable at the Marion-Franklin High School. It provided that in the routine case of misconduct, occurring in the presence of a teacher, the teacher would describe the misconduct on a form provided for that purpose and would send the student, with the form, to the principal's office. There, the principal would obtain the student's version of the story, and, if it conflicted with the teacher's written version, would send for the teacher to obtain the teacher's oral version—apparently in the presence of the student. Mr. Fulton testified that, if a discrepancy still existed, the teacher's version would be believed and the principal would arrive at a disciplinary decision based on it.

[1.3] The plaintiffs sought to bring the action on behalf of all students of the Columbus Public Schools suspended on or after February 1971, and a class action was declared accordingly. Since the complaint sought to restrain the "enforcement" and "operation" of a state statute "by restraining the action of any officer of such state in the enforcement or execution of such statute," a three-judge court was requested pursuant to 28 U.S.C. § 2281 and convened. The students also alleged that the conduct for which they could be suspended was not adequately defined by Ohio law. This vagueness and overbreadth argument was rejected by the court below and the students have not appealed from this part of the court's decision.

[1.4] Fox was given two separate 10-day suspensions for misconduct occurring on two separate occasions—the second following immediately upon her return to school. In addition to his suspension, Sutton was transferred to another school.

[1.5] Lopez was actually absent from school, following his suspension, for over 20 days. This seems to have occurred because of a misunderstanding as to the length of the suspension. A letter sent to Lopez after he had been out for over 10 days purports to assume that, being over compulsory school age, he was voluntarily staying away. Upon asserting that this was not the case, Lopez was transferred to another school.

[1.6] In its judgment, the court stated that the statute is unconstitutional in that it provides "for suspension . . . without *first* affording the student due process of law." (Emphasis supplied.) However, the language of the judgment must be read in light of the language in the opinion which expressly contemplates that under some circumstances students may properly be removed from school before a hearing is held, so long as the hearing follows promptly.

[1.7] Appellees assert in their brief that four of 12 randomly selected Ohio colleges specifically inquire of the high school of every applicant for admission whether the applicant has ever been suspended. Brief for Appellees 34-35 and n. 40. Appellees also contend that many employers request similar information. *Ibid.*

Congress has recently enacted legislation limiting access to information contained in the files of a school receiving federal funds. Section 513 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 571, 20 U.S.C. § 1232g (1970 ed., Supp. IV), adding § 438 to the General Education Provisions Act. That section would preclude release of "verified reports of serious or recurrent behavior patterns" to employers without written consent of the student's parents. While subsection (b) (1) (B) permits release of such information to "other schools . . . in which the student intends to enroll," it does so only upon condition that the parent be advised of the release of the information and be given an opportunity at a hearing to challenge the content of the information to insure against inclusion of inaccurate or misleading information. The statute does not expressly state whether the parent can contest the underlying basis for a suspension, the fact of which is contained in the student's school record.

[1.8] Since the landmark decision of the Court of Appeals for the Fifth Circuit in *Dixon v. Alabama State Board of Education*, 294 F.2d 150, cert. denied, 368 U.S. 930 (1961), the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion. *Hagopian v. Knowlton*, 470 F.2d 201, 211 (CA2 1972); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (CA2 1967); [419 U.S. 565, 577] *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089 (CA8 1969), cert. denied, 398 U.S. 965 (1970); *Vought v. Van Buren Public Schools*, 306 F. Supp. 1388 (ED Mich. 1969); *Whitfield v. Simpson*, 312 F. Supp. 889 (ED Ill. 1970); *Fielder v. Board of Education of School District of Winnebago, Neb.*, 346 F. Supp. 722, 729 (Neb. 1972); *DeJesus v. Penberthy*, 344 F. Supp. 70, 74 (Conn. 1972); *Soglin v. Kauffman*, 295 F. Supp. 978, 994 (WD Wis. 1968), aff'd, 418 F.2d 163 (CA7 1969); *Stricklin v. Regents of University of Wisconsin*, 297 F. Supp. 416, 420 (WD Wis. 1969), *appeal dismissed*, 420 F.2d 1257 (CA7 1970); *Buck v. Carter*, 308 F. Supp. 1246 (WD Wis. 1970); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F. R. D. 133, 147-148 (WD Mo. 1968) (en banc). The lower courts have been less uniform, however, on the question whether removal from school for some shorter period may ever be so trivial a deprivation as to require no process, and, if so, how short the removal must be to qualify. Courts of Appeals have held or assumed the Due Process Clause applicable to long suspensions, *Pervis v. LaMarque Ind. School Dist.*, 466 F.2d 1054 (CA5 1972); to indefinite suspensions, *Sullivan v. Houston Ind. School Dist.*, 475 F.2d 1071 (CA5), cert. denied, 414 U.S. 1032 (1973); to the addition of a 30-day suspension to a 10-day suspension, *Williams v. Dade County School Board*, 441 F.2d 299 (CA5 1971); to a 10-day suspension, *Black Students of North Fort Myers Jr.-Sr. High School v. Williams*, 470 F.2d 957 (CA5 1972); to "mild" suspensions, *Farrell v. Joel*, 437 F.2d 160 (CA2 1971), and *Tate v. Board of Education*, 453 F.2d 975 (CA8 1972); and to a three-

day suspension, *Shanley v. Northeast Ind. School Dist., Bexar County, Texas*, 462 F.2d 960, 967 n. 4 (CA5 1972); but inapplicable to a seven-day suspension, *Linwood v. Board of Ed. of City of Peoria*, 463 F.2d 763 (CA7), cert. denied, 409 U.S. 1027 (1972); to a three-day suspension, *Dunn v. Tyler Ind. School Dist.*, 460 F.2d 137 (CA5 1972); to a suspension for not "more than a few days," *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438 (CA5 1973); and to all suspensions no matter how short, *Black Coalition v. Portland School District No. 1*, [419 U.S. 565, 578] 484 F.2d 1040 (CA9 1973). The Federal District Courts have held the Due Process Clause applicable to an interim suspension pending expulsion proceedings in *Stricklin v. Regents of University of Wisconsin*, *supra*, and *Buck v. Carter*, *supra*; to a 10-day suspension, *Banks v. Board of Public Instruction of Dade County*, 314 F. Supp. 285 (SD Fla. 1970), *vacated*, 401 U.S. 988 (1971) (for entry of a fresh decree so that a timely appeal might be taken to the Court of Appeals), aff'd, 450 F.2d 1103 (CA5 1971); to suspensions of under five days, *Vail v. Board of Education of Portsmouth School Dist.*, 354 F. Supp. 592 (NH 1973); and to all suspensions, *Mills v. Board of Education of the Dist. of Columbia*, 348 F. Supp. 866 (DC 1972), and *Givens v. Poe*, 346 F. Supp. 202 (WDNC 1972); but inapplicable to suspensions of 25 days, *Hernandez v. School District Number One, Denver, Colorado*, 315 F. Supp. 289 (Colo. 1970); to suspensions of 10 days, *Baker v. Downey City Board of Education*, 307 F. Supp. 517 (CD Cal. 1969); and to suspensions of eight days, *Hatter v. Los Angeles City High School District*, 310 F. Supp. 1309 (CD Cal. 1970), *rev'd on other grounds*, 452 F.2d 673 (CA9 1971). In the cases holding no process necessary in connection with short suspensions, it is not always clear whether the court viewed the Due Process Clause as inapplicable, or simply felt that the process received was "due" even in the absence of some kind of hearing procedure.

[1.9] The facts involved in this case illustrate the point. Betty Crome was suspended for conduct which did not occur on school grounds, and for which mass arrests were made—hardly guaranteeing careful [419 U.S. 565, 581] individualized factfinding by the police or by the school principal. She claims to have been involved in no misconduct. However, she was suspended for 10 days without ever being told what she was accused of doing or being given an opportunity to explain her presence among those arrested. Similarly, Dwight Lopez was suspended, along with many others, in connection with a disturbance in the lunchroom. Lopez says he was not one of those in the lunchroom who was involved. However, he was never told the basis for the principal's belief that he was involved, nor was he ever given an opportunity to explain his presence in the lunchroom. The school principals who suspended Crome and Lopez may have been correct on the merits, but it is inconsistent with the Due Process Clause to have made the decision that misconduct had occurred without at some meaningful time giving Crome or Lopez an opportunity to persuade the principals otherwise.

We recognize that both suspensions were imposed during a time of great difficulty for the school administrations involved. At least in Lopez' case there may have been an immediate need to send home everyone in the lunchroom in order to preserve school order and property; and the administrative burden of providing 75 "hearings" of any kind is considerable. However, neither factor justifies a disciplinary suspension without at any time gathering facts relating to Lopez specifically, confronting him with them and giving him an opportunity to explain.

[1.10] Appellants point to the fact that some process is provided under Ohio law by way of judicial review. Ohio Rev. Code Ann. § 2506.01 [419 U.S. 565, 582] (Supp. 1973). Appellants do not cite any case in which

this general administrative review statute has been used to appeal from a disciplinary decision by a school official. If it be assumed that it could be so used, it is for two reasons insufficient to save inadequate procedures at the school level. First, although new proof may be offered in a § 2501.06 proceeding, *Shaker Coventry Corp. v. Shaker Heights Planning Comm'n*, 18 Ohio Op. 2d 272, 176 N. E. 2d 332 (1961), the proceeding is not *de novo*. *In re Locke*, 33 Ohio App. 2d 177, 294 N. E. 2d 230 (1972). Thus the decision by the school—even if made upon inadequate procedures—is entitled to weight in the court proceeding. Second, without a demonstration to the contrary, we must assume that delay will attend any § 2501.06 proceeding, that the suspension will not be stayed pending hearing, and that the student meanwhile will irreparably lose his educational benefits.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today invalidates an Ohio statute that permits student suspensions from school without a hearing [419 U.S. 565, 585] "for not more than ten days." 2.1 The decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education. The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension. 2.2

The Court's decision rests on the premise that, under Ohio law, education is a property interest protected by the Fourteenth Amendment's Due Process Clause and therefore that any suspension requires notice and a hearing. 2.3 In my view, a student's interest in education is [419 U.S. 565, 586] not infringed by a suspension within the limited period prescribed by Ohio law. Moreover, to the extent that there may be some arguable infringement, it is too speculative, transitory, and insubstantial to justify imposition of a *constitutional* rule.

I

Although we held in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973), that education is not a right protected by the Constitution, Ohio has elected by statute to provide free education for all youths age six to 21, Ohio Rev. Code Ann. §§ 3313.48, 3313.64 (1972 and Supp. 1973), with children under 18 years of age being compelled to attend school. § 3321.01 *et seq*. State law, therefore, extends the right of free public school education to Ohio students in accordance with the education laws of that State. The right or entitlement to education so created is protected in a proper case by the Due Process Clause. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (POWELL, J., concurring). In my view, this is not such a case.

In identifying property interests subject to due process protections, the Court's past opinions make clear that these interests "are created and their *dimensions are defined* by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, *supra*, at 577 (emphasis supplied). The Ohio statute that creates the right to a "free" education also explicitly authorizes a principal to suspend a student for as much as 10 days. Ohio Rev. Code Ann. §§ 3313.48, 3313.64, 3313.66 (1972 and Supp. 1973). Thus the very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law. Rather, the right is [419 U.S. 565, 587] encompassed in the entire package of statutory provisions governing education in Ohio—of which the power to suspend is one.

The Court thus disregards the basic structure of Ohio law in posturing this case as if Ohio had conferred an unqualified right to education, thereby compelling the school authorities to conform to due process procedures in imposing the most routine discipline. 2.4

But however one may define the entitlement to education provided by Ohio law, I would conclude that a deprivation of not more than 10 days' suspension from school, imposed as a routine disciplinary measure, does not assume constitutional dimensions. Contrary to the Court's assertion, our cases support rather than "refute" appellants' [419 U.S. 565, 588] argument that "the Due Process Clause . . . comes into play only when the State subjects a student to a 'severe detriment or grievous loss.'" *Ante*, at 575. Recently, the Court reiterated precisely this standard for analyzing due process claims:

> "Whether *any* procedural protections are due depends on the extent to which an individual will be 'condemned to suffer *grievous* loss.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970)." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (emphasis supplied).

In *Morrissey* we applied that standard to require due process procedures for parole revocation on the ground that revocation "inflicts a 'grievous loss' on the parolee and often on others." *Id.*, at 482. See also *Board of Regents v. Roth*, 408 U.S., at 573 ("seriously damage" reputation and standing); *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("important interests of the licensees"); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("significant property interest"). 2.5

The Ohio suspension statute allows no serious or significant [419 U.S. 565, 589] infringement of education. It authorizes only a maximum suspension of eight school days, less than 5% of the normal 180-day school year. Absences of such limited duration will rarely affect a pupil's opportunity to learn or his scholastic performance. Indeed, the record in this case reflects no educational injury to appellees. Each completed the semester in which the suspension occurred and performed at least as well as he or she had in previous years. 2.6 Despite the Court's unsupported speculation that a suspended student could be "seriously damage[d]" (*ante*, at 575), there is no factual showing of any such damage to appellees.

The Court also relies on a perceived deprivation of "liberty" resulting from any suspension, arguing—again without factual support in the record pertaining to these appellees—that a suspension harms a student's reputation. In view of the Court's decision in *Board of Regents v. Roth*, *supra*, I would have thought that this argument was plainly untenable. Underscoring the need for "serious damage" to reputation, the *Roth* Court held that a nontenured teacher who is not rehired by a public university could not claim to suffer sufficient reputational injury to require constitutional protections. 2.7 Surely a brief suspension is of less serious consequence to the reputation of a teenage student.

II

In prior decisions, this Court has explicitly recognized that school authorities must have broad discretionary authority [419 U.S. 565, 590] in the daily operation of public schools. This includes wide latitude with respect to maintaining discipline and good order. Addressing this point specifically, the Court stated in *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969):

"[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." 2.8

Such an approach properly recognizes the unique nature of public education and the correspondingly limited role of the judiciary in its supervision. In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), the Court stated:

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

The Court today turns its back on these precedents. It can hardly seriously be claimed that a school principal's decision to suspend a pupil for a single day would "directly and sharply implicate basic constitutional values." *Ibid.*

Moreover, the Court ignores the experience of mankind, as well as the long history of our law, recognizing [419 U.S. 565, 591] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office. Until today, and except in the special context of the First Amendment issue in *Tinker*, the educational rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students. Even with respect to the First Amendment, the rights of children have not been regarded as "co-extensive with those of adults." *Tinker*, *supra*, at 515 (STEWART, J., concurring).

A

I turn now to some of the considerations which support the Court's former view regarding the comprehensive authority of the States and school officials "to prescribe and control conduct in the schools." *Id.*, at 507. Unlike the divergent and even sharp conflict of interests usually present where due process rights are asserted, the interests here implicated—of the State through its schools and of the pupils—are essentially congruent.

The State's interest, broadly put, is in the proper functioning of its public school system for the benefit of all pupils and the public generally. Few rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process. Suspensions are one of the traditional means—ranging from keeping a student after class to permanent expulsion—used to maintain discipline in the schools. It is common knowledge that maintaining order and reasonable decorum [419 U.S. 565, 592] in school buildings and classrooms is a major educational problem, and one which has increased significantly in magnitude in recent years. 2.9 Often the teacher, in protecting the rights of other children to an education (if not his or their safety), is compelled to rely on the power to suspend.

The facts set forth in the margin 2.10 leave little room for doubt as to the magnitude of the disciplinary problem in the public schools, or as to the extent of reliance upon the right to suspend. They also demonstrate that if hearings were required for a substantial percentage of short-term suspensions, school authorities would have time to do little else.

B

The State's generalized interest in maintaining an orderly school system is not incompatible with the individual [419 U.S. 565, 593] interest of the student. Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher's authority 2.11—an invitation which rebellious or even merely spirited teenagers are likely to accept.

The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality; it provides an early understanding of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is best learned. Mr. Justice Black summed it up:

> "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens." *Tinker*, 393 U.S., at 524 (dissenting opinion).

In assessing in constitutional terms the need to protect pupils from unfair minor discipline by school authorities, the Court ignores the commonality of interest of the State and pupils in the public school system. Rather, it thinks in traditional judicial terms of an adversary [419 U.S. 565, 594] situation. To be sure, there will be the occasional pupil innocent of any rule infringement who is mistakenly suspended or whose infraction is too minor to justify suspension. But, while there is no evidence indicating the frequency of unjust suspensions, common sense suggests that they will not be numerous in relation to the total number, and that mistakes or injustices will usually be righted by informal means.

C

One of the more disturbing aspects of today's decision is its indiscriminate reliance upon the judiciary, and the adversary process, as the means of resolving many of the most routine problems arising in the classroom. In mandating due process procedures the Court misapprehends the reality of the normal teacher-pupil relationship. There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. 2.12 It is rarely adversary in nature except with respect to the chronically disruptive or insubordinate pupil whom the teacher must be free to discipline without frustrating formalities. 2.13 [419 U.S. 565, 595]

The Ohio statute, providing as it does for due notice both to parents and the Board, is compatible with the teacher-pupil relationship and the informal resolution of mistaken disciplinary action. We have relied for generations upon the experience, good faith and dedication of those who staff our public schools, 2.14 and the nonadversary means of airing grievances that always have been available to pupils and their parents. One would have thought before today's opinion that this informal method of resolving differences was more compatible with the interests of all concerned than resort to any constitutionalized procedure, however blandly it may be defined by the Court.

D

In my view, the constitutionalizing of routine classroom decisions not only represents a significant and unwise extension of the Due Process Clause, but it also was quite unnecessary in view of the safeguards prescribed by the Ohio statute. This is demonstrable from a comparison [419 U.S. 565, 596] of what the Court mandates as required by due process with the protective procedures it finds constitutionally insufficient.

The Ohio statute, limiting suspensions to not more than eight school days, requires written notice including the "reasons therefor" to the student's parents and to the Board of Education within 24 hours of any suspension. The Court only requires oral or written notice to the pupil, with no notice being required to the parents or the Board of Education. The mere fact of the statutory requirement is a deterrent against arbitrary action by the principal. The Board, usually elected by the

people and sensitive to constituent relations, may be expected to identify a principal whose record of suspensions merits inquiry. In any event, parents placed on written notice may exercise their rights as constituents by going directly to the Board or a member thereof if dissatisfied with the principal's decision.

Nor does the Court's due process "hearing" appear to provide significantly more protection than that already available. The Court holds only that the principal must listen to the student's "version of the events," either before suspension or thereafter—depending upon the circumstances. *Ante*, at 583. Such a truncated "hearing" is likely to be considerably less meaningful than the opportunities for correcting mistakes already available to students and parents. Indeed, in this case all of the students and parents were offered an opportunity to attend a conference with school officials.

In its rush to mandate a constitutional rule, the Court appears to give no weight to the practical manner in which suspension problems normally would be worked out under Ohio law. 2.15 One must doubt, then, whether [419 U.S. 565, 597] the constitutionalization of the student-teacher relationship, with all of its attendant doctrinal and practical difficulties, will assure in any meaningful sense greater protection than that already afforded under Ohio law.

III

No one can foresee the ultimate frontiers of the new "thicket" the Court now enters. Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process. Teachers and other school authorities are required to make many decisions that may have serious consequences for the pupil. They must decide, for example, how to grade the student's work, whether a student passes or fails a course, 2.16 whether he is to be promoted, whether he is required to take certain subjects, whether he may be excluded from interscholastic athletics 2.17 or other extracurricular activities, whether he may be removed from one school and sent to another, whether he may be bused long distances when available schools are nearby, and whether he should be placed in a "general," "vocational," or "college-preparatory" track.

In these and many similar situations claims of impairment of one's educational entitlement identical in principle to those before the Court today can be asserted with equal or greater justification. Likewise, in many of these situations, the pupil can advance the same types of speculative and subjective injury given critical weight in this case. The District Court, relying upon generalized opinion evidence, concluded that a suspended student may suffer psychological injury in one or more of [419 U.S. 565, 598] the ways set forth in the margin below. 2.18 The Court appears to adopt this rationale. See *ante*, at 575.

It hardly need be said that if a student, as a result of a day's suspension, suffers "a blow" to his "self esteem," "feels powerless," views "teachers with resentment," or feels "stigmatized by his teachers," identical psychological harms will flow from many other routine and necessary school decisions. The student who is given a failing grade, who is not promoted, who is excluded from certain

extracurricular activities, who is assigned to a school reserved for children of less than average ability, or who is placed in the "vocational" rather than the "college preparatory" track, is unlikely to suffer any less psychological injury than if he were suspended for a day for a relatively minor infraction. 2.19
[419 U.S. 565, 599]

If, as seems apparent, the Court will now require due process procedures whenever such routine school decisions are challenged, the impact upon public education will be serious indeed. The discretion and judgment of federal courts across the land often will be substituted for that of the 50 state legislatures, the 14,000 school boards, 2.20 and the 2,000,000 2.21 teachers who heretofore have been responsible for the administration of the American public school system. If the Court perceives a rational and analytically sound distinction between the discretionary decision by school authorities to suspend a pupil for a brief period, and the types of discretionary school decisions described above, it would be prudent to articulate it in today's opinion. Otherwise, the federal courts should prepare themselves for a vast new role in society.

IV

Not so long ago, state deprivations of the most significant forms of state largesse were not thought to require due process protection on the ground that the deprivation resulted only in the loss of a state-provided "benefit." E.g., *Bailey v. Richardson*, 86 U.S. App. D.C. 248, 182 F.2d 46 (1950), aff'd by an equally divided Court, 341 U.S. 918 (1951). In recent years the Court, wisely in my view, has rejected the "wooden distinction between 'rights' and 'privileges,'" *Board of Regents v. Roth*, 408 U.S., at 571, and looked instead to the significance of the state-created or state-enforced right and to [419 U.S. 565, 600] the substantiality of the alleged deprivation. Today's opinion appears to abandon this reasonable approach by holding in effect that government infringement of any interest to which a person is entitled, no matter what the interest or how inconsequential the infringement, requires constitutional protection. As it is difficult to think of any less consequential infringement than suspension of a junior high school student for a single day, it is equally difficult to perceive any principled limit to the new reach of procedural due process. 2.22

[2.1] The Ohio statute, Ohio Rev. Code Ann. § 3313.66 (1972), actually is a limitation on the time-honored practice of school authorities themselves determining the appropriate duration of suspensions. The statute allows the superintendent or principal of a public school to suspend a pupil "for *not more than ten days* . . ." (italics supplied); and requires notification to the parent or guardian in writing within 24 hours of any suspension.

[2.2] Section 3313.66 also provides authority for the expulsion of pupils, but requires a hearing thereon by the school board upon request of a parent or guardian. The rights of pupils expelled are not involved in this case, which concerns only the limited discretion of school authorities to suspend for not more than 10 days. Expulsion, usually resulting at least in loss of a school year or semester, is an incomparably more serious matter than the brief suspension, traditionally used as the principal sanction for enforcing routine discipline. The Ohio statute recognizes this distinction.

[2.3] The Court speaks of "exclusion from the educational process for more than a trivial period . . .," *ante*, at 576, but its opinion makes clear that even one day's suspension invokes the constitutional procedure mandated today.

[2.4] The Court apparently reads into Ohio law by implication a qualification that suspensions may be imposed only for "cause," thereby analogizing this case to the civil service laws considered in *Arnett v. Kennedy*, 416 U.S. 134 (1974). To be sure, one may assume that pupils are not suspended at the whim or caprice of the school official, and the statute does provide for notice of the suspension with the "reasons therefor." But the same statute draws a sharp distinction between suspension and the far more drastic sanction of expulsion. A hearing is required only for the latter. To follow the Court's analysis, one must conclude that the legislature nevertheless intended—without saying so—that suspension also is of such consequence that it may be imposed only for cause which can be justified at a hearing. The unsoundness of reading this sort of requirement into the statute is apparent from a comparison with *Arnett*. In that case, Congress expressly provided that nonprobationary federal employees should be discharged only for "cause." This requirement reflected congressional recognition of the seriousness of discharging such employees. There simply is no analogy between termination of nonprobationary employment of a civil service employee and the suspension of a public school pupil for not more than 10 days. Even if the Court is correct in implying some concept of justifiable cause in the Ohio procedure, it could hardly be stretched to the constitutional proportions found present in *Arnett*.

[2.5] Indeed, the Court itself quotes from a portion of Mr. Justice Frankfurter's concurrence in *Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1951), which explicitly refers to "a person in jeopardy of *serious loss*." See *ante*, at 580 (emphasis supplied).

Nor is the "*de minimis*" standard referred to by the Court relevant in this case. That standard was first stated by Mr. Justice Harlan in a concurring opinion in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969), and then quoted in a footnote to the Court's opinion in *Fuentes v. Shevin*, 407 U.S. 67, 90 n. 21 (1972). Both *Sniadach* and *Fuentes*, however, involved resolution of property disputes between two private parties claiming an interest in the same property. Neither case pertained to an interest conferred by the State.

[2.6] 2 App. 163-171 (testimony of Norval Goss, Director of Pupil Personnel). See opinion of the three-judge court, 372 F. Supp. 1279, 1291 (SD Ohio 1973).

[2.7] See also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), quoting the "grievous loss" standard first articulated in *Anti-Fascist Committee v. McGrath*, *supra*.

[2.8] In dissent on the First Amendment issue, Mr. Justice Harlan recognized the Court's basic agreement on the limited role of the judiciary in overseeing school disciplinary decisions:

> "I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions." 393 U.S., at 526.

[2.9] See generally S. Bailey, Disruption in Urban Secondary Schools (1970), which summarizes some of the recent surveys on school disruption. A Syracuse University study, for example, found that 85% of the schools responding reported some type of significant disruption in the years 1967-1970.

[2.10] An *amicus* brief filed by the Children's Defense Fund states that at least 10% of the junior and senior high school students in the States sampled were suspended one or more times in the 1972-1973 school year. The data on which this conclusion rests were obtained from an extensive survey prepared by the Office for Civil Rights of the Department of Health, Education, and Welfare. The Children's Defense Fund reviewed the suspension data for five States—Arkansas, Maryland, New Jersey, Ohio, and South Carolina.

Likewise, an *amicus* brief submitted by several school associations in Ohio indicates that the number of suspensions is significant: in 1972-1973, 4,054 students out of a school enrollment of 81,007 were suspended in Cincinnati; 7,352 of 57,000 students were suspended in Akron; and 14,598 of 142,053 students were suspended in Cleveland. See also the Office of Civil Rights Survey, *supra*, finding that approximately 20,000 students in New York City, 12,000 in Cleveland, 9,000 in Houston, and 9,000 in Memphis were suspended at least once during the 1972-1973 school year. Even these figures are probably somewhat conservative since some schools did not reply to the survey.

[2.11] See generally J. Dobson, Dare to Discipline (1970).

[2.12] The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education.

[2.13] In this regard, the relationship between a student and teacher is manifestly different from that between a welfare administrator and a recipient (see *Goldberg v. Kelly*, 397 U.S. 254 (1970)), a motor vehicle department and a driver (see *Bell v. Burson*, 402 U.S. 535 (1971)), a debtor and a creditor (see *Sniadach v. Family Finance Corp.*, *supra*; *Fuentes v. Shevin*, *supra*; *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974)), a parole officer and a parolee (see *Morrissey v. Brewer*, 408 U.S. 471 (1972)), or even an employer and an employee (see *Arnett v. Kennedy*, 416 U.S. 134 (1974)). In many of these noneducation settings there is—for purposes of this analysis [419 U.S. 565, 595]—a "faceless" administrator dealing with an equally "faceless" recipient of some form of government benefit or license; in others, such as the garnishment and repossession cases, there is a conflict-of-interest relationship. Our public school system, however, is premised on the belief that teachers and pupils should not be "faceless" to each other. Nor does the educational relationship present a typical "conflict of interest." Rather, the relationship traditionally is marked by a coincidence of interests.

Yet the Court, relying on cases such as *Sniadach* and *Fuentes*, apparently views the classroom of teenagers as comparable to the competitive and adversary environment of the adult, commercial world.

[2.14] A traditional factor in any due process analysis is "the protection implicit in the office of the functionary whose conduct is challenged. . . ." *Anti-Fascist Committee v. McGrath*, 341 U.S., at 163 (Frankfurter, J., concurring). In the public school setting there is a high degree of such protection since a teacher has responsibility for, and a commitment to, his pupils that is absent in other due process contexts.

[2.15] The Court itself recognizes that the requirements it imposes are, "if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions." *Ante*, at 583.

[2.16] See *Connelly v. University of Vermont*, 244 F. Supp. 156 (Vt. 1956).

[2.17] See *Kelley v. Metropolitan County Board of Education of Nashville*, 293 F. Supp. 485 (MD Tenn. 1968).

[2.18] The psychological injuries so perceived were as follows:

> "1. The suspension is a blow to the student's self-esteem. 2. The student feels powerless and helpless. 3. The student views school authorities and teachers with resentment, suspicion and fear. 4. The student learns withdrawal as a mode of problem solving. 5. The student has little perception of the reasons for the suspension. He does not know what offending acts he committed. 6. The student is stigmatized by his teachers and school administrators as a deviant. They expect the student to be a troublemaker in the future." 372 F. Supp., at 1292.

[2.19] There is, no doubt, a school of modern psychological or psychiatric persuasion that maintains that any discipline of the young is detrimental. Whatever one may think of the wisdom of this unproved theory, it hardly affords dependable support for a constitutional decision. Moreover, even the theory's proponents would concede that the magnitude of injury depends primarily upon the individual child or teenager. A classroom reprimand by the teacher may be more traumatic to the shy, timid introvert than expulsion would be to the aggressive, rebellious extrovert. In my view we tend to lose our sense of perspective and proportion in a case of this kind. For average, normal children—the vast majority—suspension for a few days is simply *not* a detriment; it is a commonplace [419 U.S. 565, 599] occurrence, with some 10% of all students being suspended; it leaves no scars; affects no reputations; indeed, it often may be viewed by the young as a badge of some distinction and a welcome holiday.

[2.20] This estimate was supplied by the National School Board Association, Washington, D.C.

[2.21] See U.S. Office of Education, Elementary and Secondary Public School Statistics, 1972-1973.

[2.22] Some half dozen years ago, the Court extended First Amendment rights under limited circumstances to public school pupils. Mr. Justice Black, dissenting, viewed the decision as ushering in "an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools' . . . is in ultimate effect transferred to the Supreme Court." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969). There were some who thought Mr. Justice Black was unduly concerned. But his prophecy is now being fulfilled. In the few years since Tinker there have been literally hundreds of cases by schoolchildren alleging violation of their constitutional rights. This flood of litigation, between pupils and school authorities, was triggered by a narrowly written First Amendment opinion which I could well have joined on its facts. One can only speculate as to the extent to which public education will be disrupted by giving every schoolchild the power to contest *in court* any decision made by his teacher which arguably infringes the state-conferred right to education. [419 U.S. 565, 601]

Honig v. Doe

484 U.S. 305 (1988)

United States Supreme Court, Docket No. 86-728

Argued: November 9, 1987 ***Decided:*** January 20, 1988

In order to assure that States receiving federal financial assistance will provide a "free appropriate public education" for all disabled children, including those with serious emotional disturbances, the Education of the Handicapped Act (EHA or Act) establishes a comprehensive system of procedural safeguards designed to provide meaningful parental participation in all aspects of a child's educational placement, including an opportunity for an impartial due process hearing with respect to any complaints such parents have concerning their child's placement, and the right to seek administrative review of any decisions they think inappropriate. If that review proves unsatisfactory, either the parents or the local educational agency may file a civil action in any state or federal court for "appropriate" relief. 20 U.S.C. § 1415(e)(2). The Act's "stay-put" provision directs that a disabled child "shall remain in [his or her] then current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree. § 1415(e)(3). Respondents Doe and Smith, who were emotionally disturbed students, were suspended indefinitely for violent and disruptive conduct related to their disabilities, pending the completion of expulsion proceedings by the San Francisco Unified School District (SFUSD). After unsuccessfully protesting the action against him, Doe filed a suit in Federal District Court, in which Smith intervened, alleging that the suspension and proposed expulsion violated the EHA, and seeking injunctive relief against SFUSD officials and petitioner, the State Superintendent of Public Instruction. The court entered summary judgment for respondents on their EHA claims and issued a permanent injunction. The Court of Appeals affirmed with slight modifications.

Held:

1. The case is moot as to respondent Doe, who is now 24 years old, since the Act limits eligibility to disabled children between the ages of 3 and 21. However, the case is justiciable with respect to respondent Smith, who continues to be eligible for EHA educational services since he is currently only 20 and has not yet completed high school. This Court has jurisdiction since there is a reasonable likelihood that Smith [484 U.S. 305, 306] will again suffer the deprivation of EHA-mandated rights that gave rise to this suit. Given the evidence that he is unable to conform his conduct to socially acceptable norms, and the absence of any suggestion that he has overcome his behavioral problems, it is reasonable to expect that he will again engage in aggressive and disruptive classroom misconduct. Moreover, it is unreasonable to suppose that any future educational placement will so perfectly suit his emotional and academic needs that further disruptions on his part are improbable. If Smith does repeat the objectionable conduct, it is likely that he will again be subjected to the same type of unilateral school action in any California school district in which he is enrolled, in light of the lack of a statewide policy governing local

school responses to disability-related misconduct, and petitioner's insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct. In light of the ponderousness of review procedures under the Act, and the fact that an aggrieved student will often be finished with school or otherwise ineligible for EHA protections by the time review can be had in this Court, the conduct Smith complained of is "capable of repetition, yet evading review." Thus his EHA claims are not moot. Pp. 317-323.

2. The "stay-put" provision prohibits state or local school authorities from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities during the pendency of review proceedings. Section 1415(e)(3) is unequivocal in its mandate that "the child *shall* remain in the then current educational placement" (emphasis added), and demonstrates a congressional intent to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. This Court will not rewrite the statute to infer a "dangerousness" exception on the basis of obviousness or congressional inadvertence, since, in drafting the statute, Congress devoted close attention to *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866, and *Pennsylvania Assn. for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, and 343 F. Supp. 279, thereby establishing that the omission of an emergency exception for dangerous students was intentional. However, Congress did not leave school administrators powerless to deal with such students, since implementing regulations allow the use of normal, nonplacement-changing procedures, including temporary suspensions for up to 10 schooldays for students posing an immediate threat to others' safety, while the Act allows for interim placements where parents and school officials are able to agree, [484 U.S. 305, 307] and authorizes officials to file a § 1415(e)(2) suit for "appropriate" injunctive relief where such an agreement cannot be reached. In such a suit, § 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can rebut only by showing that maintaining the current placement is substantially likely to result in injury to the student or to others. Here, the District Court properly balanced respondents' interests under the Act against the state and local school officials' safety interest, and both lower courts properly construed and applied § 1415(e)(3), except insofar as the Court of Appeals held that a suspension exceeding 10 schooldays does not constitute a prohibited change in placement. The Court of Appeals' judgment is modified to that extent. Pp. 323-328.

3. Insofar as the Court of Appeals' judgment affirmed the District Court's order directing the State to provide services directly to a disabled child where the local agency has failed to do so, that judgment is affirmed by an equally divided Court. Pp. 328-329.

793 F.2d 1470, affirmed.

BRENNAN, J., delivered the opinion of the Court as to holdings number 1 and 2 above, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 329. SCALIA, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 332.

Asher Rubin, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were John K. Van de Kamp, Attorney General, Charlton G. Holland, Assistant Attorney General, and John Davidson, Supervising Deputy Attorney General.

Glen D. Nager argued the cause pro hac vice for the United States as *amicus curiae* urging reversal. With him on the brief were Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Carvin, Walter W. Barnett, Dennis J. Dimsey, and Wendell L. Willkie.

Sheila Brogna argued the cause for respondents. With her on the brief were William J. Taylor and Toby Fishbein Rubin. *

[*] Briefs of *amici curiae* urging reversal were filed for the Davis Joint Unified School District et al. by Charles R. Mack; for the National School [484 U.S. 305, 308] Boards Association by Gwendolyn H. Gregory and August W. Steinhilber; for the National School Safety Center et al. by James A. Rapp, Donna Clontz, and Jane Slenkovich; and for the San Francisco Unified School District by Louise H. Renne and Thomas M. Berliner.

Briefs of *amici curiae* urging affirmance were filed for the American Association on Mental Deficiency et al. by Norman S. Rosenberg and Janet Stotland; for the National Association of Protection and Advocacy Systems et al. by Marilyn Holle; and for the Center for Law and Education, Inc., et al.

Briefs of *amici curiae* were filed for Senator Chafee et al. by Arlene Brynne Mayerson; and for the Legal Aid Society of the City of New York, Juvenile Rights Division, by Henry S. Weintraub. [484 U.S. 305, 308]

JUSTICE BRENNAN delivered the opinion of the Court.

As a condition of federal financial assistance, the Education of the Handicapped Act requires States to ensure a "free appropriate public education" for all disabled children within their jurisdictions. In aid of this goal, the Act establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree. Among these safeguards is the so-called "stay-put" provision, which directs that a disabled child "shall remain in [his or her] then current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree. 20 U.S.C. § 1415(e)(3). Today we must decide whether, in the face of this statutory proscription, state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities. In addition, we are called upon to

decide whether a district court may, in the exercise of its equitable powers, order a State to provide educational services directly to a disabled child when the local agency fails to do so. [484 U.S. 305, 309]

I

In the Education of the Handicapped Act (EHA or the Act), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq*., Congress sought "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected." § 1400(c). When the law was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed: 21 years after this Court declared education to be "perhaps the most important function of state and local governments," *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. § 1400(b)(3). Indeed, one out of every eight of these children was excluded from the public school system altogether, § 1400(b)(4); many others were simply "warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out. See H. R. Rep. No. 94-332, p. 2 (1975). Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet. See S. Rep. No. 94-168, p. 8 (1975) (hereinafter S. Rep.).

Although these educational failings resulted in part from funding constraints, Congress recognized that the problem reflected more than a lack of financial resources at the state and local levels. Two federal-court decisions, which the Senate Report characterized as "landmark," see *id*., at 6, demonstrated that many disabled children were excluded pursuant to state statutes or local rules and policies, typically without [484 U.S. 305, 310] any consultation with, or even notice to, their parents. See *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972); *Pennsylvania Assn. for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (ED Pa. 1971), and 343 F. Supp. 279 (1972) (PARC). Indeed, by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States. See S. Rep., at 6.

In responding to these problems, Congress did not content itself with passage of a simple funding statute. Rather, the EHA confers upon disabled students an enforceable substantive right to public education in participating States, see *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), 1.1 and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act. Accordingly, States seeking to qualify for federal funds must develop policies assuring all disabled children the "right to a free appropriate public education," and must file with the Secretary of [484 U.S. 305, 311] Education formal plans mapping out in detail the programs, procedures, and timetables under which they will effectuate these policies. 20 U.S.C. §§ 1412(1), 1413(a). Such plans must assure that, "to the maximum extent appropriate,"

States will "mainstream" disabled children, i.e., that they will educate them with children who are not disabled, and that they will segregate or otherwise remove such children from the regular classroom setting "only when the nature or severity of the handicap is such that education in regular classes . . . cannot be achieved satisfactorily." § 1412(5).

The primary vehicle for implementing these congressional goals is the "individualized educational program" (IEP), which the EHA mandates for each disabled child. Prepared at meetings between a representative of the local school district, the child's teacher, the parents or guardians, and, whenever appropriate, the disabled child, the IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. § 1401(19). The IEP must be reviewed and, where necessary, revised at least once a year in order to ensure that local agencies tailor the statutorily required "free appropriate public education" to each child's unique needs. § 1414(a)(5).

Envisioning the IEP as the centerpiece of the statute's education delivery system for disabled children, and aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. See §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2). Accordingly, the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right [484 U.S. 305, 312] to seek review of any decisions they think inappropriate. These safeguards include the right to examine all relevant records pertaining to the identification, evaluation, and educational placement of their child; prior written notice whenever the responsible educational agency proposes (or refuses) to change the child's placement or program; an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education; and an opportunity for "an impartial due process hearing" with respect to any such complaints. §§ 1415(b)(1), (2).

At the conclusion of any such hearing, both the parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state or federal court. §§ 1415(c), (e)(2). In addition to reviewing the administrative record, courts are empowered to take additional evidence at the request of either party and to "grant such relief as [they] determine[] is appropriate." § 1415(e)(2). The "stay-put" provision at issue in this case governs the placement of a child while these often lengthy review procedures run their course. It directs that:

> "During the pendency of any proceedings conducted pursuant to [§ 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . ." § 1415(e)(3).

The present dispute grows out of the efforts of certain officials of the San Francisco Unified School District (SFUSD) to expel two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities. In November 1980, respondent John Doe assaulted another student at the Louise Lombard School, a developmental center for disabled children. Doe's April 1980 IEP identified him as a socially and physically awkward 17-year-old who experienced considerable difficulty controlling his impulses and anger. Among the goals set out in his IEP was "[i]mprovement in [his] ability to relate to [his] [484 U.S. 305, 313] peers [and to] cope with frustrating situations without resorting to aggressive acts." App. 17. Frustrating situations, however, were an unfortunately prominent feature of Doe's school career: physical abnormalities, speech difficulties, and poor grooming habits had made him the target of teasing and ridicule as early as the first grade, *id.*, at 23; his 1980 IEP reflected his continuing difficulties with peers, noting that his social skills had deteriorated and that he could tolerate only minor frustration before exploding. *Id.*, at 15-16.

On November 6, 1980, Doe responded to the taunts of a fellow student in precisely the explosive manner anticipated by his IEP: he choked the student with sufficient force to leave abrasions on the child's neck, and kicked out a school window while being escorted to the principal's office afterwards. *Id.*, at 208. Doe admitted his misconduct and the school subsequently suspended him for five days. Thereafter, his principal referred the matter to the SFUSD Student Placement Committee (SPC or Committee) with the recommendation that Doe be expelled. On the day the suspension was to end, the SPC notified Doe's mother that it was proposing to exclude her child permanently from SFUSD and was therefore extending his suspension until such time as the expulsion proceedings were completed. 1.2 The Committee further advised her that she was entitled to attend the November 25 hearing at which it planned to discuss the proposed expulsion.

After unsuccessfully protesting these actions by letter, Doe brought this suit against a host of local school officials [484 U.S. 305, 314] and the State Superintendent of Public Instruction. Alleging that the suspension and proposed expulsion violated the EHA, he sought a temporary restraining order canceling the SPC hearing and requiring school officials to convene an IEP meeting. The District Judge granted the requested injunctive relief and further ordered defendants to provide home tutoring for Doe on an interim basis; shortly thereafter, she issued a preliminary injunction directing defendants to return Doe to his then current educational placement at Louise Lombard School pending completion of the IEP review process. Doe reentered school on December 15, 5½ weeks, and 24 schooldays, after his initial suspension.

Respondent Jack Smith was identified as an emotionally disturbed child by the time he entered the second grade in 1976. School records prepared that year indicated that he was unable "to control verbal or physical outburst[s]" and exhibited a "[s]evere disturbance in relationships with peers and adults." *Id.*, at 123. Further evaluations subsequently revealed that he had been physically and emotionally abused as an infant and young child and that, despite above average intelligence, he experienced academic and social difficulties as a result of extreme hyperactivity and low self-esteem.

Id., at 136, 139, 155, 176. Of particular concern was Smith's propensity for verbal hostility; one evaluator noted that the child reacted to stress by "attempt[ing] to cover his feelings of low self worth through aggressive behavior[,] . . . primarily verbal provocations." *Id.*, at 136.

Based on these evaluations, SFUSD placed Smith in a learning center for emotionally disturbed children. His grandparents, however, believed that his needs would be better served in the public school setting and, in September 1979, the school district acceded to their requests and enrolled him at A. P. Giannini Middle School. His February 1980 IEP recommended placement in a Learning Disability Group, stressing the need for close supervision and a highly structured environment. *Id.*, at 111. Like earlier evaluations, [484 U.S. 305, 315] the February 1980 IEP noted that Smith was easily distracted, impulsive, and anxious; it therefore proposed a half-day schedule and suggested that the placement be undertaken on a trial basis. *Id.*, at 112, 115.

At the beginning of the next school year, Smith was assigned to a full-day program; almost immediately thereafter he began misbehaving. School officials met twice with his grandparents in October 1980 to discuss returning him to a half-day program; although the grandparents agreed to the reduction, they apparently were never apprised of their right to challenge the decision through EHA procedures. The school officials also warned them that if the child continued his disruptive behavior—which included stealing, extorting money from fellow students, and making sexual comments to female classmates—they would seek to expel him. On November 14, they made good on this threat, suspending Smith for five days after he made further lewd comments. His principal referred the matter to the SPC, which recommended exclusion from SFUSD. As it did in John Doe's case, the Committee scheduled a hearing and extended the suspension indefinitely pending a final disposition in the matter. On November 28, Smith's counsel protested these actions on grounds essentially identical to those raised by Doe, and the SPC agreed to cancel the hearing and to return Smith to a half-day program at A. P. Giannini or to provide home tutoring. Smith's grandparents chose the latter option and the school began home instruction on December 10; on January 6, 1981, an IEP team convened to discuss alternative placements.

After learning of Doe's action, Smith sought and obtained leave to intervene in the suit. The District Court subsequently entered summary judgment in favor of respondents on their EHA claims and issued a permanent injunction. In a series of decisions, the District Judge found that the proposed expulsions and indefinite suspensions of respondents for conduct attributable to their disabilities deprived [484 U.S. 305, 316] them of their congressionally mandated right to a free appropriate public education, as well as their right to have that education provided in accordance with the procedures set out in the EHA. The District Judge therefore permanently enjoined the school district from taking any disciplinary action other than a 2- or 5-day suspension against any disabled child for disability-related misconduct, or from effecting any other change in the educational placement of any such child without parental consent pending completion of any EHA proceedings. In addition, the judge barred the State from authorizing unilateral placement changes and directed it to establish an EHA compliance-monitoring system or, alternatively, to enact guidelines governing local school responses

to disability-related misconduct. Finally, the judge ordered the State to provide services directly to disabled children when, in any individual case, the State determined that the local educational agency was unable or unwilling to do so.

On appeal, the Court of Appeals for the Ninth Circuit affirmed the orders with slight modifications. *Doe v. Maher*, 793 F.2d 1470 (1986). Agreeing with the District Court that an indefinite suspension in aid of expulsion constitutes a prohibited "change in placement" under § 1415(e)(3), the Court of Appeals held that the stay-put provision admitted of no "dangerousness" exception and that the statute therefore rendered invalid those provisions of the California Education Code permitting the indefinite suspension or expulsion of disabled children for misconduct arising out of their disabilities. The court concluded, however, that fixed suspensions of up to 30 schooldays did not fall within the reach of § 1415(e)(3), and therefore upheld recent amendments to the state Education Code authorizing such suspensions. 1.3 Lastly, the court [484 U.S. 305, 317] affirmed that portion of the injunction requiring the State to provide services directly to a disabled child when the local educational agency fails to do so.

Petitioner Bill Honig, California Superintendent of Public Instruction, 1.4 sought review in this Court, claiming that the Court of Appeals' construction of the stay-put provision conflicted with that of several other Courts of Appeals which had recognized a dangerousness exception, compare *Doe v. Maher*, *supra* (case below), with *Jackson v. Franklin County School Board*, 765 F.2d 535, 538 (CA5 1985); *Victoria L. v. District School Bd. of Lee County, Fla.*, 741 F.2d 369, 374 (CA11 1984); *S-1 v. Turlington*, 635 F.2d 342, 348, n. 9 (CA5), cert. denied, 454 U.S. 1030 (1981), and that the direct services ruling placed an intolerable burden on the State. We granted certiorari to resolve these questions, 479 U.S. 1084 (1987), and now affirm.

II

At the outset, we address the suggestion, raised for the first time during oral argument, that this case is moot. 1.5 Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 546 (1976); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires. *Steffel v. Thompson*, [484 U.S. 305, 318] 415 U.S. 452, 459, n. 10 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973). In the present case, we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation of EHA-mandated rights that gave rise to this suit. We believe that, at least with respect to respondent Smith, such a possibility does in fact exist and that the case therefore remains justiciable.

Respondent John Doe is now 24 years old and, accordingly, is no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of 3 and 21. See 20 U.S.C. § 1412(2)(B). It is clear, therefore, that whatever rights to state educational services he may yet have as a ward of the State, see Tr. of Oral Arg. 23, 26, the Act would not govern the State's

provision of those services, and thus the case is moot as to him. Respondent Jack Smith, however, is currently 20 and has not yet completed high school. Although at present he is not faced with any proposed expulsion or suspension proceedings, and indeed no longer even resides within the SFUSD, he remains a resident of California and is entitled to a "free appropriate public education" within that State. His claims under the EHA, therefore, are not moot if the conduct he originally complained of is "'capable of repetition, yet evading review.'" *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Given Smith's continued eligibility for educational services under the EHA, 1.6 the nature of his disability, and petitioner's [484 U.S. 305, 319] insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct, we have little difficulty concluding that there is a "reasonable [484 U.S. 305, 320] expectation," *ibid.*, that Smith would once again be subjected to a unilateral "change in placement" for conduct growing out of his disabilities were it not for the statewide injunctive relief issued below.

Our cases reveal that, for purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury. See *Los Angeles v. Lyons*, 461 U.S. 95, 105-106 (1983) (no threat that party seeking injunction barring police use of chokeholds would be stopped again for traffic violation or other offense, or would resist arrest if stopped); *Murphy v. Hunt*, *supra*, at 484 (no reason to believe that party challenging denial of pretrial bail "will once again be in a position to demand bail"); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (unlikely that parties challenging discriminatory bond-setting, sentencing, and jury-fee practices would again violate valid criminal laws). No such reluctance, however, is warranted here. It is respondent Smith's very inability to conform his conduct to socially acceptable norms that renders him "handicapped" within the meaning of the EHA. See 20 U.S.C. § 1401(1); 34 CFR § 300.5(b)(8) (1987). As noted above, the record is replete with evidence that Smith is unable to govern his aggressive, impulsive behavior—indeed, his notice of suspension acknowledged that "Jack's actions seem beyond his control." App. 152. In the absence of any suggestion that respondent has overcome his earlier difficulties, it is certainly reasonable to expect, based on his prior history of behavioral problems, that he will again engage in classroom misconduct. Nor is it reasonable to suppose that Smith's future educational placement will so perfectly suit his emotional and academic needs that further disruptions on his part are improbable. Although JUSTICE SCALIA suggests in his dissent, *post*, at 338, that school officials are unlikely to place Smith in a setting where they cannot control his misbehavior, any efforts [484 U.S. 305, 321] to ensure such total control must be tempered by the school system's statutory obligations to provide respondent with a free appropriate public education in "the least restrictive environment," 34 CFR § 300.552(d) (1987); to educate him, "to the maximum extent appropriate," with children who are not disabled, 20 U.S.C. § 1412(5); and to consult with his parents or guardians, and presumably with respondent himself, before choosing a placement. §§ 1401(19), 1415 (b). Indeed, it is only by ignoring these mandates, as well as Congress' unquestioned desire to wrest from school officials their former unilateral authority to determine the placement of

emotionally disturbed children, see *infra*, at 323-324, that the dissent can so readily assume that respondent's future placement will satisfactorily prevent any further dangerous conduct on his part. Overarching these statutory obligations, moreover, is the inescapable fact that the preparation of an IEP, like any other effort at predicting human behavior, is an inexact science at best. Given the unique circumstances and context of this case, therefore, we think it reasonable to expect that respondent will again engage in the type of misconduct that precipitated this suit.

We think it equally probable that, should he do so, respondent will again be subjected to the same unilateral school action for which he initially sought relief. In this regard, it matters not that Smith no longer resides within the SFUSD. While the actions of SFUSD officials first gave rise to this litigation, the District Judge expressly found that the lack of a state policy governing local school responses to disability-related misconduct had led to, and would continue to result in, EHA violations, and she therefore enjoined the state defendant from authorizing, among other things, unilateral placement changes. App. 247-248. She of course also issued injunctions directed at the local defendants, but they did not seek review of those orders in this Court. Only petitioner, the State Superintendent of Public Instruction, has invoked our jurisdiction, and he now urges us to hold that [484 U.S. 305, 322] local school districts retain unilateral authority under the EHA to suspend or otherwise remove disabled children for dangerous conduct. Given these representations, we have every reason to believe that were it not for the injunction barring petitioner from authorizing such unilateral action, respondent would be faced with a real and substantial threat of such action in any California school district in which he enrolled. *Cf. Los Angeles v. Lyons*, *supra*, at 106 (respondent lacked standing to seek injunctive relief because he could not plausibly allege that police officers choked all persons whom they stopped, or that the city "*authorized* police officers to act in such manner" (emphasis added)). Certainly, if the SFUSD's past practice of unilateral exclusions was at odds with state policy and the practice of local school districts generally, petitioner would not now stand before us seeking to defend the right of all local school districts to engage in such aberrant behavior. 1.7

We have previously noted that administrative and judicial review under the EHA is often "ponderous," *Burlington School Committee v. Massachusetts Dept. of Education*, 471 U.S. 359, 370 (1985), and this case, which has taken seven years to reach us, amply confirms that observation. For obvious reasons, the misconduct of an emotionally disturbed or otherwise disabled child who has not yet reached adolescence typically will not pose such a serious threat to the well-being of other students that school officials can only ensure classroom safety by excluding the child. Yet, the adolescent student improperly disciplined for misconduct that does pose such a threat will often be finished with school or otherwise [484 U.S. 305, 323] ineligible for EHA protections by the time review can be had in this Court. Because we believe that respondent Smith has demonstrated both "a sufficient likelihood that he will again be wronged in a similar way," *Los Angeles v. Lyons*, 461 U.S., at 111, and that any resulting claim he may have for relief will surely evade our review, we turn to the merits of his case.

III

The language of § 1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, "the child *shall* remain in the then current educational placement." § 1415(e)(3) (emphasis added). Faced with this clear directive, petitioner asks us to read a "dangerousness" exception into the stay-put provision on the basis of either of two essentially inconsistent assumptions: first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight. Because we cannot accept either premise, we decline petitioner's invitation to rewrite the statute.

Petitioner's arguments proceed, he suggests, from a simple, commonsense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often lengthy EHA proceedings run their course. We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed [484 U.S. 305, 324] that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.

As noted above, Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes. In drafting the law, Congress was largely guided by the recent decisions in *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (1972), and *PARC*, 343 F. Supp. 279 (1972), both of which involved the exclusion of hard-to-handle disabled students. *Mills* in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labeled four of the seven minor plaintiffs "behavioral problems," and had excluded them from classes without providing any alternative education to them or any notice to their parents. 348 F. Supp., at 869-870. After finding that this practice was not limited to the named plaintiffs but affected in one way or another an estimated class of 12,000 to 18,000 disabled students, *id.*, at 868-869, 875, the District Court enjoined future exclusions, suspensions, or expulsions "on grounds of discipline." *Id.*, at 880.

Congress attacked such exclusionary practices in a variety of ways. It required participating States to educate all disabled children, regardless of the severity of their disabilities, 20 U.S.C. § 1412(2)(C), and included within the definition of "handicapped" those children with serious emotional disturbances. § 1401(1). It further provided for meaningful parental participation in all aspects of a child's educational placement, and barred schools, through the stay-put provision, from changing that placement over the parent's objection until all review proceedings were completed. Recognizing

that those proceedings might prove long and tedious, the Act's drafters did not intend § 1415(e)(3) to operate inflexibly, see 121 Cong. Rec. 37412 (1975) (remarks of Sen. Stafford), and they therefore allowed for interim placements where parents [484 U.S. 305, 325] and school officials are able to agree on one. Conspicuously absent from § 1415(e)(3), however, is any emergency exception for dangerous students. This absence is all the more telling in light of the injunctive decree issued in *PARC*, which permitted school officials unilaterally to remove students in "'extraordinary circumstances.'" 343 F. Supp., at 301. Given the lack of any similar exception in Mills, and the close attention Congress devoted to these "landmark" decisions, see S. Rep., at 6, we can only conclude that the omission was intentional; we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create.

Our conclusion that § 1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." Comment following 34 CFR § 300.513 (1987). Such procedures may include the use of study carrels, time-outs, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 schooldays. 1.8 This authority, which respondent [484 U.S. 305, 326] in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief.

Petitioner contends, however, that the availability of judicial relief is more illusory than real, because a party seeking review under § 1415(e)(2) must exhaust time-consuming administrative remedies, and because under the Court of Appeals' construction of § 1415(e)(3), courts are as bound by the stay-put provision's "automatic injunction," 793 F.2d, at 1486, as are schools. 1.9 It is true that judicial review is normally [484 U.S. 305, 327] not available under § 1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate. See *Smith v. Robinson*, 468 U.S. 992, 1014, n. 17 (1984) (citing cases); see also 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams) ("[E]xhaustion . . . should not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter"). While many of the EHA's procedural safeguards protect the rights of parents and children, schools can and do seek redress through the administrative review process, and we have no reason to believe that Congress meant to require schools alone to exhaust in all cases, no matter how exigent the circumstances. The burden in such cases, of course, rests with the school to demonstrate the futility or inadequacy of administrative review, but nothing in § 1415(e)

(2) suggests that schools are completely barred from attempting to make such a showing. Nor do we think that § 1415(e)(3) operates to limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by schools, not courts, and one of the purposes of 1415(e)(3), therefore, was "to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Burlington School Committee v. Massachusetts Dept. of Education*, 471 U.S., at 373 (emphasis added). The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by § 1415(e)(2), see *Doe v. Brookline School Committee*, 722 F.2d 910, 917 (CA1 1983); indeed, it says nothing whatever about judicial power. [484 U.S. 305, 328]

In short, then, we believe that school officials are entitled to seek injunctive relief under § 1415(e)(2) in appropriate cases. In any such action, § 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others. In the present case, we are satisfied that the District Court, in enjoining the state and local defendants from indefinitely suspending respondent or otherwise unilaterally altering his then current placement, properly balanced respondent's interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA against the interests of the state and local school officials in maintaining a safe learning environment for all their students. 1.10

IV

We believe the courts below properly construed and applied § 1415(e)(3), except insofar as the Court of Appeals held that a suspension in excess of 10 schooldays does not constitute [484 U.S. 305, 329] a "change in placement." 1.11 We therefore affirm the Court of Appeals' judgment on this issue as modified herein. Because we are equally divided on the question whether a court may order a State to provide services directly to a disabled child where the local agency has failed to do so, we affirm the Court of Appeals' judgment on this issue as well.

Affirmed.

Footnotes

[1.1] Congress' earlier efforts to ensure that disabled students received adequate public education had failed in part because the measures it adopted were largely hortatory. In the 1966 amendments to the Elementary and Secondary Education Act of 1965, Congress established a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children." Pub. L. 89-750, § 161, 80 Stat. 1204. It repealed that program four years later and replaced it with the original version of the Education of the Handicapped Act, Pub. L.

91-230, 84 Stat. 175, Part B of which contained a similar grant program. Neither statute, however, provided specific guidance as to how States were to use the funds, nor did they condition the availability of the grants on compliance with any procedural or substantive safeguards. In amending the EHA to its present form, Congress rejected its earlier policy of "merely establish[ing] an unenforceable goal requiring all children to be in school." 121 Cong. Rec. 37417 (1975) (remarks of Sen. Schweiker). Today, all 50 States and the District of Columbia receive funding assistance under the EHA. U.S. Dept. of Education, Ninth Annual Report to Congress on Implementation of Education of the Handicapped Act (1987).

[1.2] California law at the time empowered school principals to suspend students for no more than five consecutive schooldays, Cal. Educ. Code Ann. § 48903(a) (West 1978), but permitted school districts seeking to expel a suspended student to "extend the suspension until such time as [expulsion proceedings were completed]; provided, that [it] has determined that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the instructional process." § 48903(h). The State subsequently amended the law to permit school districts to impose longer initial periods of suspension. See n. 3, *infra*.

[1.3] In 1983, the State amended its Education Code to permit school districts to impose initial suspensions of 20, and in certain circumstances, 30 schooldays. Cal. Educ. Code Ann. §§ 48912(a), 48903 (West Supp. 1988). The legislature did not alter the indefinite suspension authority which the [484 U.S. 305, 317] SPC exercised in this case, but simply incorporated the earlier provision into a new section. See § 48911(g).

[1.4] At the time respondent Doe initiated this suit, Wilson Riles was the California Superintendent of Public Instruction. Petitioner Honig succeeded him in office.

[1.5] We note that both petitioner and respondents believe that this case presents a live controversy. See Tr. of Oral Arg. 6, 27-31. Only the United States, appearing as *amicus curiae*, urges that the case is presently nonjusticiable. *Id.*, at 21.

[1.6] Notwithstanding respondent's undisputed right to a free appropriate public education in California, JUSTICE SCALIA argues in dissent that there is no "demonstrated probability" that Smith will actually avail himself of that right because his counsel was unable to state affirmatively during oral argument that her client would seek to reenter the state school system. See *post*, at 337. We believe the dissent overstates the stringency of the "capable of repetition" test. Although JUSTICE SCALIA equates "reasonable expectation" with "demonstrated probability," the very case he cites for this proposition described these standards in the disjunctive, see *Murphy v. Hunt*, 455 U.S., at 482 ("[T]here must be a 'reasonable expectation' *or* a 'demonstrated probability' that the same controversy will [484 U.S. 305, 319] recur" (emphasis added)), and in numerous cases decided both before and since Hunt we have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable. See, e.g., *Burlington Northern R. Co. v. Maintenance of Way Employes*, 481 U.S. 429, 436, n. 4 (1987) (parties "reasonably likely" to find themselves in future disputes over collective-bargaining agreement); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987) (O'CONNOR, J.) ("likely" that respondent would again submit mining plans that would trigger contested state permit requirement); *Press-Enterprise Co. v. Superior Court of Cal., Riverside County*, 478 U.S. 1, 6 (1986) ("It can reasonably be assumed" that newspaper publisher will be subjected to similar closure

order in the future); *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 603 (1982) (same); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (case not moot where litigant "faces some likelihood of becoming involved in same controversy in the future") (dicta). Our concern in these cases, as in all others involving potentially moot claims, was whether the controversy was capable of repetition and not, as the dissent seems to insist, whether the claimant had demonstrated that a recurrence of the dispute was more probable than not. Regardless, then, of whether respondent has established with mathematical precision the likelihood that he will enroll in public school during the next two years, we think there is at the very least a reasonable expectation that he will exercise his rights under the EHA. In this regard, we believe respondent's actions over the course of the last seven years speak louder than his counsel's momentary equivocation during oral argument. Since 1980, he has sought to vindicate his right to an appropriate public education that is not only free of charge, but also free from the threat that school officials will unilaterally change his placement or exclude him from class altogether. As a disabled young man, he has as at least as great a need of a high school education and diploma as any of his peers, and his counsel advises us that he is awaiting the outcome of this case to decide whether to pursue his degree. Tr. Oral Arg. 23-24. Under these circumstances, we think it not only counterintuitive but also unreasonable to assume that respondent will forgo the exercise of a right that he has for so long sought to defend. Certainly we have as much reason to expect that respondent will reenter the California school system as we had to assume that Jane Roe would again both have an unwanted pregnancy and wish to exercise her right to an abortion. See *Roe v. Wade*, 410 U.S. 113, 125 (1973).

[1.7] Petitioner concedes that the school district "made a number of procedural mistakes in its eagerness to protect other students from Doe and Smith." Reply Brief for Petitioner 6. According to petitioner, however, unilaterally excluding respondents from school was not among them; indeed, petitioner insists that the SFUSD acted properly in removing respondents and urges that the stay-put provision "should not be interpreted to require a school district to maintain such dangerous children with other children." *Id.*, at 6-7.

[1.8] The Department of Education has adopted the position first espoused in 1980 by its Office of Civil Rights that a suspension of up to 10 schooldays does not amount to a "change in placement" prohibited by § 1415(e)(3). U.S. Dept. of Education, Office of Special Education Programs, Policy Letter (Feb. 26, 1987), Ed. for Handicapped L. Rep. 211:437 (1987). The EHA nowhere defines the phrase "change in placement," nor does the statute's structure or legislative history provide any guidance as to how the term applies to fixed suspensions. Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Moreover, the agency's position comports fully with the purposes of the statute: Congress sought to prevent schools from permanently and unilaterally excluding disabled children by means of indefinite suspensions and [484 U.S. 305, 326] expulsions; the power to impose fixed suspensions of short duration does not carry the potential for total exclusion that Congress found so objectionable. Indeed, despite its broad injunction, the District Court in *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972), recognized that school officials could suspend disabled children on a short-term, temporary basis. See id, at 880. *Cf. Goss v. Lopez*, 419 U.S. 565, 574-576 (1975) (suspension of 10 schooldays or more works a sufficient deprivation of property and liberty interests to trigger the protections of the Due Process Clause). Because we believe the agency correctly determined that a suspension in excess of 10 days does constitute a

prohibited "change in placement," we conclude that the Court of Appeals erred to the extent it approved suspensions of 20 and 30 days' duration.

[1.9] Petitioner also notes that in California, schools may not suspend any given student for more than a total of 20, and in certain special circumstances 30, schooldays in a single year, see Cal. Educ. Code Ann. § 48903 (West Supp. 1988); he argues, therefore, that a school district may not have the option of imposing a 10-day suspension when dealing with an obstreperous child whose previous suspensions for the year total 18 or 19 days. The fact remains, however, that state law does not define the scope of § 1415(e)(3). There may be cases in which a suspension that is otherwise valid under the stay-put provision would violate local law. The effect [484 U.S. 305, 327] of such a violation, however, is a question of state law upon which we express no view.

[1.10] We therefore reject the United States' contention that the District Judge abused her discretion in enjoining the local school officials from indefinitely suspending respondent pending completion of the expulsion proceedings. Contrary to the Government's suggestion, the District Judge did not view herself bound to enjoin any and all violations of the stay-put provision, but rather, consistent with the analysis we set out above, weighed the relative harms to the parties and found that the balance tipped decidedly in favor of respondent. App. 222-223. We of course do not sit to review the factual determinations underlying that conclusion. We do note, however, that in balancing the parties' respective interests, the District Judge gave proper consideration to respondent's rights under the EHA. While the Government complains that the District Court indulged an improper presumption of irreparable harm to respondent, we do not believe that school officials can escape the presumptive effect of the stay-put provision simply by violating it and forcing parents to petition for relief. In any suit brought by parents seeking injunctive relief for a violation of § 1415(e)(3), the burden rests with the school district to demonstrate that the educational *status quo* must be altered.

[1.11] See n. 8, *supra*.

CHIEF JUSTICE REHNQUIST, concurring.

I write separately on the mootness issue in this case to explain why I have joined Part II of the Court's opinion, and why I think reconsideration of our mootness jurisprudence may be in order when dealing with cases decided by this Court.

The present rule in federal cases is that an actual controversy must exist at all stages of appellate review, not merely at the *time the complaint is filed. This doctrine was clearly articulated in United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), in which Justice Douglas noted that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.*, at 39. The rule has been followed fairly consistently over the last 30 years. See, e.g., *Preiser v. Newkirk*, 422 U.S. 395 (1975); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972).

All agree that this case was "very much alive," *ante*, at 317, when the action was filed in the District Court, and very probably when the Court of Appeals decided the case. It is supervening events

since the decision of the Court of Appeals which have caused the dispute between the majority and the dissent over whether this case is moot. Therefore, all that the Court actually *holds* is that these supervening events do [484 U.S. 305, 330] not deprive *this* Court of the authority to hear the case. I agree with that holding, and would go still further in the direction of relaxing the test of mootness where the events giving rise to the claim of mootness have occurred after our decision to grant certiorari or to note probable jurisdiction.

The Court implies in its opinion, and the dissent expressly states, that the mootness doctrine is based upon Art. III of the Constitution. There is no doubt that our recent cases have taken that position. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 546 (1976); *Preiser v. Newkirk*, *supra*, at 401; *Sibron v. New York*, 392 U.S. 40, 57 (1968); *Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n. 3 (1964). But it seems very doubtful that the earliest case I have found discussing mootness, *Mills v. Green*, 159 U.S. 651 (1895), was premised on constitutional constraints; Justice Gray's opinion in that case nowhere mentions Art. III.

If it were indeed Art. III which—by reason of its requirement of a case or controversy for the exercise of federal judicial power—underlies the mootness doctrine, the "capable of repetition, yet evading review" exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are "capable of repetition, yet evading review." If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are "moot" but which also raise questions which are capable of repetition but evading review than we would to decide cases which are "moot" but raise no such questions.

The exception to mootness for cases which are "capable of repetition, yet evading review," was first stated by this Court in *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). There the Court enunciated the exception in the light of obvious pragmatic considerations, with no mention of Art. III as the principle underlying the mootness doctrine: [484 U.S. 305, 331]

> "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." *Id.*, at 515.

The exception was explained again in Moore v. Ogilvie, 394 U.S. 814, 816 (1969):

> "The problem is therefore 'capable of repetition, yet evading review.' The need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust" (citation omitted).

It is also worth noting that *Moore v. Ogilvie* involved a question which had been mooted by an election, just as did *Mills v. Green* some 74 years earlier. But at the time of *Mills*, the case originally enunciating the mootness doctrine, there was no thought of any exception for cases which were "capable of repetition, yet evading review."

The logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it. The "capable of repetition, yet evading review" exception is an example. So too is our refusal to dismiss as moot those cases in which the defendant voluntarily ceases, at some advanced stage of the appellate proceedings, whatever activity prompted the plaintiff to seek an injunction. See, e.g., *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n. 10 (1982); *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). I believe that we should adopt an additional exception to our [484 U.S. 305, 332] present mootness doctrine for those cases where the events which render the case moot have supervened since our grant of certiorari or noting of probable jurisdiction in the case. Dissents from denial of certiorari in this Court illustrate the proposition that the roughly 150 or 160 cases which we decide each year on the merits are less than the number of cases warranting review by us if we are to remain, as Chief Justice Taft said many years ago, "the last word on every important issue under the Constitution and the statutes of the United States." But these unique resources—the time spent preparing to decide the case by reading briefs, hearing oral argument, and conferring—are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented. To me the unique and valuable ability of this Court to decide a case—we are, at present, the only Art. III court which can decide a federal question in such a way as to bind all other courts—is a sufficient reason either to abandon the doctrine of mootness altogether in cases which this Court has decided to review, or at least to relax the doctrine of mootness in such a manner as the dissent accuses the majority of doing here. I would leave the mootness doctrine as established by our cases in full force and effect when applied to the earlier stages of a lawsuit, but I believe that once this Court has undertaken a consideration of a case, an exception to that principle is just as much warranted as where a case is "capable of repetition, yet evading review."

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, dissenting.

Without expressing any views on the merits of this case, I respectfully dissent because in my opinion we have no authority to decide it. I think the controversy is moot.

I

The Court correctly acknowledges that we have no power under Art. III of the Constitution to adjudicate a case that no [484 U.S. 305, 333] longer presents an actual, ongoing dispute between the named parties. *Ante*, at 317, citing *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 546 (1976); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Here, there is obviously no present controversy between the

parties, since both respondents are no longer in school and therefore no longer subject to a unilateral "change in placement." The Court concedes mootness with respect to respondent John Doe, who is now too old to receive the benefits of the Education of the Handicapped Act (EHA). *Ante*, at 318. It concludes, however, that the case is not moot as to respondent Jack Smith, who has two more years of eligibility but is no longer in the public schools, because the controversy is "capable of repetition, yet evading review." *Ante*, at 318-323.

Jurisdiction on the basis that a dispute is "capable of repetition, yet evading review" is limited to the "exceptional situatio[n]," *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), where the following two circumstances simultaneously occur: "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam), quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). The second of these requirements is not met in this case.

For there to be a "reasonable expectation" that Smith will be subjected to the same action again, that event must be a "demonstrated probability." *Murphy v. Hunt*, *supra*, at 482, 483; *Weinstein v. Bradford*, *supra*, at 149. I am surprised by the Court's contention, fraught with potential for future mischief, that "reasonable expectation" is satisfied by something less than "demonstrated probability." *Ante*, at 318-319, n. 6. No one expects that to happen which he does not think probable; and his expectation cannot be shown to be reasonable unless the probability is demonstrated. Thus, as the Court notes, our cases recite the two descriptions side by [484 U.S. 305, 334] side ("a 'reasonable expectation' or a 'demonstrated probability,'" *Hunt*, *supra*, at 482). The Court asserts, however, that these standards are "described . . . in the disjunctive," *ante*, at 318-319, n. 6—evidently believing that the conjunction "or" has no accepted usage except a disjunctive one, i.e., "expressing an alternative, contrast, or opposition," Webster's Third New International Dictionary 651 (1981). In fact, however, the conjunction is often used "to indicate . . . (3) the synonymous, equivalent, or substitutive character of two words or phrases ; (4) correction or greater exactness of phrasing or meaning ." *Id.*, at 1585. It is obvious that in saying "a reasonable expectation or a demonstrated probability" we have used the conjunction in one of the latter, or nondisjunctive, senses. Otherwise (and according to the Court's exegesis), we would have been saying that a controversy is sufficiently likely to recur if *either* a certain degree of probability exists *or* a higher degree of probability exists. That is rather like a statute giving the vote to persons who are "18 or 21." A bare six years ago, the author of today's opinion and one other Member of the majority plainly understood "reasonable expectation" and "demonstrated probability" to be synonymous. *Cf. Edgar v. MITE Corp.*, 457 U.S. 624, 662, and n. 11 (1982) (MARSHALL, J., dissenting, joined by BRENNAN, J.) (using the two terms here at issue interchangeably, and concluding that the case is moot because "there is no *demonstrated probability* that the State will have occasion to prevent MITE from making a takeover offer for some other corporation") (emphasis added).

The prior holdings cited by the Court in a footnote, see *ante*, at 319, n. 6, offer no support for the novel proposition that less than a probability of recurrence is sufficient to avoid mootness. In *Burlington Northern R. Co. v. Maintenance of Way Employes*, 481 U.S. 429, 436, n. 4 (1987), we found [484 U.S. 305, 335] that the same railroad and union were "reasonably likely" to find themselves in a recurring dispute over the same issue. Similarly, in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987), we found it "likely" that the plaintiff mining company would submit new plans which the State would seek to subject to its coastal permit requirements. See Webster's Third New International Dictionary 1310 (1981) (defining "likely" as "of such a nature or so circumstanced as to make something probable[;] . . . seeming to justify belief or expectation[;] . . . in all probability"). In the cases involving exclusion orders issued to prevent the press from attending criminal trials, we found that "[i]t can reasonably be assumed" that a news organization covering the area in which the defendant court sat will again be subjected to that court's closure rules. *Press-Enterprise Co. v. Superior Court of Cal., Riverside County*, 478 U.S. 1, 6 (1986); *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 603 (1982). In these and other cases, one may quarrel, perhaps, with the accuracy of the Court's probability assessment; but there is no doubt that assessment was regarded as necessary to establish jurisdiction.

In *Roe v. Wade*, 410 U.S. 113, 125 (1973), we found that the "human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete," so that "pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied." *Roe*, at least one other abortion case, see *Doe v. Bolton*, 410 U.S. 179, 187 (1973), and some of our election law decisions, see *Rosario v. Rockefeller*, 410 U.S. 752, 756, n. 5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333, n. 2 (1972), differ from the body of our mootness jurisprudence not in accepting less than a probability that the issue will recur, in a manner evading review, between the same parties; but in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members* [484 U.S. 305, 336] *of the public at large* without ever reaching us. Arguably those cases have been limited to their facts, or to the narrow areas of abortion and election rights, by our more recent insistence that, at least in the absence of a class action, the "capable of repetition" doctrine applies only where "there [is] a 'reasonable expectation'" that the "*same complaining party*" would be subjected to the same action again. *Hunt*, 455 U.S., at 482 (emphasis added), quoting *Weinstein*, 423 U.S., at 149; see *Burlington Northern R. Co.*, *supra*, at 436, n. 4; *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 187 (1979). If those earlier cases have not been so limited, however, the conditions for their application do not in any event exist here. There is no extraordinary improbability of the present issue's reaching us as a traditionally live controversy. It would have done so in this very case if Smith had not chosen to leave public school. In sum, on any analysis, the proposition the Court asserts in the present case—that probability need not be shown in order to establish the "same-party-recurrence" exception to mootness—is a significant departure from settled law.

II

If our established mode of analysis were followed, the conclusion that a live controversy exists in the present case would require a demonstrated probability that all of the following events will occur: (1) Smith will return to public school; (2) he will be placed in an educational setting that is unable to tolerate his dangerous behavior; (3) he will again engage in dangerous behavior; and (4) local school officials will again attempt unilaterally to change his placement and the state defendants will fail to prevent such action. The Court spends considerable time establishing that the last two of these events are likely to recur, but relegates to a footnote its discussion of the first event, upon which all others depend, and only briefly alludes to the second. Neither the facts in [484 U.S. 305, 337] the record, nor even the extrarecord assurances of counsel, establish a demonstrated probability of either of them.

With respect to whether Smith will return to school, at oral argument Smith's counsel forthrightly conceded that she "cannot represent whether in fact either of these students will ask for further education from the Petitioners." Tr. of Oral Arg. 23. Rather, she observed, respondents would "look to [our decision in this case] to find out what will happen after that." *Id.*, at 23-24. When pressed, the most counsel would say was that, in her view, the 20-year-old Smith *could* seek to return to public school because he has not graduated, he is handicapped, and he has a right to an education. *Id.*, at 27. I do not perceive the principle that would enable us to leap from the proposition that Smith could reenter public school to the conclusion that it is a demonstrated probability he will do so.

The Court nevertheless concludes that "there is at the very least a reasonable expectation" that Smith will return to school. *Ante*, at 319, n. 6. I cannot possibly dispute that on the basis of the Court's terminology. Once it is accepted that a "reasonable expectation" can exist without a demonstrable probability that the event in question will occur, the phrase has been deprived of all meaning, and the Court can give it whatever application it wishes without fear of effective contradiction. It is worth pointing out, however, how slim are the reeds upon which this conclusion of "reasonable expectation" (whatever that means) rests. The Court bases its determination on three observations from the record and oral argument. First, it notes that Smith has been pressing this lawsuit since 1980. It suffices to observe that the equivalent argument can be made in every case that remains active and pending; we have hitherto avoided equating the existence of a case or controversy with the existence of a lawsuit. Second, the Court observes that Smith has "as great a need of a high school education and diploma as any of his peers." *Ibid.* While this is undoubtedly good advice, it hardly establishes [484 U.S. 305, 338] that the 20-year-old Smith is likely to return to high school, much less to public high school. Finally, the Court notes that counsel "advises us that [Smith] is awaiting the outcome of this case to decide whether to pursue his degree." *Ibid.* Not only do I not think this establishes a current case or controversy, I think it a most conclusive indication that no current case or controversy exists. We do not sit to broaden decisionmaking options, but to adjudicate the lawfulness of acts that have happened or, at most, are about to occur.

The conclusion that the case is moot is reinforced, moreover, when one considers that, even if Smith does return to public school, the controversy will still not recur unless he is again placed in an educational setting that is unable to tolerate his behavior. It seems to me not only not demonstrably probable, but indeed quite unlikely, given what is now known about Smith's behavioral problems, that local school authorities would again place him in an educational setting that could not control his dangerous conduct, causing a suspension that would replicate the legal issues in this suit. The majority dismisses this further contingency by noting that the school authorities have an obligation under the EHA to provide an "appropriate" education in "the least restrictive environment." *Ante*, at 321. This means, however, the least restrictive environment appropriate for the particular child. The Court observes that "the preparation of an [individualized educational placement]" is "an inexact science at best," *ibid.*, thereby implying that the school authorities are likely to get it wrong. Even accepting this assumption, which seems to me contrary to the premises of the Act, I see no reason further to assume that they will get it wrong by making the same mistake they did last time—assigning Smith to too *un*restrictive an environment, from which he will thereafter be suspended—rather than by assigning him to too *restrictive* an environment. The latter, which seems to me more likely than the former (though both combined are much less likely than a correct placement), might produce a lawsuit, [484 U.S. 305, 339] but not a lawsuit involving the issues that we have before us here.

III

THE CHIEF JUSTICE joins the majority opinion on the ground, not that this case is not moot, but that where the events giving rise to the mootness have occurred after we have granted certiorari we may disregard them, since mootness is only a prudential doctrine and not part of the "case or controversy" requirement of Art. III. I do not see how that can be. There is no more reason to intuit that mootness is merely a prudential doctrine than to intuit that initial standing is. Both doctrines have equivalently deep roots in the common-law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (describing mootness and standing as various illustrations of the requirement of "justifiability" in Art. III).

THE CHIEF JUSTICE relies upon the fact that an 1895 case discussing mootness, *Mills v. Green*, 159 U.S. 651, makes no mention of the Constitution. But there is little doubt that the Court believed the doctrine called into question the Court's power and not merely its prudence, for (in an opinion by the same Justice who wrote *Mills*) it had said two years earlier:

> "[T]he court is not *empowered* to decide moot questions or abstract propositions, or to declare . . . principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel . . . can enlarge the power, or affect the duty, of the court in this regard." *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308, 314 (1893) (Gray, J.) (emphasis added).

If it seems peculiar to the modern lawyer that our 19th-century mootness cases make no explicit mention of Art. III, that is a peculiarity shared with our 19th-century, and even [484 U.S. 305, 340] our early 20th-century, standing cases. As late as 1919, in dismissing a suit for lack of standing we said simply:

> "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Blair v. United States*, 250 U.S. 273, 279.

See also, e.g., *Standard Stock Food Co. v. Wright*, 225 U.S. 540, 550 (1912); *Southern R. Co. v. King*, 217 U.S. 524, 534 (1910); *Turpin v. Lemon*, 187 U.S. 51, 60-61 (1902); *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409 (1900). The same is also true of our early cases dismissing actions lacking truly adverse parties, that is, collusive actions. See, e.g., *Cleveland v. Chamberlain*, 1 Black 419, 425-426 (1862); *Lord v. Veazie*, 8 How. 251, 254-256 (1850). The explanation for this ellipsis is that the courts simply chose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms ("The judicial Power"; "Cases"; "Controversies") that have virtually no meaning except by reference to that tradition. The ultimate circularity, coming back in the end to tradition, is evident in the statement by Justice Field:

> "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case." *In re Pacific Railway Comm'n*, 32 F. 241, 255 (CC ND Cal. 1887). [484 U.S. 305, 341]

See also 2 M. Farrand, Records of the Federal Convention of 1787, p. 430 (rev. ed. 1966):

> "Docr. Johnson moved to insert the words 'this Constitution and the' before the word 'laws.'
>
> "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.
>
> "The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature."

In sum, I cannot believe that it is only our prudence, and nothing inherent in the understood nature of "The judicial Power," U.S. Const., Art. III, § 1, that restrains us from pronouncing judgment in a case that the parties have settled, or a case involving a nonsurviving claim where the plaintiff has died, or a case where the law has been changed so that the basis of the dispute no longer exists,

or a case where conduct sought to be enjoined has ceased and will not recur. Where the conduct has ceased for the time being but there is a demonstrated probability that it *will* recur, a real-life controversy between parties with a personal stake in the outcome continues to exist, and Art. III is no more violated than it is violated by entertaining a declaratory judgment action. But that is the limit of our power. I agree with THE CHIEF JUSTICE to this extent: the "yet evading review" portion of our "capable of repetition, yet evading review" test is prudential; whether or not that criterion is met, a justiciable controversy exists. But the probability of recurrence between the same parties is essential to our jurisdiction as a court, and it is that deficiency which the case before us presents.

It is assuredly frustrating to find that a jurisdictional impediment prevents us from reaching the important merits [484 U.S. 305, 342] issues that were the reason for our agreeing to hear this case. But we cannot ignore such impediments for purposes of our appellate review without simultaneously affecting the principles that govern district courts in their assertion or retention of original jurisdiction. We thus do substantial harm to a governmental structure designed to restrict the courts to matters that actually affect the litigants before them. [484 U.S. 305, 343]

PART 5

Missouri Laws: Teacher Termination

Stewart v. Board of Ed. of Ritenour

630 S.W.2d 130 (1982)

Missouri Court of Appeals, Eastern District, Division Four, Docket No. 42331

Argued: January 5, 1982 ***Motions for Rehearing or to Transfer Denied:*** February 19, 1982

Dorothy STEWART, Respondent, v. BOARD OF EDUCATION OF RITENOUR CONSOLIDATED SCHOOL DISTRICT, R-3, et al., Appellants.

Attorney(s) appearing for the Case

[630 S.W.2d 131] Donald L. James, St. Louis, for respondent.
George J. Bude, Clayton, for appellants.

Motions for Rehearing or to Transfer to Supreme Court Denied February 19, 1982.

SIMON, Judge.

This teacher termination case comes before our court for the third time in five years. 1.1 On this appeal, the issues before our court relate to the proper measure of damages. The trial court awarded respondent Dorothy Stewart $108,948.01 in damages. 1.2 Appellant Board of Education of [630 S.W.2d 132] Ritenour Consolidated School District (Board) contends that the trial court erred (1) in finding that Stewart could not have mitigated her damages; (2) in restoring thirty days of sick leave pay to Stewart because this issue had been previously litigated; (3) in awarding Stewart compensation for the loss of her teacher's hospitalization insurance policy because Stewart did not, in fact, sustain any damages resulting from the loss; (4) in awarding Stewart $500 to pay the fee and expenses of an expert witness because the amount was unreasonable; and (5) in awarding excessive attorney's fees. We affirm in part and reverse in part.

In 1974, Dorothy Stewart, by virtue of having taught in the Ritenour School District since 1959, was a permanent teacher under the Teacher Tenure Act, § 168.104(4) RSMo.1969. 1.3 In June of 1974 the Board terminated Stewart's teaching contract. Stewart contested her termination. As justification for Stewart's discharge, the Board claimed that during the previous five years she had been excessively absent from work. The trial court upheld the Board's actions. Our court reversed and remanded, finding that the Board's findings of fact and conclusions of law were insufficient. On remand, the trial court found that the Board had wrongfully discharged Stewart and ordered the Board to reinstate her at the salary level she would have attained had the Board not wrongfully discharged her. The trial court also awarded Stewart damages in the form of back pay plus 6% interest.

In the second *Stewart* case before our court, we affirmed the trial court's reinstatement order, holding that the Board had wrongfully discharged Stewart. We remanded the cause for a determination of the amount by which Stewart could have mitigated her damages. On remand, Stewart stated that she had made no efforts to secure any type of teaching position during the five years that she was unemployed. The trial court refused to reduce the Board's damages, awarding Stewart $108,948.01.

Our preliminary inquiry concerns whether there was sufficient evidence to support the trial court's findings of fact. Appellate review of a court tried case is limited. We must sustain the trial court's judgment, "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 31 (Mo. banc 1976). The court found that Stewart had been a tenured teacher in the Ritenour School District, but that she could not have obtained a tenured or non-tenured position in another district. As to the non-tenured position, the court found:

> "3. If plaintiff had sought a non-tenured position in any other School District, she could only have done so by signing a one year contract in such District, and would have been compelled upon her reinstatement to either breach the contract with such District or to refuse reinstatement at Ritenour. . . ."

After reviewing the entire record, we are convinced that there is no substantial evidence to support the trial court's third finding of fact. There was simply no evidence before the trial court that Stewart's taking a non-tenured teaching position would have placed her in the dilemma of deciding whether to refuse reinstatement or to breach her contract. The evidence merely showed that another school district would expect Stewart to complete a one year contract. There is no evidence to support the dilemma which the trial court found.

This determination does not dispose of the case. While we cannot act as a trial [630 S.W.2d 133] court, we recognize that our primary concern is the correctness of the trial court's decision, not its reasoning. Our brethren in the western district, in a similar situation stated:

> "When this Court considers the evidence before it, under the searchlight of controlling law, and the reasonable conclusion and inferences to be drawn therefrom, and, in so doing, concludes that in a bench-tried case the proper result was reached, the judgment or decree should be affirmed. And this is true even though the trial court *may have assigned incorrect or erroneous legal or factual reasons for its judgment*." (emphasis added) *Kenilworth Insurance Co. v. Cole*, 587 S.W.2d 93, 96 (Mo.App.1979).

Our court has reached a similar conclusion. *Koedding v. N. B. West Contracting Co.*, 596 S.W.2d 744, 747 (Mo.App.1980), ("judgment of the trial court will be affirmed if based upon erroneous reasoning.") We believe that the record supports the decision reached by the trial court concerning the issue of mitigation of damages.

The Board contends that Stewart failed to use reasonable diligence to secure similar employment. In *Wolf v. Missouri State Training School for Boys*, 517 S.W.2d 138, 142-43 (Mo. banc 1974), our Supreme Court stated: "the employer . . . [may] reduce damages recoverable by a wrongfully discharged employee by whatever the employee has earned or by reasonable diligence could have earned during the period of wrongful discharge." (citations omitted) *Wolf*, *supra*, at 143. *Wolf* involved a wrongfully discharged state corrections officer. Our court, following *Wolf*, *supra*, held that the doctrine of mitigation applies to wrongfully discharged teachers protected under the Teacher Tenure

Act, §§ 168.102-168.130. *Stewart v. Board of Education of Ritenour Consolidated School District*, 574 S.W.2d 471, 474-75 (Mo.App.1978).

A great deal of confusion surrounds the doctrine of mitigation. While it is often stated that the employee has the "duty" to mitigate damages, this characterization is misleading. As Professor Corbin notes, "The law does not penalize . . . [plaintiff's] inaction; it merely does nothing to compensate... [plaintiff] for the loss that he helped to cause by not avoiding it." 5 Corbin on Contracts § 1039 (1954). See also Reinstatement (Second) of Contracts § 336, Comment d. Thus, the doctrine of avoidable consequences is the basis for most rules of general damages. Missouri law is in clear agreement with that of the overwhelming majority or jurisdictions to the effect that the Board has the burden of proving that Stewart could have mitigated her damages. See *Lynch v. Webb City School District*, 373 S.W.2d 193, 199 (Mo. App.1963); *Curlee v. Donaldson*, 233 S.W.2d 746, 757 (Mo.App.1950); *Miller v. Woolman Todd Boot & Shoe Co.*, 26 Mo.App. 57 (1887); 11 Williston on Contracts § 1360 (1980). However, the crucial question concerns the precise elements of this burden and its application to the specific facts adduced at trial. We have been unable to discover any Missouri cases concerning mitigation of damages in employment contracts that elucidate the extent and nature of the Board's burden of proof. In reaching our decision we have relied on our courts' holdings in analogous situations, and have taken note of similar cases decided in other jurisdictions.

In *Curlee v. Donaldson*, *supra*, our court addressed the burden of proof issue. In *Curlee*, defendant's lumberjack wrongfully entered onto plaintiff's property and cut down a substantial number of trees, many of which they left lying on plaintiff's property. In plaintiff's suit for damages defendant claimed that plaintiff had the duty to mitigate and that the recovery should have been reduced by the amount of money that plaintiff could have received from a sale of the remaining cut timber. Defendant offered no evidence on mitigation and our court rejected the argument, holding that:

> "The burden is on the party claiming the allowance to introduce evidence which shows *the opportunity the injured party* had to dispose of the property and the [630 S.W.2d 134] reasonable amount which he could have received..." *Curlee*, *supra*, at 757 (emphasis added).

The *Curlee* 1.4 holding makes it clear that the defendant has the burden of proving that plaintiff's recovery should be reduced for failing to mitigate. Under *Curlee*, the Board must show not only that Stewart failed to mitigate, but that Stewart had an opportunity to mitigate. Furthermore, McCormick states, "It is not enough for the employer to prove that the plaintiff made no effort to get other employment, but he must go further and prove that such employment could have been secured." McCormick, Damages 628 (1975 reprint).

In *Ryan v. Superintendent of Schools of Quincy*, 374 Mass. 670, 373 N.E.2d 1178, 1181 (1978), the Massachusetts Supreme Court outlined the defendant's burden:

> "A former employer meets its burden of proof of 'mitigation of damages' if the employer proves that (a) one or more discoverable opportunities for comparable employment were available in a location as, or more convenient than, the place of former employment, (b) the improperly

> discharged employee unreasonably made no attempt to apply for any such job, and (c) it was reasonably likely that the former employee would obtain one of those comparable jobs."

We believe the test enunciated in *Ryan* dovetails with our court's holding in *Curlee*. Apparently, the Board also believes that this test represents the applicable standard because the Board urges our court to adopt the identical rule as set forth in *Black v. School Committee of Malden*, 369 Mass. 657, 341 N.E.2d 896 (1976).

In *Ryan*, defendant school committee wrongfully discharged plaintiff Ryan, a fifty nine year old art teacher. After winning reinstatement, Ryan sought damages in the form of back pay. As in the case at bar, Ryan did not apply for any teaching positions during the five years of her unemployment. The court stated that "[t]his fact alone . . . is not sufficient to establish that the employee could have mitigated damages." *Ryan*, *supra* 373 N.E.2d at 1182.

The court proceeded to examine the facts of the case to determine whether "it was reasonably likely that Ryan could have obtained a comparable job." *Id.* The court noted that the facts indicated that during the period in question the number of art teachers greatly exceeded demand. The court also noted that Ryan would not have been able to get favorable references from her former employer. Finally, the court concluded that Ryan's age would probably have been viewed unfavorably by any prospective employers. On these facts the court held that "the defendants did not sustain their burden of proving that it was 'reasonably likely that the former employee would obtain one of . . . [the] comparable jobs.'" *Ryan*, *supra*, 373 N.E.2d at 1183.

Likewise, we do not believe that the Board met their burden of proof. The evidence introduced at trial reveals that there were teaching jobs available in the St. Louis area during Stewart's period of unemployment for which she was qualified. The Board presented three witnesses who were in charge of hiring teaching personnel in different metropolitan school districts. They testified that in every year from 1974 to 1979, each of their districts hired from zero to 27 teachers in Stewart's subject area. Generally, the number of applicants exceeded the number of vacancies. For example, Dr. Burchard Neel, Associate Superintendent for Personnel for the St. Louis Public Schools, testified that in 1976 when the St. Louis Public Schools hired 27 teachers there were several hundred applicants. The witnesses further testified that from 1974 to 1979 none of their districts had hired a teacher in Stewart's age bracket, with Stewart's qualifications, who had been discharged from another district. None of [630 S.W.2d 135] the evidence indicated that there was a reasonable likelihood that Stewart could have received a teaching position. In fact, the evidence indicated that Stewart's chances of finding a teaching job were slim at best. Stewart was a fifty-five year old tenured teacher with fifteen years experience and a Masters degree plus thirty hours, who had been discharged for excessive absences. It is reasonable to conclude that Stewart's age, though not determinative in any hiring decision, would probably not have been viewed favorably by prospective employers. The three administrators from the other metropolitan school districts testified that if their district hired a teacher with Stewart's qualifications the teacher would be "credited" with five to ten years experience

in the district for purposes of determining the teacher's salary. Salary schedules introduced into evidence showed that the salary of a teacher with Stewart's qualifications would be $4,125 to $6,400 greater than that of a new teacher.

We recognize that the Board did not have to prove conclusively that Stewart would have obtained a comparable job, but it did have to show that it was reasonably likely that she would have obtained such a job. Although Stewart was not required to prove that she would have been unable to find a teaching position, she did present evidence for this point. Dr. Ellen Harshman, Director of Career Planning and Placement at St. Louis University, testified that a person in Stewart's position would have "very poor" possibilities. Viewing the record in its entirety, we conclude that the Board did not meet its burden of proof. Our holding should not be construed to constitute our approval of a discharged employee's reaping a "reward" as a consequence of her failure to make a reasonable effort to mitigate her damages. Our holding is simply a result of the Board's failure to carry its burden of proof, i.e., of showing there was a reasonable likelihood that Stewart could have obtained one of the available positions. Therefore, we affirm the trial court's decision that Stewart's recovery should not be reduced for her failure to mitigate.

The Board's second point is that the trial court erred in restoring Stewart thirty days of sick leave for the 1973-74 school year. The Board argues that this issue was previously litigated. In 1976, Stewart brought suit against the Board to obtain reimbursement for sick leave pay that she alleged was due to her from the 1973-74 school year. In that case, the trial court found against Stewart on this issue. Here, the trial court held that Stewart was entitled to sick leave. Stewart was relitigating the precise issue which had been disposed of in an earlier proceeding against the Board. Well established principles of res judicata preclude the same parties from litigating issues that have been previously adjudicated by a court of competent jurisdiction. *Prentzler v. Schneider*, 411 S.W.2d 135, 138 (Mo. banc 1967). Therefore, we reverse that part of the judgment relating to sick leave.

The Board next contends that the trial court erred in granting Stewart damages for the loss of hospitalization insurance coverage during the time of her wrongful discharge, because there was no evidence that Stewart had been damaged. At trial, George Chapman, the Assistant Superintendent of Schools in the Ritenour School District, testified that the premiums for the insurance were paid directly to the insurance company. The record is devoid of any evidence that Stewart incurred any hospitalization costs during this time, and there is no evidence to indicate that Stewart purchased a substitute hospitalization plan during this time.

A similar situation to the case at bar existed in *Mass v. Board of Education of San Francisco Unified School District*, 61 Cal. 2d 612, 39 Cal. Rptr. 739, 394 P.2d 579 (banc 1964). There a teacher was found to have been wrongfully discharged and claimed as part of the damages the loss of medical insurance during the time of wrongful discharge. The California Supreme Court stated: "[P]laintiff proved no incurred medical expenditures or 'losses' from 'other insurance plans.' Plaintiff is [630 S.W.2d 136] therefore not entitled to any recovery on these latter matters." *Id.* 39 Cal. Rptr. at 747, 394 P.2d at 587.

We believe this reasoning to be sound. To allow Stewart to recover on this question would allow her to recover more than she lost. Therefore, we reverse the judgment of the trial court with respect to the award of damages for the loss of hospitalization coverage.

The Board's final two claims will be considered together. The Board claims that the trial court erred in awarding Stewart attorney's fees totaling $15,275.88. The Board also claims that the trial court erred in awarding Stewart $500 for the fees and expenses of Dr. Leroy Grossman, an expert witness. We agree and, accordingly, reduce Stewart's damages by $15,775.88.

In *Wolf v. Missouri State Training School for Boys*, *supra*, our Supreme Court, quoting from *Perrella v. Board of Education*, 51 N.J. 323, 240 A.2d 417, 428 (1968), held that a wrongfully discharged Corrections Officer "should be given credit for attorney's fees and expenses in the determination of the sum to be deducted in mitigation of back pay. . . ." In the second *Stewart* case, our court applied the *Wolf* holding to wrongfully discharged teachers and remanded the cause "for a determination of the amount by which [the] back-pay award is to be mitigated under the rules of avoidable consequences to have credited against such amount the counsel fee plus expenses which the employee has paid or obligated himself to pay. . . ." *Stewart*, *supra*, 574 S.W.2d at 475. In the instant case, the trial court did not credit Stewart's fees and expenses against an amount to be deducted. Rather the court added the fees and expenses to Stewart's damage award. Under the holdings in *Wolf* and the second *Stewart* case this was error. The award of fees and expenses in this case was improper. Therefore, we reverse the trial court's award of $15,775.88 for fees and expenses.

For the foregoing reasons, the judgment of the trial court is affirmed in part and reversed in part. Judgment entered accordingly.

SATZ, P. J., and SMITH, J., concur.

Notes

[1.1] The earlier cases are reported at 538 S.W.2d 765 (Mo.App.1976) and 574 S.W.2d 471 (Mo. App.1980).

[1.2] The trial court specified: "that defendants pay to the Missouri Retirement System [630 S.W.2d 132] $8,372.89 representing the principal and interest on unpaid retirement and pay to plaintiff the hospitalization and the interest thereon of $1,267.24, the plaintiff's salary of $84,032.00, and attorney's fees and expenses for the presentation of this action of $15,275.88, for a total judgment of $108,948.01 together with the costs of this action."

[1.3] All statutory references shall be to RSMo. 1969, unless otherwise noted.

[1.4] Our brethren in the western district recently cited *Curlee* with approval, stating:

> "The burden of proof of mitigation of damages is on the defendant who must show the opportunity the injured party had to mitigate and *the reasonable prospective consequences*." *Braun v. Lorenz*, 585 S.W.2d 102, 108 (Mo.App. 1979) (emphasis added).

Smith v. Normandy School Dist.

734 S.W.2d 943 (1987)

Missouri Court of Appeals, Eastern District, Division Three, Docket No. 51597

Argued: August 4, 1987

Janis SMITH, Appellant, v. NORMANDY SCHOOL DISTRICT, Respondent.

Attorney(s) appearing for the Case

[734 S.W.2d 944] Daniel J. Gralike, Paskal, Cohen & Benson, Clayton, for appellant.
Darold E. Crotzer, Jr., Steinberg & Crotzer, Clayton, for respondent.

KAROHL, Judge.

Janis Smith appeals a judgment of the circuit court affirming the decision of the Board of Education of the Normandy School District (Board) to terminate her indefinite contract as a permanent teacher as that status is defined in Section 168.104(4) RSMo 1978. She was a teacher in the district for sixteen years. The Teacher Tenure Act provides substantive and procedural safeguards with respect to tenured teachers. The purpose of the Act is to establish strictly defined grounds and procedures for removing a permanent teacher which may not be evaded or other procedures substituted therefor. *Iven v. Hazelwood School District*, 710 S.W.2d 462, 464 (Mo.App.1986).

On June 26, 1985 the Board entered findings of fact, conclusions of law and ordered the indefinite contract of Janis Smith be terminated for cause. Within fifteen days of receipt of the order Smith filed a timely Notice of Appeal with the Board. Section 168.120.1 RSMo 1978. The Board promptly certified the record of its proceedings and filed the same in the circuit court for its review according to the provisions of Chapter 536 RSMo according to Section 168.120.2 RSMo 1978. The scope of review before the circuit court is defined in Section 536.140.1 RSMo 1978. We review the decision of the Board under Rule 73.01 as interpreted in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

Appellant teacher claims: (1) the Board failed to comply with the provisions of Section 168.116(2) RSMo 1978 which requires the Board to begin the termination proceeding by a "warning in writing, stating specifically the causes which, if not removed, may result in charges"; (2) the Board waived prior warnings by subsequently offering a continuing contract for the next school year; and, (3) the termination was arbitrary, capricious and unreasonable.

We discussed the chronological sequence of the requirements of Section 168.116 RSMo 1978 for termination of a tenured teacher in *Iven v. Hazelwood School District*, 710 S.W.2d 462, 464 (Mo. App.1986). We review the claims of error in the same sequence.

Appellant teacher claims that the Board erred in its conclusion of law that letters from the Superintendent of schools addressed to Smith on April 22, 1983 and September 17, 1984 satisfied the statutory requirements for a "warning in writing." The April 22, 1983 letter contains the following:

> This letter is being sent to you pursuant to Section 168.116-2 RSMo. 1978. The purpose of the letter is to inform you that I consider you to be incompetent, inefficient and insubordinate in the line of duty and to be in willful and persistent violation of or failure to obey the published regulations of the Normandy School District. I consider the following to be the areas in which your work is unsatisfactory.
>
> [The letter notes five specific areas which include failure to file certain forms; refusal to permit class to participate [734 S.W.2d 945] in physical education classes as a means of discipline; failure to treat associates with proper respect; failure to turn in lesson plans and grade books as required; and, late in reporting for work.]
>
> You are further notified that I would like you to schedule a conference with Mr. Greer, your principal, at your earliest convenience and begin efforts to resolve these difficulties. Please inform Mr. Greer of a date at which time you will be available for such a conference.
>
> In addition to the items enumerated above, I believe grounds may exist for your termination for reasons other than incompetency, inefficiency, insubordination and failure to obey School Board regulations. This letter is intended to give the formal warning notice required by the laws of the State of Missouri in cases of incompetency, inefficiency, insubordination or failure to follow School Board regulations, and should not be construed by you to be a waiver of any other basis upon which your contract may be terminated by the Board.

We need not decide whether this letter is an insufficient basis to satisfy the statutory requirement of a "warning in writing" as a first step leading to termination by the Board. There was no evidence that subsequent to this letter the superintendent or Mr. Greer ever met and conferred with appellant teacher in an effort to resolve the matters mentioned in the letter. Incompetency and inefficiency were never charged or found as grounds for termination. The general charge of "failure to obey the published regulations of the Normandy School District" was not the basis of a subsequent meeting or charge. The Board, therefore, could not treat the letter of April 22, 1983 as a statutory warning as required by Section 168.116.2. Nothing in this letter was incorporated in the letter of September 17, 1984. We need not rule on appellant's claim of insufficiency because of remoteness since the letter did not comply with statutory requirements.

> The letter of September 17, 1984 was written by the same Superintendent of Schools. It contains the following statements:
>
> This letter is being sent to you pursuant to Section 168.116-2 RSMo. 1978. The purpose of the letter is to inform you that I consider you to be insubordinate in the line of duty. You have demonstrated insubordinate behavior and demeanor in the 1984-85 school year. Examples of such insubordination are as follows:
>
> 1. On or about September 13, 1984 the following incident of direct insubordination to your principal, Jerome Greer, occurred at about 8:30 a.m., following the bell signals for students:

a. Mr. Greer directed your students to go to your classroom from the playground since he was aware you were involved in a grade level staff meeting.

b. Your children proceeded toward your classroom pursuant to Mr. Greer's instructions.

c. Shortly thereafter, Mr. Greer observed your children returning to the playground and went to the hallway near your classroom.

d. You were in the hallway near your classroom at approximately 8:35 a.m. and the following conversation took place:

Greer: Mrs. Smith, is there a problem?

Smith: There is no problem.

Greer: But Mrs. Smith, I sent your students in.

Smith: But I'm sending them back out.

Greer: Mrs. Smith, we will need to talk about this.

During this entire conversation with Mr. Greer, you continued to send the students back out to the playground. All of the activities and conversations described in this paragraph took place in the presence of and within the hearing of your sixth grade students.

2. On or about March 17, 1983 you were sent a letter by your principal, Jerome Greer, advising you that no recordings of any other none [sic] N.O. [734 S.W.2d 946] R.S.E. activities are to take place during the period of the day that has been set aside for N.O.R.S.E. (Copy of letter attached hereto).

In a conference between yourself and Mr. Greer which took place on May 9, 1983, you confirmed these instructions and stated that you would discontinue the use of any recording during N.O.R.S.E. In spite of Mr. Greer's express instructions and directions the following conduct has occurred:

a. On the days of September 6, 7, 10, 1984 and other days in September 1984, you played records and recordings to your class during the N.O.R.S.E. period.

b. Your playing of the records and recordings was loud and was disturbing and disrupting to the classes of other teachers and students.

The above conduct is serious and detrimental to the efficient and productive operation of the Normandy School District.

I am directing you to follow all directions and instructions both verbal and written from school administrators including but not limited to your principal and assistant principal in the conduct of school business.

> If satisfactory improvement is not made in your performance, a recommendation will be submitted to the Board of Education to terminate your employment with the Normandy School District.
>
> You are further notified that I would like to schedule a conference with you, Mr. Basil Hunt, Director of Elementary Education and Mr. Greer, your principal, and begin efforts to resolve these difficulties. That conference will take place at Garfield School on Wednesday, September 26, 1984 at 8:35 a.m.
>
> This letter is intended to give the formal warning notice required by the laws of the State of Missouri in cases of insubordination and should not be construed by you to be a waiver of any other basis upon which your contract may be terminated by the Board.

In this letter the Superintendent attempted to issue a warning relating only to a question of insubordination. He appointed Basil Hunt and Mr. Greer as his representatives. He also scheduled a conference to "begin efforts to resolve these difficulties." This letter appears to comply with the statutory requirements for a warning.

On the appointed day, September 26, 1984, appellant teacher and her attorney met with Mr. Hunt and Mr. Greer. In the form of an exhibit the Board received and considered a report of Greer summarizing the meeting. That exhibit includes the following:

Mr. Hunt opened the conference by stating that "The purpose of the meeting is to resolve the problem. Mrs. Smith, we are not asking you to apologize to Mr. Greer we are not asking you to like Mr. Greer, we are saying to you that you must follow all written and oral instructions given to you by your principal and assistant principal." (our emphasis)

Reference was made to the September 17, 1984 letter addressed to Mrs. Smith and she responded to the first example mentioned in the letter of September 17, 1984. There was no evidence before the Board, by exhibit or testimony, that the September 26, 1984 meeting involved any other discussion or any proposal or plan to resolve the matter mentioned in the warning letter of September 17, 1984. Under the circumstances, including the presence of counsel, the meeting satisfied the requirements of Section 168.116.2.

The letter of September 17, 1984 refers to "demonstrated insubordinate behavior and demeanor." Insubordination is a statutory cause for termination. Section 168.-114.1(3) RSMo 1978. The first example noted does not specifically state an act of insubordination. At most it describes a direction of the principal to the teacher's class and a subsequent contrary instruction by the teacher. The second example indicates a direction by the principal addressed to the teacher which on three occasions the [734 S.W.2d 947] teacher violated in regard to a silent reading period. This example of failure to follow instructions is the only specific reference of insubordination contained in the letter. The statute requires specific causes.

On May 10, 1985, eight months after the meeting, the Board filed a "notice of charges" against appellant teacher. Section 168.116.3 RSMo 1978. The Board charged insubordination generally and set forth in separate subparagraphs eleven specifications. For purposes of this opinion it is sufficient to summarize the eleven specifications. The Board charged appellant teacher with the following:

1. Playing a recording during a silent reading period on February 5, 1985 contrary to prior written and verbal instructions and the September 17, 1984 warning letter.

2. She caused or permitted a sign to be displayed in her classroom which said in part down with Mr. Greer.

3. On January 30, 1985 she caused or allowed students to chant down with Greer, up with Smith.

4. During a teacher staff meeting of February 19, 1985 she challenged Mr. Greer in a rude and abusive manner.

5. On December 14, 1984 on the playground she made disparaging comments about Mr. Greer's race.

6. On November 19, 1984 she confronted Mr. Greer in his office about a feminine hygiene matter.

7. On December 12, 1984 she challenged Mr. Greer on his admonition that she make an effort to supervise her children.

8. On twelve different specified occasions she violated specific directives by leaving her classroom unattended.

9. On February 27, 1985 she administered corporal punishment to a student in opposition to a written directive forbidding such conduct.

10. Between February 27, 1985 and April 25, 1985 she kept a paddle in her classroom in direct violation of instructions from the principal.

11. On frequent occasions she addressed Mr. Greer in a rude and unseemly manner in the presence of other members of the school faculty.

The Board found as a fact that appellant teacher was guilty of specifications 1, 2, 4, 5, 6, 8, 9 and 10. The Board apparently made no findings on numbers 7 and 11. It found insufficient evidence to support number 3. The circuit court adopted the findings of fact and conclusions of law of the Board in affirming the order of the Board.

The statutory procedure set forth in Section 168.116 RSMo 1978 is sequential. There must be a warning describing specific causes, designation of a representative to meet and confer in an effort to resolve the matters and a meeting between the teacher and the representative. In order that the required warning and meeting have their recognized purpose charges must relate to the scope of warning and subsequent meeting. Otherwise, the intent of the legislature to provide substantive and procedural safeguards would not be honored.

The warning letter in the present case and the subsequent meeting related only to insubordination for failure to follow written and oral instructions given by appellant teacher's principal and assistant principal. The Superintendent and Mr. Hunt as his representatives chose to limit the specified cause of insubordination to matters of following all written and oral instructions of the principal and the assistant principal.

During the hearing before the Board, counsel for appellant teacher made numerous objections to consideration of any charges not within the scope of the warning letter and the meeting. Even without objection the statute and the purpose of the statute limit the Board to only those charges which are supported by a prior warning and a meeting held for the purpose of cure. In our review of the charges before the Board and its findings, we note that a number of the specifications are unrelated to any written or oral instruction of the principal or assistant principal. Of the specifications found supported, number 2 (sign), 4 (rude comments at staff meeting), 5 (derogatory comment about principal), and 6 (feminine hygiene comment to [734 S.W.2d 948] principal) are unrelated to disobedience of written or oral instructions. Only charges 1 (playing music during reading period), 8 (absences from classroom), 9 (administration of corporal punishment), and 10 (keeping a paddle in classroom) comply with the general cause of insubordination as limited by the subject matter of the meeting following the warning letter.

We find that the Board erred in concluding as a matter of law that the specifications found were all supported by the warning letter. The Board relied on *Rafael v. Meramec Valley R-III Board of Education*, 569 S.W.2d 309, 315 (Mo.App. 1978). It was there held that the warning letter relating to insubordination was adequate although subsequent acts of insubordination were not identical to the acts set forth in the warning letter. The court in *Rafael* did not consider whether the subsequent meeting limited the scope of charges. However, *Rafael* stands for the proposition that within the context of the warning letter subsequent acts of insubordination were properly charged, considered and found supported by the evidence. The only charges which survive under the statute because of the cause given in the warning letter and discussed in the meeting in the present case are the four specifications of disobedience of written or oral instructions. [1, 8, 9 and 10]. There was competent and substantial evidence to support the findings on these four charges. *Eddington v. St. Francois County R-III Board of Education*, 564 S.W.2d 283, 294 (Mo.App.1978). The Board is not required to find each and every charge to support an order of termination. Proof on one charge which constitutes insubordination may be sufficient to support termination. *Rose v. State Board of Registration for Healing Arts*, 397 S.W.2d 570, 577 (Mo.1965).

Appellant teacher first claims that respondent Board failed to comply with the requirements of warning according to Section 168.116(2) RSMo 1978. For those reasons previously discussed we agree that the Board erred in relying on the letter of April 22, 1983. We reject appellant teacher's argument that the letter of September 17, 1984 was inadequate. It stated specifically that Mrs. Smith was insubordinate in the line of duty and gave as an example a direct violation of instructions from her principal not to play music during silent reading period. This was followed by a meeting at

which a request was made that she follow written and oral instructions of the principal and assistant principal. The four charges relating to violation of direct instructions fall within the scope of the warning. In the warning letter the Superintendent expressly directed appellant teacher to follow all directions and instructions, verbal and written, from school administrators. We find the letter adequate to inform appellant of her deficient area. *Merideth v. Board of Education of Rockwood R-6 School District*, 513 S.W.2d 740, 750 (Mo.App.1984). As described it complied with the requirements of Section 168.116.2 RSMo 1978. *Rafael v. Meramec Valley R-III Board of Education*, 569 S.W.2d 309, 313 (Mo.App.1978). This discussion is directed only toward those four specifications of insubordination which relate to violating written and oral instructions of superiors. Point denied.

Appellant teacher also contends that after the September 1984 warning letter and before the hearing and termination the Board waived the subject matter of the warning letter. In support of this position she contends that on April 12, 1985 the President of the Board of Education sent a letter to all teachers in the district, including appellant teacher, to inform them that "[i]n accordance with state statute, you are under continuing contract for the 1985-86 school year predicated on your 1984-85 salary. Formal contracts will be issued when the salary schedule is finally determined." Appellant teacher signed and returned a copy of the letter indicating that she intended to remain at the Normandy School District. Appellant teacher without citing any authority in support of the theory of waiver argues that the letter is a waiver, as a matter of law.

This claim was never presented to the school district and the Board made no findings of fact or law relating to this claim. It was first presented to the circuit court. There are no provisions in the Teacher Tenure Act expressly providing for waiver. The renewal letter was sent to [734 S.W.2d 949] all teachers in the district. There is no indication that the question of waiver was considered. We find the issue is not properly before this court and will not set aside an administrative action unless an agency has been given a prior opportunity, on timely request by the complainant, to consider the point. *Mills v. Federal Soldiers Home*, 549 S.W.2d 862, 868 (Mo. banc 1977). The issue has not been preserved. See, *Brown v. Weir*, 675 S.W.2d 135, 139 (Mo.App.1984).

For a final claim of error appellant teacher contends that there was no competent and substantial evidence to support the decision of the Board. We find on the four specifications relating to the failure to follow written and oral instructions there was sufficient evidence. "We may only determine whether the Board reasonably could have made its finding and reached the decision it did. . . . Also we are to consider the evidence in a light most favorable to the Board's decision, together with all reasonable inferences which support it." *Rafael v. Meramec Valley R-III Board of Education*, 569 S.W.2d 309, 314-15 (Mo. App. 1978). We have reviewed the record and find the four specifications of insubordination supported by substantial and competent evidence.

We have considered and reject respondent Board's motion for damages for frivolous appeal under Rule 84.19. The judgment of the circuit court affirming the decision of the Board is affirmed. However, some of the findings and conclusions reached by the Board were based upon charges

not properly before the Board under Section 168.116. Some of the claims of error relating to these matters are valid as matters of law. Under these circumstances we find the appeal was not frivolous within the meaning of Rule 84.19.

We affirm.

PUDLOWSKI, P.J., and CRANDALL, J., concur.

PART 6

IDEA and IDEIA

Cedar Rapids Community School Dist. v. Garret F.

526 U.S. 66 (1999)

United States Supreme Court, Docket No. 96-1793

Argued: November 4, 1998 ***Decided:*** March 3, 1999

To help "assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs," 20 U.S.C. § 1400(c), the Individuals with Disabilities Education Act (IDEA) authorizes federal financial assistance to States that agree to provide such children with special education and "related services," as defined in § 1401(a)(17). Respondent Garret F., a student in petitioner school district (District), is wheelchair-bound and ventilator dependent; he therefore requires, in part, a responsible individual nearby to attend to certain physical needs during the school day. The District declined to accept financial responsibility for the services Garret needs, believing that it was not legally obligated to provide continuous one-on-one nursing care. At an Iowa Department of Education hearing, an Administrative Law Judge concluded that the IDEA required the District to bear financial responsibility for all of the disputed services, finding that most of them are already provided for some other students; that the District did not contend that only a licensed physician could provide the services; and that applicable federal regulations require the District to furnish "school health services," which are provided by a "qualified school nurse or other qualified person," but not "medical services," which are limited to services provided by a physician. The Federal District Court agreed and the Court of Appeals affirmed, concluding that *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, provided a two-step analysis of § 1401(a)(17)'s "related services" definition that was satisfied here. First, the requested services were "supportive services" because Garret cannot attend school unless they are provided; and second, the services were not excluded as "medical services" under *Tatro*'s bright-line test: Services provided by a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided by a nurse or qualified layperson are not.

Held:

> The IDEA requires the District to provide Garret with the nursing services he requires during school hours. The IDEA's "related services" definition, *Tatro*, and the overall statutory scheme support the Court of Appeals' decision. The "related services" definition broadly encompasses those supportive services that "may be required to assist a child with a disability to benefit from special education," § 1401(a)(17), and the District does not challenge the Court of Appeals' conclusion that the services at issue are "supportive services." Furthermore, § 1401(a)(17)'s general "related services" definition is illuminated by a parenthetical phrase listing examples of services that are included within the statute's coverage, including "medical services" if they are "for diagnostic and evaluation purposes." Although the IDEA itself does not define "medical services" more specifically, this Court in *Tatro* concluded that the Secretary of Education had

reasonably determined that "medical services" referred to services that must be performed by a physician, and not to school health services. 468 U.S., at 892-894. The cost-based, multi-factor test proposed by the District is supported by neither the statute's text nor the regulations upheld in *Tatro*. Moreover, the District offers no explanation why characteristics such as cost make one service any more "medical" than another. Absent an elaboration of the statutory terms plainly more convincing than that reviewed in *Tatro*, there is no reason to depart from settled law. Although the District may have legitimate concerns about the financial burden of providing the services Garret needs, accepting its cost-based standard as the sole test for determining § 1401(a)(17)'s scope would require the Court to engage in judicial lawmaking without any guidance from Congress. It would also create tension with the IDEA's purposes, since Congress intended to open the doors of public education to all qualified children and required participating States to educate disabled children with nondisabled children whenever possible, *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 192, 202. Pp. 73-79.

106 F. 3d 822, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which KENNEDY, J., joined, *post*, p. 79.

Sue Luettjohann Seitz argued the cause for petitioners.

With her on the briefs was Edward M. Mansfield.

Douglas R. Oelschlaeger argued the cause for respondents. With him on the brief was Diane Kutzko.

Beth S. Brinkmann argued the cause for the United States as *amicus curiae* urging affirmance. With her on the [526 U.S. 66, 68] brief were Solicitor General Waxman, Acting Assistant Attorney General Lee, Deputy Solicitor General Underwood, David K. Flynn, and Seth M. Galanter. [*]

[*] Gwendolyn H. Gregory and Julie Underwood filed a brief for the National School Boards Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Pediatrics et al. by Paul M. Smith and Nory Miller; and for the National Association of Protection and Advocacy Systems et al. by Leslie Seid Margolis.

JUSTICE STEVENS delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, was enacted, in part, "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c). Consistent with this purpose, the IDEA authorizes federal financial

assistance to States that agree to provide disabled children with special education and "related services." See §§ 1401(a)(18), 1412(1). The question presented in this case is whether the definition of "related services" in § 1401(a)(17) 1.1 requires a public school [526 U.S. 66, 69] district in a participating State to provide a ventilator-dependent student with certain nursing services during school hours.

I

Respondent Garret F. is a friendly, creative, and intelligent young man. When Garret was four years old, his spinal column was severed in a motorcycle accident. Though paralyzed from the neck down, his mental capacities were unaffected. He is able to speak, to control his motorized wheelchair through use of a puff and suck straw, and to operate a computer with a device that responds to head movements. Garret is currently a student in the Cedar Rapids Community School District (District), he attends regular classes in a typical school program, and his academic performance has been a success. Garret is, however, ventilator dependent, 1.2 and therefore requires a responsible individual nearby to attend to certain physical needs while he is in school. 1.3 [526 U.S. 66, 70]

During Garret's early years at school his family provided for his physical care during the schoolday. When he was in kindergarten, his 18-year-old aunt attended him; in the next four years, his family used settlement proceeds they received after the accident, their insurance, and other resources to employ a licensed practical nurse. In 1993, Garret's mother requested the District to accept financial responsibility for the health care services that Garret requires during the schoolday. The District denied the request, believing that it was not legally obligated to provide continuous one-on-one nursing services.

Relying on both the IDEA and Iowa law, Garret's mother requested a hearing before the Iowa Department of Education. An Administrative Law Judge (ALJ) received extensive evidence concerning Garret's special needs, the District's treatment of other disabled students, and the assistance provided to other ventilator-dependent children in other parts of the country. In his 47-page report, the ALJ found that the District has about 17,500 students, of whom approximately 2,200 need some form of special education or special services. Although Garret is the only ventilator-dependent student in the District, most of the health care services that he needs are already provided for some other students. 1.4 "The primary difference between Garret's situation and that of other students is his dependency on his ventilator for life support." App. to Pet. for Cert. 28a. The ALJ noted that the parties disagreed over the training or [526 U.S. 66, 71] licensure required for the care and supervision of such students, and that those providing such care in other parts of the country ranged from nonlicensed personnel to registered nurses. However, the District did not contend that only a licensed physician could provide the services in question.

The ALJ explained that federal law requires that children with a variety of health impairments be provided with "special education and related services" when their disabilities adversely affect their academic performance, and that such children should be educated to the maximum extent appropriate with children who are not disabled. In addition, the ALJ explained that applicable federal

regulations distinguish between "school health services," which are provided by a "qualified school nurse or other qualified person," and "medical services," which are provided by a licensed physician. See 34 CFR §§ 300.16(a), (b)(4), (b)(ll) (1998). The District must provide the former, but need not provide the latter (except, of course, those "medical services" that are for diagnostic or evaluation purposes, 20 U.S.C. § 1401(a)(17)). According to the ALJ, the distinction in the regulations does not just depend on "the title of the person providing the service"; instead, the "medical services" exclusion is limited to services that are "in the special training, knowledge, and judgment of a physician to carry out." App. to Pet. for Cert. 51a. The ALJ thus concluded that the IDEA required the District to bear financial responsibility for all of the services in dispute, including continuous nursing services. 1.5 [526 U.S. 66, 72]

The District challenged the ALJ's decision in Federal District Court, but that court approved the ALJ's IDEA ruling and granted summary judgment against the District. *Id.*, at 9a, 15a. The Court of Appeals affirmed. 106 F.3d 822 (CA8 1997). It noted that, as a recipient of federal funds under the IDEA, Iowa has a statutory duty to provide all disabled children a "free appropriate public education," which includes "related services." See *id.*, at 824. The Court of Appeals read our opinion in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984), to provide a two-step analysis of the "related services" definition in § 1401(a)(17)—asking first, whether the requested services are included within the phrase "supportive services"; and second, whether the services are excluded as "medical services." 106 F. 3d, at 824-825. The Court of Appeals succinctly answered both questions in Garret's favor. The court found the first step plainly satisfied, since Garret cannot attend school unless the requested services are available during the school day. *Id.*, at 825. As to the second step, the court reasoned that *Tatro* "established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." 106 F. 3d, at 825.

In its petition for certiorari, the District challenged only the second step of the Court of Appeals' analysis. The District pointed out that some federal courts have not asked whether the requested health services must be delivered by a physician, but instead have applied a multifactor test that considers, generally speaking, the nature and extent of the services at issue. See, e.g., *Neely v. Rutherford County School*, 68 F.3d 965, 972-973 (CA6 1995), cert. denied, 517 U.S. 1134 (1996); *Detsel v. Board of Ed. of Auburn Enlarged City School Dist.*, 820 F.2d 587, 588 (CA2) (*per curiam*), cert. denied, 484 U.S. 981 (1987). We granted the District's petition to resolve this conflict. 523 U.S. 1117 (1998). [526 U.S. 66, 73]

II

The District contends that § 1401(a)(17) does not require it to provide Garret with "continuous one-on-one nursing services" during the schoolday, even though Garret cannot remain in school without such care. Brief for Petitioner 10. However, the IDEA's definition of "related services," our decision

in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984), and the overall statutory scheme all support the decision of the Court of Appeals.

The text of the "related services" definition, see n. 1, *supra*, broadly encompasses those supportive services that "may be required to assist a child with a disability to benefit from special education." As we have already noted, the District does not challenge the Court of Appeals' conclusion that the in-school services at issue are within the covered category of "supportive services." As a general matter, services that enable a disabled child to remain in school during the day provide the student with "the meaningful access to education that Congress envisioned." *Tatro*, 468 U.S., at 891 ("'Congress sought primarily to make public education available to handicapped children' and 'to make such access meaningful'" (quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 192 (1982))).

This general definition of "related services" is illuminated by a parenthetical phrase listing examples of particular services that are included within the statute's coverage. § 1401(a)(17). "[M]edical services" are enumerated in this list, but such services are limited to those that are "for diagnostic and evaluation purposes." *Ibid.* The statute does not contain a more specific definition of the "medical services" that are excepted from the coverage of § 1401(a)(17).

The scope of the "medical services" exclusion is not a matter of first impression in this Court. In *Tatro* we concluded that the Secretary of Education had reasonably determined that the term "medical services" referred only to services [526 U.S. 66, 74] that must be performed by a physician, and not to school health services. 468 U.S., at 892-894. Accordingly, we held that a specific form of health care (clean intermittent catheterization) that is often, though not always, performed by a nurse is not an excluded medical service. We referenced the likely cost of the services and the competence of school staff as justifications for drawing a line between physician and other services, *ibid.*, but our endorsement of that line was unmistakable. 1.6 It is thus settled that the phrase [526 U.S. 66, 75] "medical services" in § 1401(a)(17) does not embrace all forms of care that might loosely be described as "medical" in other contexts, such as a claim for an income tax deduction. See 26 U.S.C. § 213(d)(1) (1994 ed. and Supp. II) (defining "medical care").

The District does not ask us to define the term so broadly. Indeed, the District does not argue that any of the items of care that Garret needs, considered individually, could be excluded from the scope of 20 U.S.C. § 1401(a)(17). 1.7 It could not make such an argument, considering that one of the services Garret needs (catheterization) was at issue in *Tatro*, and the others may be provided competently by a school nurse or other trained personnel. See App. to Pet. for Cert. 15a, 52a. As the ALJ concluded, most of the requested services are already provided by the District to other students, and the in-school care necessitated by Garret's ventilator dependency does not demand the training, knowledge, and judgment of a licensed physician. *Id.*, at 51a-52a. While more extensive, the in-school services Garret needs are no more "medical" than was the care sought in *Tatro*.

Instead, the District points to the combined and continuous character of the required care, and proposes a test under which the outcome in any particular case would "depend upon a series of factors, such as [1] whether the care is continuous or intermittent, [2] whether existing school health personnel can provide the service, [3] the cost of the service, and [4] the potential consequences if the service is not properly performed." Brief for Petitioner 11; see also *id.*, at 34-35.

The District's multifactor test is not supported by any recognized source of legal authority. The proposed factors can be found in neither the text of the statute nor the regulations that we upheld in *Tatro*. Moreover, the District offers no explanation why these characteristics make one service [526 U.S. 66, 76] any more "medical" than another. The continuous character of certain services associated with Garret's ventilator dependency has no apparent relationship to "medical" services, much less a relationship of equivalence. Continuous services may be more costly and may require additional school personnel, but they are not thereby more "medical." Whatever its imperfections, a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute. Absent an elaboration of the statutory terms plainly more convincing than that which we reviewed in *Tatro*, there is no good reason to depart from settled law. 1.8

Finally, the District raises broader concerns about the financial burden that it must bear to provide the services that Garret needs to stay in school. The problem for the District in providing these services is not that its staff cannot be trained to deliver them; the problem, the District contends, is that the existing school health staff cannot meet all of their [526 U.S. 66, 77] responsibilities and provide for Garret at the same time. 1.9 Through its multifactor test, the District seeks to establish a kind of undue-burden exemption primarily based on the cost of the requested services. The first two factors can be seen as examples of cost-based distinctions: Intermittent care is often less expensive than continuous care, and the use of existing personnel is cheaper than hiring additional employees. The third factor-the cost of the servicewould then encompass the first two. The relevance of the fourth factor is likewise related to cost because extra care may be necessary if potential consequences are especially serious.

The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law. Defining "related services" in a manner that *accommodates* the cost concerns Congress may have had, *cf. Tatro*, 468 U.S., at 892, is altogether different from using cost itself as the definition. Given that § 1401(a)(17) does not employ cost in its definition of "related services" or excluded "medical services," accepting the District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress. It would also create some tension with the purposes of the IDEA. The statute may not require public schools to maximize the potential of disabled students commensurate [526 U.S. 66, 78] with the opportunities provided to other children, see *Rowley*, 458 U.S., at 200; and the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA, see *Tatro*, 468 U.S., at 892. But Congress intended "to open the

door of public education" to all qualified children and "require[d] participating States to educate handicapped children with nonhandicapped children whenever possible." *Rowley*, 458 U.S., at 192, 202; see *id.*, at 179-181; see also *Honig v. Doe*, 484 U.S. 305, 310-311, 324 (1988); §§ 1412(1), (2)(C), (5)(B). 1.10 [526 U.S. 66, 79]

This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools.

The judgment of the Court of Appeals is accordingly

Affirmed.

Footnotes

[1.1] "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(a)(17).

Originally, the statute was enacted without a definition of "related services." See Education of the Handicapped Act, 84 Stat. 175. In 1975, Congress added the definition at issue in this case. Education for All Handicapped Children Act of 1975, § 4(a)(4), 89 Stat. 775. Aside from nonsubstantive changes and added examples of included services, see, e.g., Individuals with Disabilities Education Act [526 U.S. 66, 69] Amendments of 1997, § 101, 111 Stat. 45; Individuals with Disabilities Education Act Amendments of 1991, § 25(a)(1)(B), 105 Stat. 605; Education of the Handicapped Act Amendments of 1990, § 101(c), 104 Stat. 1103, the relevant language in § 1401(a)(17) has not been amended since 1975. All references to the IDEA herein are to the 1994 version as codified in Title 20 of the United States Code-the version of the statute in effect when this dispute arose.

[1.2] In his report in this case, the Administrative Law Judge explained:

> "Being ventilator dependent means that [Garret] breathes only with external aids, usually an electric ventilator, and occasionally by someone else's manual pumping of an air bag attached to his tracheotomy tube when the ventilator is being maintained. This later procedure is called ambu bagging." App. to Pet. for Cert. 19a.

[1.3] "He needs assistance with urinary bladder catheterization once a day, the suctioning of his tracheotomy tube as needed, but at least once every six hours, with food and drink at lunchtime, in getting into a reclining position for five minutes of each hour, and ambu bagging occasionally as needed when the ventilator is checked for proper functioning. He also needs assistance from someone familiar with

his ventilator in the event there is a malfunction or electrical problem, and someone who can perform emergency procedures in the event he experiences autonomic hyperreflexia. Autonomic hyperreflexia is an uncontrolled visceral reaction to anxiety or a full bladder. Blood pressure increases, heart rate increases, [526 U.S. 66, 70] and flushing and sweating may occur. Garret has not experienced autonomic hyperreflexia frequently in recent years, and it has usually been alleviated by catheterization. He has not ever experienced autonomic hyperreflexia at school. Garret is capable of communicating his needs orally or in another fashion so long as he has not been rendered unable to do so by an extended lack of oxygen." *Id.*, at 20a.

[1.4] "Included are such services as care for students who need urinary catheterization, food and drink, oxygen supplement positioning, and suctioning." *Id.*, at 28a; see also *id.*, at 53a.

[1.5] In addition, the ALJ's opinion contains a thorough discussion of "other tests and criteria" pressed by the District, *id.*, at 52a, including the burden on the District and the cost of providing assistance to Garret. Although the ALJ found no legal authority for establishing a cost-based test for determining what related services are required by the statute, he went on to reject the District's arguments on the merits. See *id.*, at 42a-53a. We do not reach the issue here, but the ALJ also found that Garret's in-school needs must be met by the District under an Iowa statute as well as the IDEA. *Id.*, at 54a-55a.

[1.6] "The regulations define 'related services' for handicapped children to include 'school health services,' 34 CFR § 300.13(a) (1983), which are defined in turn as 'services provided by a qualified school nurse or other qualified person,' § 300.13(b)(10). 'Medical services' are defined as 'services provided by a licensed physician.' § 300.13(b)(4). Thus, the Secretary has [reasonably] determined that the services of a school nurse otherwise qualifying as a 'related service' are not subject to exclusion as a 'medical service,' but that the services of a physician are excludable as such.

. . . . .

" . . . *By limiting the 'medical services' exclusion to the services of a physician or hospital*, both far more expensive, the Secretary has given a permissible construction to the provision." 468 U.S., at 892-893 (emphasis added) (footnote omitted); see also *id.*, at 894 ("[T]he regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician").

Based on certain policy letters issued by the Department of Education, it seems that the Secretary's post-*Tatro* view of the statute has not been entirely clear. E.g., App. to Pet. for Cert. 64a. We may assume that the Secretary has authority under the IDEA to adopt regulations that define the "medical services" exclusion by more explicitly taking into account the nature and extent of the requested services; and the Secretary surely has the authority to enumerate the services that are, and are not, fairly included within the scope of § 1407(a)(17). But the Secretary has done neither; and, in this Court, he advocates affirming the judgment of the Court of Appeals. Brief for United States as *Amicus Curiae* 7-8, 30; see also *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (an agency's views as *amicus curiae* may be entitled to deference). We obviously have no authority to rewrite the regulations, and we see no sufficient reason to revise *Tatro*, either.

[1.7] See Tr. of Oral Arg. 4-5, 12.

[1.8] At oral argument, the District suggested that we first consider the nature of the requested service (either "medical" or not); then, if the service is "medical," apply the multifactor test to determine whether the service is an excluded physician service or an included school nursing service under the Secretary of Education's regulations. See Tr. of Oral Arg. 7, 13-14. Not only does this approach provide no additional guidance for identifying "medical" services, it is also disconnected from both the statutory text and the regulations we upheld in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984). "Medical" services are generally *excluded* from the statute, and the regulations elaborate on that statutory term. No authority cited by the District requires an additional inquiry if the requested service is both "related" and non-"medical." Even if § 1401(a)(17) demanded an additional step, the factors proposed by the District are hardly more useful in identifying "nursing" services than they are in identifying "medical" services; and the District cannot limit educational access simply by pointing to the limitations of existing staff. As we noted in *Tatro*, the IDEA requires schools to hire specially trained personnel to meet disabled student needs. *Id.*, at 893.

[1.9] See Tr. of Oral Arg. 4-5, 13; Brief for Petitioner 6-7, 9. The District, however, will not necessarily need to hire an additional employee to meet Garret's needs. The District already employs a one-on-one teacher associate (TA) who assists Garret during the schoolday. See App. to Pet. for Cert. 26a-27a. At one time, Garret's TA was a licensed practical nurse (LPN). In light of the state Board of Nursing's recent ruling that the District's registered nurses may decide to delegate Garret's care to an LPN, see Brief for United States as *Amicus Curiae* 9-10 (filed Apr. 22, 1998), the dissent's future-cost estimate is speculative. See App. to Pet. for Cert. 28a, 58a-60a (if the District could assign Garret's care to a TA who is also an LPN, there would be "a minimum of additional expense").

[1.10] The dissent's approach, which seems to be even broader than the District's, is unconvincing. The dissent's rejection of our unanimous decision in *Tatro* comes 15 years too late, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989) (*stare decisis* has "special force" in statutory interpretation), and it offers nothing constructive in its place. Aside from rejecting a "provider-specific approach," the dissent cites unrelated statutes and offers a circular definition of "medical services." *Post*, at 81 (opinion of THOMAS, J.) ("'services' that are 'medical' in 'nature'"). Moreover, the dissent's approach apparently would exclude most ordinary school nursing services of the kind routinely provided to nondisabled children; that anomalous result is not easily attributable to congressional intent. See *Tatro*, 468 U.S., at 893.

In a later discussion the dissent does offer a specific proposal: that we now interpret (or rewrite) the Secretary's regulations so that school districts need only provide disabled children with "health-related services that school nurses can perform as part of their normal duties." *Post*, at 85. The District does not dispute that its nurses "can perform" the requested services, so the dissent's objection is that District nurses would not be performing their "normal duties" if they met Garret's needs. That is, the District would need an "additional employee." *Ibid.* This proposal is functionally similar to a proposed regulation-ultimately withdrawn-that would have replaced the "school health services" provision. See 47 Fed. Reg. 33838, 33854 (1982) (the statute and regulations may not be read to affect legal obligations to make available to handicapped children services, including school health services, made available to nonhandicapped children). The dissent's suggestion is unacceptable for several reasons. Most important, such revisions of the regulations are better left to the Secretary, and an additional staffing need is generally not a sufficient objection to the requirements of § 1401(a)(17). See n. 8, *supra*.

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, dissenting.

The majority, relying heavily on our decision in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984), concludes that the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires a public school district to fund continuous, one-on-one nursing care for disabled children. Because *Tatro* cannot be squared with the text of IDEA, the Court should not adhere to it in this case. Even assuming that *Tatro* was correct in the first instance, the majority's extension of it is unwarranted and ignores the constitutionally mandated rules of construction applicable to legislation enacted pursuant to Congress' spending power.

I

As the majority recounts, *ante*, at 68, IDEA authorizes the provision of federal financial assistance to States that agree to provide, *inter alia*, "special education and related services" for disabled children. § 1401(a)(18). In *Tatro*, *supra*, we held that this provision of IDEA required a school district to provide clean intermittent catheterization to a disabled child several times a day. In so holding, we relied on Department of Education regulations, which we concluded had reasonably interpreted IDEA's definition of "related [526 U.S. 66, 80] services" 2.1 to require school districts in participating States to provide "school nursing services" (of which we assumed catheterization was a subcategory) but not "services of a physician." *Id.*, at 892-893. This holding is contrary to the plain text of IDEA, and its reliance on the Department of Education's regulations was misplaced.

A

Before we consider whether deference to an agency regulation is appropriate, "we first ask whether Congress has 'directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 499-500 (1998) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

Unfortunately, the Court in *Tatro* failed to consider this necessary antecedent question before turning to the Department of Education's regulations implementing IDEA's related services provision. The Court instead began "with the regulations of the Department of Education, which," it said, "are entitled to deference." 468 U.S., at 891-892. The Court need not have looked beyond the text of IDEA, which expressly indicates that school districts are not required to provide medical services, except for diagnostic and evaluation purposes. 20 U.S.C. § 1401(a)(17). The majority asserts that *Tatro* precludes reading the term "medical services" [526 U.S. 66, 81] to include "all forms of care that might loosely be described as 'medical.'" *Ante*, at 75. The majority does not explain, however, why "services" that are "medical" in nature are not "medical services." Not only is the definition that the majority rejects consistent with other uses of the term in federal law, 2.2 it also avoids the anomalous result of

holding that the services at issue in *Tatro* (as well as in this case), while not "medical services," would nonetheless qualify as medical care for federal income tax purposes. *Ante*, at 74-75.

The primary problem with *Tatro*, and the majority's reliance on it today, is that the Court focused on the provider of the services rather than the services themselves. We do not typically think that automotive services are limited to those provided by a mechanic, for example. Rather, anything done to repair or service a car, no matter who does the work, is thought to fall into that category. Similarly, the term "food service" is not generally thought to be limited to work performed by a chef. The term "medical" similarly does not support *Tatro*'s provider-specific approach, but encompasses services that are "of, *relating to, or concerned with* physicians *or* with the practice of medicine." See Webster's Third New International Dictionary 1402 (1986) (emphasis added); see also *id.*, at 1551 (defining "nurse" as "a person skilled in caring for and waiting on the infirm, the injured, or the sick; *specif:* one esp. trained to carry out such duties under the supervision of a physician"). [526 U.S. 66, 82]

IDEA's structure and purpose reinforce this textual interpretation. Congress enacted IDEA to increase the *educational* opportunities available to disabled children, not to provide medical care for them. See 20 U.S.C. § 1400(c) ("It is the purpose of this chapter to assure that all children with disabilities have . . . a free appropriate public education"); see also § 1412 ("In order to qualify for assistance . . . a State shall demonstrate . . . [that it] has in effect a policy that assures all children with disabilities the right to a free appropriate public education"); *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 179 (1982) ("The Act represents an ambitious federal effort to promote the education of handicapped children"). As such, where Congress decided to require a supportive service-including speech pathology, occupational therapy, and audiology-that appears "medical" in nature, it took care to do so explicitly. See § 1401(a)(17). Congress specified these services precisely because it recognized that they would otherwise fall under the broad "medical services" exclusion. Indeed, when it crafted the definition of related services, Congress could have, but chose not to, include "nursing services" in this list.

B

Tatro was wrongly decided even if the phrase "medical services" was subject to multiple constructions, and therefore, deference to any reasonable Department of Education regulation was appropriate. The Department of Education has never promulgated regulations defining the scope of IDEA's "medical services" exclusion. One year before *Tatro* was decided, the Secretary of Education issued proposed regulations that defined excluded medical services as "services relating to the practice of medicine." 47 Fed. Reg. 33838 (1982). These regulations, which represent the Department's only attempt to define the disputed term, were never adopted. Instead, "[t]he regulations actually define only those 'medical services' that *are* owed to handicapped [526 U.S. 66, 83] children," *Tatro*, 468 U.S., at 892, n. 10 (emphasis in original), not those that *are not*. Now, as when *Tatro* was decided, the regulations require districts to provide services performed "'by a licensed physician to determine a child's medically related handicapping condition which results in the

child's need for special education and related services.'" *Ibid.* (quoting 34 CFR § 300.13(b)(4) (1983), recodified and amended as 34 CFR § 300.16(b)(4) (1998).

Extrapolating from this regulation, the *Tatro* Court presumed that this meant that "'medical services' not owed under the statute are those 'services by a licensed physician' that serve other purposes." *Tatro*, *supra*, at 892, n. 10 (emphasis deleted). The Court, therefore, did not defer to the regulation itself, but rather relied on an inference drawn from it to speculate about how a regulation might read if the Department of Education promulgated one. Deference in those circumstances is impermissible. We cannot defer to a regulation that does not exist. 2.3

II

Assuming that *Tatro* was correctly decided in the first instance, it does not control the outcome of this case. Because IDEA was enacted pursuant to Congress' spending power, *Rowley*, *supra*, at 190, n. 11, our analysis of the statute in this case is governed by special rules of construction. We have repeatedly emphasized that, when Congress places conditions on the receipt of federal funds, "it must do so unambiguously." *Pennhurst State School and Hospital v. Halderman*, [526 U.S. 66, 84] 451 U.S. 1, 17 (1981). See also *Rowley*, *supra*, at 190, n. 11; *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *New York v. United States*, 505 U.S. 144, 158 (1992). This is because a law that "condition[s] an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 286 (1998). As such, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, *supra*, at 17 (citations omitted). It follows that we must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate.

The majority's approach in this case turns this Spending Clause presumption on its head. We have held that, in enacting IDEA, Congress wished to require "States to educate handicapped children with nonhandicapped children whenever possible," *Rowley*, *supra*, at 202. Congress, however, also took steps to limit the fiscal burdens that States must bear in attempting to achieve this laudable goal. These steps include requiring States to provide an education that is only "appropriate" rather than requiring them to maximize the potential of disabled students, see 20 U.S.C. § 1400(c); *Rowley*, *supra*, at 200, recognizing that integration into the public school environment is not always possible, see § 1412(5), and clarifying that, with a few exceptions, public schools need not provide "medical services" for disabled students, §§ 1401(a)(17) and (18).

For this reason, we have previously recognized that Congress did not intend to "impos[e] upon the States a burden of unspecified proportions and weight" in enacting IDEA. *Rowley*, *supra*, at 190, n. 11. These federalism concerns require us to interpret IDEA's related services provision, consistent [526 U.S. 66, 85] with *Tatro*, as follows: Department of Education regulations require districts to provide disabled children with health-related services that school nurses can perform as part of their

normal duties. This reading of *Tatro*, although less broad than the majority's, is equally plausible and certainly more consistent with our obligation to interpret Spending Clause legislation narrowly. Before concluding that the district was required to provide clean intermittent catheterization for Amber Tatro, we observed that school nurses in the district were authorized to perform services that were "difficult to distinguish from the provision of [clean intermittent catheterization] to the handicapped." *Tatro*, 468 U.S., at 893. We concluded that "[i]t would be strange indeed if Congress, in attempting to extend special services to handicapped children, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped." *Id.*, at 893-894.

Unlike clean intermittent catheterization, however, a school nurse cannot provide the services that respondent requires, see *ante*, at 69-70, n. 3, and continue to perform her normal duties. To the contrary, because respondent requires continuous, one-on-one care throughout the entire schoolday, all agree that the district must hire an additional employee to attend solely to respondent. This will cost a minimum of $18,000 per year. Although the majority recognizes this fact, it nonetheless concludes that the "more extensive" nature of the services that respondent needs is irrelevant to the question whether those services fall under the medical services exclusion. *Ante*, at 75. This approach disregards the constitutionally mandated principles of construction applicable to Spending Clause legislation and blindsides unwary States with fiscal obligations that they could not have anticipated.

***

For the foregoing reasons, I respectfully dissent.

[2.1] IDEA currently defines "related services" as "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, *except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education. . . ." 20 U.S.C. § 1401(a)(17) (emphasis added).

[2.2] See, e.g., 38 U.S.C. § 1701(6) ("The term 'medical services' includes, in addition to medical examination, treatment, and rehabilitative services— . . . surgical services, dental services . . . , optometric and podiatric services, . . . preventive health services, . . . [and] such consultation, professional counseling, training, and mental health services as are necessary in connection with the treatment"); § 101(28) ("The term 'nursing home care' means the accommodation of convalescents . . . who require nursing care and related medical services"); 26 U.S.C. § 213(d)(1) ("The term 'medical care' means amounts paid— . . . for the diagnosis, cure, mitigation, treatment, or prevention of disease").

[2.3] Nor do I think that it is appropriate to defer to the Department of Education's litigating position in this case. The agency has had ample opportunity to address this problem but has failed to do so in a formal regulation. Instead, it has maintained conflicting positions about whether the services at issue in this case are required by IDEA. See *ante*, at 74, n. 6. Under these circumstances, we should not assume that the litigating position reflects the "agency's fair and considered judgment." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Burlington School Comm. v. Mass. Dept. of Ed.

471 U.S. 359 (1985)

United States Supreme Court, Docket No. 84-433

Argued: March 26, 1985 ***Decided:*** April 29, 1985

The Education of the Handicapped Act requires participating state and local educational agencies to assure that handicapped children and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education for such children. These procedures include the parents' right to participate in the development of an "individualized education program" (IEP) for the child and to challenge in administrative and court proceedings a proposed IEP with which they disagree. With respect to judicial review, the Act in 20 U.S.C. § 1415(e)(2) authorizes the reviewing court to "grant such relief as the court determines is appropriate." Section 1415(e)(3) provides that during the pendency of any review proceedings, unless the state or local educational agency and the parents otherwise agree, "the child shall remain in the then current educational placement of such child." Respondent father of a handicapped child rejected petitioner town's proposed IEP for the 1979-1980 school year calling for placement of the child in a certain public school, and sought review by respondent Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA). Meanwhile, the father, at his own expense, enrolled the child in a state-approved private school for special education. The BSEA thereafter decided that the town's proposed IEP was inappropriate and that the private school was better suited for the child's educational needs, and ordered the town to pay the child's expenses at the private school for the 1979-1980 school year. The town then sought review in Federal District Court. Ultimately, after the town in the meantime had agreed to pay for the child's private-school placement for the 1980-1981 school year but refused to reimburse the father for the 1979-1980 school year as ordered by the BSEA, the court overturned the BSEA's decision, holding that the appropriate 1979-1980 placement was the one proposed in the IEP and that the town was not responsible for the costs at the private school for the 1979-1980 through 1981-1982 school years. The Court of Appeals, remanding, held that the father's unilateral change of the child's placement during the pendency of the [471 U.S. 359, 360] administrative proceedings would not be a bar to reimbursement if such change were held to be appropriate.

Held:

1. The grant of authority to a reviewing court under § 1415(e)(2) includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act. The ordinary meaning of the language in § 1415(e)(2) directing the court to "grant such relief as [it] determines is appropriate" confers broad discretion on the court. To deny such reimbursement would mean that the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards of the Act would be less than complete. Pp. 369-371.

2. A parental violation of § 1415(e)(3) by changing the "then current educational placement" of their child during the pendency of proceedings to review a challenged proposed IEP does not constitute a waiver of the parents' right to reimbursement for expenses of the private placement. Otherwise, the parents would be forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. But if the courts ultimately determine that the proposed IEP was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3). Pp. 371-374.

736 F.2d 773, affirmed.

REHNQUIST, J., delivered the opinion for a unanimous Court.

David Berman argued the cause for petitioners. With him on the briefs was Jane Kenworthy Lewis.

Ellen L. Janos, Assistant Attorney General of Massachusetts, argued the cause for respondent Department of Education of Massachusetts. With her on the brief were Francis X. Bellotti, Attorney General, Judith S. Yogman, Assistant Attorney General, and Kristen Reasoner Apgar. David W. Rosenberg argued the cause and filed a brief for respondent Panico. *

[*] Thomas A. Mela and Stanley J. Eichner filed a brief for Developmental Disabilities Law Center et al. as *amici curiae* urging affirmance. [471 U.S. 359, 361]

JUSTICE REHNQUIST delivered the opinion of the Court.

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U.S.C. § 1401 *et seq.*, requires participating state and local educational agencies "to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education" to such handicapped children. § 1415(a). These procedures include the right of the parents to participate in the development of an "individualized education program" (IEP) for the child and to challenge in administrative and court proceedings a proposed IEP with which they disagree. §§ 1401(19), 1415(b), (d), (e). Where as in the present case review of a contested IEP takes years to run its course—years critical to the child's development—important practical questions arise concerning interim placement of the child and financial responsibility for that placement. This case requires us to address some of those questions.

Michael Panico, the son of respondent Robert Panico, was a first grader in the public school system of petitioner Town of Burlington, Mass., when he began experiencing serious difficulties in school. It later became evident that he had "specific learning disabilities" and thus was "handicapped" within the meaning of the Act, 20 U.S.C. § 1401(1). This entitled him to receive at public expense specially designed instruction to meet his unique needs, as well as related transportation. §§ 1401(16), 1401(17). The negotiations and other proceedings between the Town and the Panicos, thus far

spanning more than eight years, are too involved to relate in full detail; the following are the parts relevant to the issues on which we granted certiorari.

In the spring of 1979, Michael attended the third grade of the Memorial School, a public school in Burlington, Mass., under an IEP calling for individual tutoring by a reading specialist for one hour a day and individual and group counselling. Michael's continued poor performance and the fact that [471 U.S. 359, 362] Memorial School was not equipped to handle his needs led to much discussion between his parents and Town school officials about his difficulties and his future schooling. Apparently the course of these discussions did not run smoothly; the upshot was that the Panicos and the Town agreed that Michael was generally of above average to superior intelligence, but had special educational needs calling for a placement in a school other than Memorial. They disagreed over the source and exact nature of Michael's learning difficulties, the Town believing the source to be emotional and the parents believing it to be neurological.

In late June, the Town presented the Panicos with a proposed IEP for Michael for the 1979-1980 academic year. It called for placing Michael in a highly structured class of six children with special academic and social needs, located at another Town public school, the Pine Glen School. On July 3, Michael's father rejected the proposed IEP and sought review under § 1415(b)(2) by respondent Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA). A hearing was initially scheduled for August 8, but was apparently postponed in favor of a mediation session on August 17. The mediation efforts proved unsuccessful.

Meanwhile the Panicos received the results of the latest expert evaluation of Michael by specialists at Massachusetts General Hospital, who opined that Michael's "emotional difficulties are secondary to a rather severe learning disorder characterized by perceptual difficulties" and recommended "a highly specialized setting for children with learning handicaps . . . such as the Carroll School," a state-approved private school for special education located in Lincoln, Mass. App. 26, 31. Believing that the Town's proposed placement of Michael at the Pine Glen School was inappropriate in light of Michael's needs, Mr. Panico enrolled Michael in the Carroll School in mid-August at his own expense, and Michael started there in September. [471 U.S. 359, 363]

The BSEA held several hearings during the fall of 1979, and in January 1980 the hearing officer decided that the Town's proposed placement at the Pine Glen School was inappropriate and that the Carroll School was "the least restrictive adequate program within the record" for Michael's educational needs. The hearing officer ordered the Town to pay for Michael's tuition and transportation to the Carroll School for the 1979-1980 school year, including reimbursing the Panicos for their expenditures on these items for the school year to date.

The Town sought judicial review of the State's administrative decision in the United States District Court for the District of Massachusetts pursuant to 20 U.S.C. § 1415(e)(2) and a parallel state statute, naming Mr. Panico and the State Department of Education as defendants. In November 1980, the District Court granted summary judgment against the Town on the state-law claim under a

"substantial evidence" standard of review, entering a final judgment on this claim under Federal Rule of Civil Procedure 54(b). The court also set the federal claim for future trial. The Court of Appeals vacated the judgment on the state-law claim, holding that review under the state statute was pre-empted by § 1415(e)(2), which establishes a "preponderance of the evidence" standard of review and which permits the reviewing court to hear additional evidence. 655 F.2d 428, 431-432 (1981).

In the meantime, the Town had refused to comply with the BSEA order, the District Court had denied a stay of that order, and the Panicos and the State had moved for preliminary injunctive relief. The State also had threatened outside of the judicial proceedings to freeze all of the Town's special education assistance unless it complied with the BSEA order. Apparently in response to this threat, the Town agreed in February 1981 to pay for Michael's Carroll School placement and related transportation for the 1980-1981 term, none of which had yet been paid, and to continue [471 U.S. 359, 364] paying for these expenses until the case was decided. But the Town persisted in refusing to reimburse Mr. Panico for the expenses of the 1979-1980 school year. When the Court of Appeals disposed of the state claim, it also held that under this status quo none of the parties could show irreparable injury and thus none was entitled to a preliminary injunction. The court reasoned that the Town had not shown that Mr. Panico would not be able to repay the tuition and related costs borne by the Town if he ultimately lost on the merits, and Mr. Panico had not shown that he would be irreparably harmed if not reimbursed immediately for past payments which might ultimately be determined to be the Town's responsibility.

On remand, the District Court entered an extensive pretrial order on the Town's federal claim. In denying the Town summary judgment, it ruled that 20 U.S.C. § 1415(e) (3) did not bar reimbursement despite the Town's insistence that the Panicos violated that provision by changing Michael's placement to the Carroll School during the pendency of the administrative proceedings. The court reasoned that § 1415(e)(3) concerned the physical placement of the child and not the right to tuition reimbursement or to procedural review of a contested IEP. The court also dealt with the problem that no IEP had been developed for the 1980-1981 or 1981-1982 school years. It held that its power under § 1415(e)(2) to grant "appropriate" relief upon reviewing the contested IEP for the 1979-1980 school year included the power to grant relief for subsequent school years despite the lack of IEPs for those years. In this connection, however, the court interpreted the statute to place the burden of proof on the Town to upset the BSEA decision that the IEP was inappropriate for 1979-1980 and on the Panicos and the State to show that the relief for subsequent terms was appropriate.

After a 4-day trial, the District Court in August 1982 overturned the BSEA decision, holding that the appropriate 1979-1980 placement for Michael was the one proposed by [471 U.S. 359, 365] the Town in the IEP and that the parents had failed to show that this placement would not also have been appropriate for subsequent years. Accordingly, the court concluded that the Town was "not responsible for the cost of Michael's education at the Carroll School for the academic years 1979-80 through 1981-82."

In contesting the Town's proposed form of judgment embodying the court's conclusion, Mr. Panico argued that, despite finally losing on the merits of the IEP in August 1982, he should be reimbursed for his expenditures in 1979-1980, that the Town should finish paying for the recently completed 1981-1982 term, and that he should not be required to reimburse the Town for its payments to date, apparently because the school terms in question fell within the pendency of the administrative and judicial review contemplated by § 1415(e)(2). The case was transferred to another District Judge and consolidated with two other cases to resolve similar issues concerning the reimbursement for expenditures during the pendency of review proceedings.

In a decision on the consolidated cases, the court rejected Mr. Panico's argument that the Carroll School was the "current educational placement" during the pendency of the review proceedings and thus that under § 1415(e)(3) the Town was obligated to maintain that placement. *Doe v. Anrig*, 561 F. Supp. 121 (1983). The court reasoned that the Panicos' unilateral action in placing Michael at the Carroll School without the Town's consent could not "confer thereon the *imprimatur* of continued placement," *id.*, at 129, n. 5, even though strictly speaking there was no actual placement in effect during the summer of 1979 because all parties agreed Michael was finished with the Memorial School and the Town itself proposed in the IEP to transfer him to a new school in the fall.

The District Court next rejected an argument, apparently grounded at least in part on a state regulation, that the Panicos were entitled to rely on the BSEA decision upholding [471 U.S. 359, 366] their placement contrary to the IEP, regardless of whether that decision were ultimately reversed by a court. With respect to the payments made by the Town after the BSEA decision, under the State's threat to cut off funding, the court criticized the State for resorting to extrajudicial pressure to enforce a decision subject to further review. Because this "was not a case where the town was legally obliged under section 1415(e)(3) to continue payments preserving the status quo," the State's coercion could not be viewed as "the basis for a final decision on liability," and could only be "regarded as other than wrongful . . . on the assumption that the payments were to be returned if the order was ultimately reversed." *Id.*, at 130. The court entered a judgment ordering the Panicos to reimburse the Town for its payments for Michael's Carroll placement and related transportation in 1980-1981 and 1981-1982. The Panicos appealed.

In a broad opinion, most of which we do not review, the Court of Appeals for the First Circuit remanded the case a second time. 736 F.2d 773 (1984). The court ruled, among other things, that the District Court erred in conducting a full trial *de novo*, that it gave insufficient weight to the BSEA findings, and that in other respects it did not properly evaluate the IEP. The court also considered several questions about the availability of reimbursement for interim placement. The Town argued that § 1415(e)(3) bars the Panicos from any reimbursement relief, even if on remand they were to prevail on the merits of the IEP, because of their unilateral change of Michael's placement during the pendency of the § 1415(e)(2) proceedings. The court held that such unilateral parental change of placement would not be "a bar to reimbursement of the parents if their actions are held to be appropriate at final judgment." *Id.*, at 799. In dictum the court suggested, however, that a lack of

parental consultation with the Town or "attempt to achieve a negotiated compromise and agreement on a private placement," as [471 U.S. 359, 367] contemplated by the Act, "may be taken into account in a district court's computation of an award of equitable reimbursement." *Ibid.* To guide the District Court on remand, the court stated that "whether to order reimbursement, and at what amount, is a question determined by balancing the equities." *Id.*, at 801. The court also held that the Panicos' reliance on the BSEA decision would estop the Town from obtaining reimbursement "for the period of reliance and requires that where parents have paid the bill for the period, they must be reimbursed." *Ibid.*

The Town filed a petition for a writ of certiorari in this Court challenging the decision of the Court of Appeals on numerous issues, including the scope of judicial review of the administrative decision and the relevance to the merits of an IEP of violations by local school authorities of the Act's procedural requirements. We granted certiorari, 469 U.S. 1071 (1984), only to consider the following two issues: whether the potential relief available under § 1415(e)(2) includes reimbursement to parents for private school tuition and related expenses, and whether § 1415(e)(3) bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local school authorities. We express no opinion on any of the many other views stated by the Court of Appeals.

Congress stated the purpose of the Act in these words:

> "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of handicapped children and their parents or guardians are protected." 20 U.S.C. § 1400(c).

The Act defines a "free appropriate public education" to mean

> "special education and related services which (A) have been provided at public expense, under public supervision [471 U.S. 359, 368] and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with [an] individualized education program." 20 U.S.C. § 1401(18).

To accomplish this ambitious objective, the Act provides federal money to state and local educational agencies that undertake to implement the substantive and procedural requirements of the Act. See *Hendrick Hudson District Bd. of Education v. Rowley*, 458 U.S. 176, 179-184 (1982).

The *modus operandi* of the Act is the already mentioned "individualized educational program." The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. § 1401 (19). The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child. In several places,

the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness. See §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2); 34 CFR § 300.345 (1984).

Apparently recognizing that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labeled "procedural safeguards" to insure the full participation of the parents and proper resolution of substantive disagreements. Section 1415(b) entitles the parents "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child," to obtain an independent educational evaluation of the child, to notice of any decision to initiate or change the identification, evaluation, or educational placement [471 U.S. 359, 369] of the child, and to present complaints with respect to any of the above. The parents are further entitled to "an impartial due process hearing," which in the instant case was the BSEA hearing, to resolve their complaints.

The Act also provides for judicial review in state or federal court to "[a]ny party aggrieved by the findings and decision" made after the due process hearing. The Act confers on the reviewing court the following authority:

> "[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(e)(2).

The first question on which we granted certiorari requires us to decide whether this grant of authority includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.

We conclude that the Act authorizes such reimbursement. The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense where this is not possible. See § 1412(5); 34 CFR §§ 300.132, 300.227, 300.307(b), 300.347 [471 U.S. 359, 370] (1984). In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective

injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

If the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which such prospective injunctive relief would not be sufficient. As this case so vividly demonstrates, however, the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

In this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay [471 U.S. 359, 371] expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP. Such a *post hoc* determination of financial responsibility was contemplated in the legislative history:

> "If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and *the question of who remains financially responsible* is a matter to which the due process procedures established under [the predecessor to § 1415] appl[y]." S. Rep. No. 94-168, p. 32 (1975) (emphasis added).

See 34 CFR § 300.403(b) (1984) (disagreements and question of financial responsibility subject to the due process procedures).

Regardless of the availability of reimbursement as a form of relief in a proper case, the Town maintains that the Panicos have waived any right they otherwise might have to reimbursement because they violated § 1415(e)(3), which provides:

> "During the pendency of any proceedings conducted pursuant to [§ 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . ."

We need not resolve the academic question of what Michael's "then current educational placement" was in the summer of 1979, when both the Town and the parents had agreed that a new school was in order. For the purposes of our decision, we assume that the Pine Glen School, proposed in the IEP, was Michael's current placement and, therefore, that the Panicos did "change" his placement after they had rejected the IEP and had set the administrative review in motion. In [471 U.S. 359, 372] so doing, the Panicos contravened the conditional command of § 1415(e)(3) that "the child shall remain in the then current educational placement."

As an initial matter, we note that the section calls for agreement by *either* the *State or* the *local educational agency*. The BSEA's decision in favor of the Panicos and the Carroll School placement would seem to constitute agreement by the State to the change of placement. The decision was issued in January 1980, so from then on the Panicos were no longer in violation of § 1415(e)(3). This conclusion, however, does not entirely resolve the instant dispute because the Panicos are also seeking reimbursement for Michael's expenses during the fall of 1979, prior to the State's concurrence in the Carroll School placement.

We do not agree with the Town that a parental violation of § 1415(e)(3) constitutes a waiver of reimbursement. The provision says nothing about financial responsibility, waiver, or parental right to reimbursement at the conclusion of judicial proceedings. Moreover, if the provision is interpreted to cut off parental rights to reimbursement, the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement were never available. As in this case, parents will often notice a child's learning difficulties while the child is in a regular public school program. If the school officials disagree with the need for special education or the adequacy of the public school's program to meet the child's needs, it is unlikely they will agree to an interim private school placement while the review process runs its course. Thus, under the Town's reading of § 1415(e)(3), the parents are forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives. [471 U.S. 359, 373]

The legislative history supports this interpretation, favoring a proper interim placement pending the resolution of disagreements over the IEP:

> "The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child have been completely protected. We did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach to try to meet the needs of both the child and the State." 121 Cong. Rec. 37412 (1975) (Sen. Stafford).

We think at least one purpose of § 1415(e)(3) was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings. As we observed in Rowley, 458 U.S., at 192, the impetus for the Act came from

two federal-court decisions, *Pennsylvania Assn. for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (ED Pa. 1971), and 343 F. Supp. 279 (1972), and *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972), which arose from the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from the public schools. Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes. See § 1400(b)(4); 34 CFR § 300.347(a) (1984). We also note that § 1415(e)(3) is located in a section detailing procedural safeguards which are largely for the benefit of the parents and the child.

This is not to say that § 1415(e)(3) has no effect on parents. While we doubt that this provision would authorize a court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child's placement during the pendency of [471 U.S. 359, 374] review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3). This conclusion is supported by the agency's interpretation of the Act's application to private placements by the parents:

> "(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. . . .
>
> "(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under [§ 1415]." 34 CFR § 300.403 (1984).

We thus resolve the questions on which we granted certiorari; because the case is here in an interlocutory posture, we do not consider the estoppel ruling below or the specific equitable factors identified by the Court of Appeals for granting relief. We do think that the court was correct in concluding that "such relief as the court determines is appropriate," within the meaning of § 1415(e)(2), means that equitable considerations are relevant in fashioning relief.

The judgment of the Court of Appeals is

> Affirmed. [471 U.S. 359, 375]

Stuart v. Nappi

443 F. Supp. 1235 (D. Conn. 1978)

United States District Court, D. Connecticut, Civ. No. B-77-381

Decided: January 4, 1978

[443 F. Supp. 1235, 1236] Wenner A. Lohe, Jr., Danbury, Conn., John A. Dziamba, Willimantic, Conn., for plaintiffs.

Russell Lee Post, Jr., Avon, Conn., Robert W. Garvey, Hartford, Conn., for defendants.
[443 F. Supp. 1235, 1237]

DALY, District Judge.

Plaintiff, Kathy Stuart, 1.1 is in her third year at Danbury High School. The records kept by the Danbury School System concerning plaintiff tell of a student with serious academic and emotional difficulties. They describe her as having deficient academic skills caused by a complex of learning disabilities and limited intelligence. Not surprising, her record also reflects a history of behavioral problems. It was precisely for handicapped children such as plaintiff that Congress enacted the Education of the Handicapped Act (Handicapped Act), 20 U.S.C. § 1401 *et seq.* See 20 U.S.C. § 1401(1).

Plaintiff seeks a preliminary injunction of an expulsion hearing to be held by the Danbury Board of Education. She claims that she has been denied rights afforded her by the Handicapped Act. Her claims raise novel issues concerning the impact of recent regulations to the Handicapped Act on the disciplinary process of local schools.

The Handicapped Act was passed in 1970 and amended in 1975. Its purpose is to provide states with federal assistance for the education of handicapped children. See 45 C.F.R. § 121a at 374 (Appendix § 2.1) (1976). The regulations on which this decision turns became effective on October 1, 1977. See 42 Fed.Reg. 42,473 (1977) (to be codified in 45 C.F.R. § 121a). State eligibility for federal funding under the Handicapped Act is made contingent upon the implementation of a detailed state plan and upon compliance with certain procedural safeguards. See 20 U.S.C. § 1413, 1415. The state plan must require all public schools within the state to provide educational programs which meet the unique needs of handicapped children. See *Kruse v. Campbell*, 431 F. Supp. 180, 186 (E.D.Va.), [443 F. Supp. 1235, 1238] vacated and remanded, ___ U.S. ___, ___, 98 S. Ct. 38, 54 L. Ed. 2d 65 (October 4, 1977); *cf. Cuyahoga County Association For Retarded Children and Adults v. Essex*, 411 F. Supp. 46, 61 n. 7 (N.D.Ohio 1976). Connecticut's plan has been approved and the state presently receives federal funds. As a handicapped student in a recipient state, plaintiff is entitled to a special education program that is responsive to her needs and may insist on compliance with the procedural safeguards contained in the Handicapped Act. After scrutinizing the recent regulations to the Handicapped Act

and reviewing both plaintiff's involved school record and the evidence introduced at the preliminary injunction hearing, this Court is persuaded that a preliminary injunction should issue.

The events leading to the present controversy began in 1975 when one of plaintiff's teachers reported to the school guidance counselor that plaintiff was "academically unable to achieve success in his class." As a result of this report and corroboration from her other teachers, it was suggested that plaintiff be given a psychological evaluation and that she be referred to a Planning and Placement Team (PPT). The members of a PPT are drawn from a variety of disciplines, but in all cases they are "professional personnel" employed by the local board of education. 1.2 The PPT's functions are to identify children requiring special education, to prescribe special education programs, and to evaluate these programs.

A meeting of the PPT was held in February of 1975, at which plaintiff was diagnosed as having a major learning disability. The PPT recommended that plaintiff be scheduled on a trial basis in the special education program for remediating learning disabilities and that she be given a psychological evaluation. Although the PPT report specifically stated that the psychological evaluation be given "at the earliest feasible time," no such evaluation was administered.

A second PPT meeting was held in May in order to give plaintiff the annual review mandated by Conn.Reg. § 10-76b-7(b). The PPT reported plaintiff had made encouraging gains, but she suffered from poor learning behaviors and emotional difficulties. A psychological evaluation was again recommended. Her continued participation in the special educational program was also advised, but it was made contingent upon the results of the psychological evaluation.

When school commenced in September of 1975, the PPT requested an immediate psychological evaluation. The PPT stated that an evaluation was essential in order to develop an appropriate special education program. For reasons which have not been explained to the Court, the psychological evaluation was not administered for some time, and the clinical psychologist's report of the evaluation was not completed until January 22, 1976. The report stated that plaintiff had severe learning disabilities derived from either a minimal brain dysfunction or an organically rooted perceptual disorder. It recommended her continued participation in the special education program and concluded: "I can only imagine that someone with such deficit and lack of development must feel utterly lost and humiliated at this point in adolescence in a public school where other students . . . are performing in such contrast to her." The report of plaintiff's psychological evaluation was reviewed at a March, 1976 PPT meeting. The PPT noted that plaintiff was responding remarkably well to the intensive one-to-one teaching she received in the special education program, and recommended that she continue the program until the close of the 1975-1976 school year.

The first indication that the special education program was no longer appropriate came in May of 1976. At that time plaintiff's special education teacher reported that plaintiff had all but stopped attending the program. The teacher requested a PPT meeting to consider whether plaintiff's primary handicap was an emotional disability [443 F. Supp. 1235, 1239] rather than a learning disability. Despite

this request, plaintiff's schedule was not changed nor was a PPT meeting held to review her program before the close of the school year.

At the beginning of the 1976-1977 school year, plaintiff was scheduled to participate in a learning disability program on a part-time basis. Her attendance continued to decline throughout the first half of the school year. By late fall she had completely stopped attending her special education classes and had begun to spend this time wandering the school corridors with her friends. Although she was encouraged to participate in the special education classes, the PPT meeting concerning plaintiff's program, which had been requested at the end of the previous school year, was not conducted in the fall of 1976.

In December of 1976 plaintiff was involved in several incidents which resulted in a series of disciplinary conferences between her mother and school authorities. These conferences were followed by a temporary improvement in plaintiff's attendance and behavior. In light of these improvements, the annual PPT review held in March of 1977 concluded that plaintiff should continue to participate in the special education program on a part-time basis for the remaining three months of the school year. The PPT also recommended that in the next school year plaintiff be scheduled for daily special education classes and that she be considered for a special education vocational training program. The PPT report stated that it was of primary importance for plaintiff to be given a program of study in the 1977-1978 school year which was based on a realistic assessment of her abilities and interests.

Despite the PPT recommendation, plaintiff has not been attending any learning disability program this school year. It is unclear whether this resulted from the school's failure to schedule plaintiff properly or from plaintiff's refusal to attend the program. Regardless of the reason, the school authorities were on notice in the early part of September that the program prescribed by the PPT in March of 1977 was not being administered. In fact, a member of the school staff who was familiar with plaintiff requested that a new PPT review be conducted. This review has never been undertaken.

On September 14, 1977 plaintiff was involved in school-wide disturbances which erupted at Danbury High School. As a result of her complicity in these disturbances, she received a ten-day disciplinary suspension and was scheduled to appear at a disciplinary hearing on November 30, 1977. The Superintendent of Danbury Schools recommended to the Danbury Board of Education that plaintiff be expelled for the remainder of the 1977-1978 school year at this hearing.

Plaintiff's counsel made a written request on November 16, 1977 to the Danbury Board of Education for a hearing and a review of plaintiff's special education program in accordance with Conn.Gen.Stat. § 10-76h. On November 29, 1977 plaintiff obtained a temporary restraining order from this Court which enjoined the defendants from conducting the disciplinary hearing. This order was continued on December 12, 1977 at the conclusion of the preliminary injunction hearing. Between the time the first temporary restraining order was issued and the preliminary injunction hearing was held plaintiff was given a psychological evaluation. However, the results of this evaluation were unavailable at the

time of the hearing. A PPT review of plaintiff's program has not been conducted since March of 1977, nor has the school developed a new special education program for plaintiff. Furthermore, there was no showing at the hearing that plaintiff's attendance at Danbury High School would endanger her or others.

Plaintiff is entitled to a preliminary injunction enjoining Danbury Board of Education from conducting a hearing to expel her. The standard which governs the issuance of a preliminary injunction is well-settled. Plaintiff must demonstrate either (1) probable success on the merits of her claim and possible irreparable injury, or (2) [443 F. Supp. 1235, 1240] sufficiently serious questions going to the merits of her claim and a balance of hardship tipping decidedly in her favor. *Triebwasser & Katz v. American Tel. & Tel. Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976); *Sonesta Int'l Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973); *City of Hartford v. Hills*, 408 F. Supp. 879, 882 (D.Conn.1975). In *Triebwasser supra* at 1359 the Second Circuit stated that a demonstration of possible irreparable harm is required under both of these alternatives.

Plaintiff has made a persuasive showing of possible irreparable injury. It is important to note that the issuance of a preliminary injunction is contingent upon *possible* injury. The irreparable injuries claimed by plaintiff are those which will result from her expulsion at the Board of Education hearing. In this situation the Court must assume that she will, in fact, be expelled, and then proceed to consider the probable consequences of her expulsion. If plaintiff is expelled, she will be without any educational program from the date of her expulsion until such time as another PPT review is held and an appropriate educational program is developed. In light of past delays in the administration of plaintiff's special education program, the Court is concerned that some time may pass before plaintiff is afforded the special education to which she is entitled. However, even assuming her new program is developed with dispatch, for a period of time plaintiff will suffer the injury inherent in being without any educational program. The second irreparable injury to which plaintiff will be subjected derives from the fact that her expulsion will preclude her from taking part in any special education programs offered at Danbury High School. If plaintiff is expelled, she will be restricted to placement in a private school or to home-bound tutoring. Regardless of whether these two alternatives are responsive to plaintiff's needs, the PPT will be limited to their use in fashioning a new special education program for plaintiff. Of particular concern to the Court is the possibility that an appropriate private placement will be unavailable and plaintiff's education will be reduced to some type of homebound tutoring. Such a result can only serve to hinder plaintiff's social development and to perpetuate the vicious cycle in which she is caught. See *Hairston v. Drosick*, 423 F. Supp. 180, 183 (S.D.W.Va.1973) (holding that it is "imperative that every child receive an education with his or her peers insofar as it is at all possible"). The Court is persuaded that plaintiff's expulsion would have been accompanied by a very real possibility of irreparable injury.

Plaintiff has also demonstrated probable success on the merits of four federal claims. 1.3 The Handicapped Act and the regulations thereunder detail specific rights to which handicapped children are entitled. Among these rights are: (1) the right to an "appropriate public education"; (2) the right

to remain in her present placement until the resolution of her special education complaint; (3) the right to an education in the "least restrictive environment"; and (4) the right to have all changes of placement effectuated in accordance with prescribed procedures. Plaintiff claims she has been or will be denied these rights.

Plaintiff argues with no little force that she has been denied her right to an "appropriate public education." The meaning of this term is clarified in the definitional section of the Handicapped Act. Essentially, it is defined so as to require Danbury High [443 F. Supp. 1235, 1241] School to provide plaintiff with an educational program specially designed to meet her learning disabilities. See 20 U.S.C. § 1401(1), (15)-(19). The record before this Court suggests that plaintiff has not been provided with an appropriate education. Evidence has been introduced which shows that Danbury High School not only failed to provide plaintiff with the special education program recommended by the PPT in March of 1977, but that the high school neglected to respond adequately when it learned plaintiff was no longer participating in the special education program it had provided. The Court cannot disregard the possibility that Danbury High School's handling of plaintiff may have contributed to her disruptive behavior. The existence of a causal relationship between plaintiff's academic program and her anti-social behavior was supported by expert testimony introduced at the preliminary injunction hearing. *Cf. Frederick v. Thomas*, 408 F. Supp. 832, 835 (E.D.Pa.1976) (argument that inappropriate educational placement caused anti-social behavior is raised). If a subsequent PPT were to conclude that plaintiff has not been given an appropriate special education placement, then the defendant's resort to its disciplinary process is unjustifiable. The Court is not making a final determination of whether plaintiff has been afforded an appropriate education. The resolution of this question is beyond the scope of the present inquiry. In order to sustain a preliminary injunction plaintiff need only demonstrate probable success on the merits of her claim. She has satisfied this standard.

Plaintiff also claims that her expulsion prior to the resolution of her special education complaint would be in violation of 20 U.S.C. § 1415(e)(3). 1.4 This subsection of the Handicapped Act states: "During the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . until all such proceedings have been completed." Plaintiff qualifies for the protection that this subsection provides. She has filed a complaint pursuant to 20 U.S.C. § 1415(b)(1)(E) requesting a hearing and a review of her special education placement. Moreover, there has been no agreement to leave her present special education placement voluntarily. Thus, plaintiff has a right to remain in this placement until her complaint is resolved. The novel issue raised by plaintiff arises from the fact that the right to remain in her present placement directly conflicts with Danbury High Schools's disciplinary process. If the high school expels plaintiff during the pendency of her special education complaint, then her placement will be changed in contravention of 20 U.S.C. § 1415(e)(3). The Court must determine whether this subsection of the

Handicapped Act prohibits the expulsion of handicapped children during the pendency of a special education complaint.

This is a case of first impression. Although there are no decisions in which the relation between the special education processes and disciplinary procedures is discussed, the regulations promulgated under the new law are helpful. The Department of Health, Education and Welfare (HEW) released regulations in August of this year that are aimed at facilitating the implementation of the Handicapped Act. See 42 Fed.Reg. 42,473 (1977) (to be codified in 45 [443 F. Supp. 1235, 1242] C.F.R. § 121a). Contained therein is a comment addressing the conflict between 20 U.S.C. § 1415(e)(3) and the disciplinary procedures of public schools. The comment reiterates the rule that after a complaint proceeding has been initiated, a change in a child's placement is prohibited. It then states: "While the placement may not be changed, this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others." 42 Fed.Reg. 42,473, 42,496 (1977) (to be codified in 42 C.F.R. § 121a.513). This somewhat cryptic statement suggests that subsection 1415(e)(3) prohibits disciplinary measures which have the effect of changing a child's placement, while permitting the type of procedures necessary for dealing with a student who appears to be dangerous. This interpretation is supported by a comment-to-the-comment which states that the comment was added to make it clear that schools are permitted to use their regular procedures for dealing with emergencies. 1.5 See 42 Fed. Reg. 42,473, 42,512 (1977) (to follow the codification at 45 C.F.R. § 121a.513). There is no indication in either the regulations or the comments thereto that schools should be permitted to expel a handicapped child while a special education complaint is pending.

The Court concurs with HEW's reading of subsection 1415(e)(3). As will be discussed, the Handicapped Act establishes procedures which replace expulsion as a means of removing handicapped children from school if they become disruptive. Furthermore, school authorities can deal with emergencies by suspending handicapped children. Suspension will permit the child to remain in his or her present placement, but will allow schools in Connecticut to exclude a student for up to ten consecutive school days. See Conn.Gen. Stat. § 10-233a(c) and note 3 *supra*. Therefore, plaintiff's expulsion prior to the resolution of her complaint would violate the Handicapped Act.

Plaintiff makes a third claim that the Handicapped Act prohibits her expulsion even after her complaint proceedings have terminated. She bases this claim on her right to an education in the "least restrictive environment" and on the overall design of the Handicapped Act. An important feature of the Handicapped Act is its requirement that children be educated in the "least restrictive environment." This requirement entitles handicapped children to be educated with nonhandicapped children whenever possible. See 20 U.S.C. § 1412(5)(B); 42 Fed.Reg. 42,473, 42,497, 42,513 (1977) (to be codified in 45 C.F.R. § 121a.550). The right of handicapped children to an education in the "least restrictive environment" is implemented, in part, by requiring schools to provide a continuum of alternative placements. See 20 U.S.C. § 1412(5)(B); 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.551). These alternatives include instruction in regular classes, special classes, private schools, the child's home and other institutions. By providing handicapped children with a

range of placements, the Handicapped Act attempts to insure that each child receives an education which is responsive to his or her individual needs while maximizing the child's opportunity to learn with nonhandicapped peers. See 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.552).

The right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children. An expulsion has the effect [443 F. Supp. 1235, 1243] not only of changing a student's placement, but also of restricting the availability of alternative placements. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the Handicapped Act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment. See 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.533(a)(4)).

The expulsion of handicapped children not only jeopardizes their right to an education in the least restrictive environment, but is inconsistent with the procedures established by the Handicapped Act for changing the placement of disruptive children. The Handicapped Act prescribes a procedure whereby disruptive children are transferred to more restrictive placements when their behavior significantly impairs the education of other children. See 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.552). 1.6 The responsibility for changing a handicapped child's placement is allocated to professional teams, such as Connecticut's PPTs. See 42 Fed.Reg. 42,473, 42,497 (1977) (to be codified in 45 C.F.R. § 121a.533(a)(3)). Furthermore, parents of handicapped children are entitled to participate in and to appeal from these placement decisions. See 42 Fed.Reg. 42,473, 42,490 (1977) (to be codified in 45 C.F.R. § 121a.345); 20 U.S.C. § 1415(b)(1)(C), (c). Thus, the use of expulsion proceedings as a means of changing the placement of a disruptive handicapped child contravenes the procedures of the Handicapped Act. After considerable reflection the Court is persuaded that any changes in plaintiff's placement must be made by a PPT after considering the range of available placements and plaintiff's particular needs.

It is important that the parameters of this decision are clear. This Court is cognizant of the need for school officials to be vested with ample authority and discretion. It is, therefore, with great reluctance that the Court has intervened in the disciplinary process of Danbury High School. However, this intervention is of a limited nature. Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children. Secondly, a PPT can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children. The Handicapped Act thereby affords schools with both short-term and long-term methods of dealing with handicapped children who are behavioral problems.

Defendants contend that their disciplinary procedures are beyond the purview of this Court. They are mistaken. It has long been fundamental to our federalism that public education is under the control of state and local authorities. See *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968); *Buck v. Board of Education of City of New York*, 553 F.2d 315, 320 (2d Cir. 1977). Although there is little doubt that the judgment of state and local school authorities is entitled to considerable deference, it is equally clear that even a school's disciplinary procedures are subject to the scrutiny of the federal judiciary. See e.g., *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1974); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); *Board of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1942). *Cf. Yoo v. Moynihan*, 28 Conn.Sup. 375, 262 A.2d 814 (1969) (temporary injunction issued by state [443 F. Supp. 1235, 1244] court against expulsion of student for violation of dress code). In the instant case, judicial intervention in Danbury High School's disciplinary procedures is Congressionally mandated. The Handicapped Act vests jurisdiction in federal district courts over all claims of noncompliance with the Act's procedural safeguards, regardless of the amount in controversy. See 20 U.S.C. § 1415(e)(4).

Defendants' principle objection to the issuance of a preliminary injunction is that the procedures for securing a special education are distinct from disciplinary procedures and therefore one process should not interfere with the other. This contention is based on a non sequitur. The inference that the special education and disciplinary procedures cannot conflict, does not follow from the premise that these are separate processes. Defendants are really asking the Court to refuse to resolve an obvious conflict between these procedures. This Court will not oblige them.

Danbury Board of Education is HEREBY ORDERED to require an immediate PPT review of plaintiff's special education program and is preliminarily enjoined from conducting a hearing to expel her. Furthermore, any changes in her placement must be effectuated through the proper special education procedures until the final resolution of plaintiff's claims.

Notes

[1.1] Pursuant to counsel's request, plaintiff is proceeding under a fictitious name. Those sections of the file reflecting her real name have been sealed from public inspection.

[1.2] The PPT is defined in Conn.Reg. § 10-76b-1(q) as "The group of persons chosen from the teaching, administrative and pupil personnel staff of the school district . . ."

[1.3] Plaintiff makes an intriguing state claim that her expulsion contravenes Conn.Gen.Stat. § 10-233d, 4-177. This claim is based on the argument that plaintiff is entitled to a current psychological evaluation and a PPT determination of the adequacy of her special education placement prior to an expulsion hearing. The thrust of this argument is that without a current evaluation and PPT determination plaintiff is being denied a meaningful opportunity "to present evidence and argument on all issues involved" as required by Conn.Gen.Stat. § 4-177(c). This is exclusively a state claim and a state court should rule on it in the first instance. *Cf. Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1940). Until such

time as a state court has clarified the meaning of Conn.Gen.Stat. § 4-177, this Court will decline to exercise its discretionary, pendent jurisdiction over this claim.

[1.4] The terms "suspension" and "expulsion" are used in accordance with the definitions appearing in Conn.Gen.Stat. § 10-233a(c), (d):

(c) Suspension means an exclusion from school privileges for no more than ten consecutive school days, provided such exclusion shall not extend beyond the end of the school year in which such suspension was imposed.

(d) Expulsion means an exclusion from school privileges for more than ten consecutive days and shall be deemed to include, but not be limited to, exclusion from the school to which such pupil was assigned at the time such disciplinary action was taken, provided such exclusion shall not extend beyond the end of the school year in which such exclusion was imposed.

This decision in no way affects the "removal" of students for all or part of a single class period. See Conn. Gen.Stat. § 10-233a(b).

[1.5] The complete text of the comment-to-the-comment states:

Commenters suggested a provision be added to allow change of placement for health or safety reasons. One Commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or if the parents agree, in an interim special placement.

Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

42 Fed.Reg. 42,473, 42,512 (1977) (to follow codification at 45 C.F.R. § 121a.513).

[1.6] The comment to 45 C.F.R. § 121 A. 552 explains that a handicapped child's placement is inappropriate whenever the child becomes so disruptive that the "education of other students is significantly impaired." This explanation is derived from a comment to the Rehabilitation Act of 1973, 29 U.S.C. § 794. See 42 Fed. Reg. 22,676, 22,691 (1977) (to follow codification in 45 C.F.R. § 84.34).

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PART 7

Segregation and the Fourteenth Amendment

Brown v. Board of Education of Topeka (1)

347 U.S. 483 (1954)

United States Supreme Court, Docket No. 1

No. 1. Appeal from the United States District Court for the District of Kansas. [*]

Argued: December 9, 1952 ***Reargued:*** December 8, 1953 ***Decided:*** May 17, 1954

Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment—even though the physical facilities and other "tangible" factors of white and Negro schools may be equal. Pp. 486-496.

(a) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education. Pp. 489-490.

(b) The question presented in these cases must be determined, not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation. Pp. 492-493.

(c) Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right which must be made available to all on equal terms. P. 493.

(d) Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other "tangible" factors may be equal. Pp. 493-494.

(e) The "separate but equal" doctrine adopted in *Plessy v. Ferguson*, 163 U.S. 537, has no place in the field of public education. P. 495. [347 U.S. 483, 484]

(f) The cases are restored to the docket for further argument on specified questions relating to the forms of the decrees. Pp. 495-496.

[*] Together with No. 2, *Briggs et al. v. Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9-10, 1952, reargued December 7-8, 1953; No. 4, *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7-8, 1953; and No. 10, *Gebhart et al. v. Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

Robert L. Carter argued the cause for appellants in No. 1 on the original argument and on the reargument. Thurgood Marshall argued the cause for appellants in No. 2 on the original argument and Spottswood W. Robinson, III, for appellants in No. 4 on the original argument, and both argued the causes for appellants in Nos. 2 and 4 on the reargument. Louis L. Redding and Jack Greenberg

argued the cause for respondents in No. 10 on the original argument and Jack Greenberg and Thurgood Marshall on the reargument.

On the briefs were Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, Louis L. Redding, Jack Greenberg, George E. C. Hayes, William R. Ming, Jr., Constance Baker Motley, James M. Nabrit, Jr., Charles S. Scott, Frank D. Reeves, Harold R. Boulware and Oliver W. Hill for appellants in Nos. 1, 2 and 4 and respondents in No. 10; George M. Johnson for appellants in Nos. 1, 2 and 4; and Loren Miller for appellants in Nos. 2 and 4. Arthur D. Shores and A. T. Walden were on the Statement as to Jurisdiction and a brief opposing a Motion to Dismiss or Affirm in No. 2.

Paul E. Wilson, Assistant Attorney General of Kansas, argued the cause for appellees in No. 1 on the original argument and on the reargument. With him on the briefs was Harold R. Fatzer, Attorney General.

John W. Davis argued the cause for appellees in No. 2 on the original argument and for appellees in Nos. 2 and 4 on the reargument. With him on the briefs in No. 2 were T. C. Callison, Attorney General of South Carolina, Robert McC. Figg, Jr., S. E. Rogers, William R. Meagher and Taggart Whipple. [347 U.S. 483, 485]

J. Lindsay Almond, Jr., Attorney General of Virginia, and T. Justin Moore argued the cause for appellees in No. 4 on the original argument and for appellees in Nos. 2 and 4 on the reargument. On the briefs in No. 4 were J. Lindsay Almond, Jr., Attorney General, and Henry T. Wickham, Special Assistant Attorney General, for the State of Virginia, and T. Justin Moore, Archibald G. Robertson, John W. Riely and T. Justin Moore, Jr. for the Prince Edward County School Authorities, appellees.

H. Albert Young, Attorney General of Delaware, argued the cause for petitioners in No. 10 on the original argument and on the reargument. With him on the briefs was Louis J. Finger, Special Deputy Attorney General.

By special leave of Court, Assistant Attorney General Rankin argued the cause for the United States on the reargument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10. With him on the brief were Attorney General Brownell, Philip Elman, Leon Ulman, William J. Lamont and M. Magdelena Schoch. James P. McGranery, then Attorney General, and Philip Elman filed a brief for the United States on the original argument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10.

Briefs of *amici curiae* supporting appellants in No. 1 were filed by Shad Polier, Will Maslow and Joseph B. Robison for the American Jewish Congress; by Edwin J. Lukas, Arnold Forster, Arthur Garfield Hays, Frank E. Karelsen, Leonard Haas, Saburo Kido and Theodore Leskes for the American Civil Liberties Union et al.; and by John Ligtenberg and Selma M. Borchardt for the American Federation of Teachers. Briefs of *amici curiae* supporting appellants in No. 1 and respondents in No. 10 were filed by Arthur J. Goldberg and Thomas E. Harris [347 U.S. 483, 486] for the Congress of Industrial Organizations and by Phineas Indritz for the American Veterans Committee, Inc.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion. 1.1 [347 U.S. 483, 487]

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, [347 U.S. 483, 488] they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. 1.2 Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court. 1.3 [347 U.S. 483, 489]

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. 1.4 In the South, the movement toward free common schools, supported [347 U.S. 483, 490] by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of

the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. 1.5 The doctrine of [347 U.S. 483, 491] "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, *supra*, involving not education but transportation. 1.6 American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. 1.7 In *Cumming v. County Board of Education*, 175 U.S. 528, and *Gong Lum v. Rice*, 275 U.S. 78, the validity of the doctrine itself was not challenged. 1.8 In more recent cases, all on the graduate school [347 U.S. 483, 492] level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337; *Sipuel v. Oklahoma*, 332 U.S. 631; *Sweatt v. Painter*, 339 U.S. 629; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, *supra*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. 1.9 Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout [347 U.S. 483, 493] the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

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

environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, *supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, *supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." [347 U.S. 483, 494] Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." 1.10

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. 1.11 Any language [347 U.S. 483, 495] in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment. 1.12

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems

of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. 1.13 The Attorney General [347 U.S. 483, 496] of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954. 1.14

It is so ordered.

Footnotes

[1.1] In the Kansas case, *Brown v. Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U.S.C. § 1253.

In the South Carolina case, *Briggs v. Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S. C. Const., Art. XI, § 7; S. C. Code § 5377 (1942). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission [347 U.S. 483, 487] to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U.S.C. 1253.

In the Virginia case, *Davis v. County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward county. They brought this action in the United States District Court for the

Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22-221 (1950). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F. Supp. 337. The case is here on direct appeal under 28 U.S.C. § 1253.

In the Delaware case, *Gebhart v. Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved [347 U.S. 483, 488] in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

[1.2] 344 U.S. 1, 141, 891.

[1.3] 345 U.S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

[1.4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc. II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269-275; Cubberley, *supra*, at 288-339, 408-431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408-423. In the country as a whole, but particularly in the South, the War [347 U.S. 483, 490] virtually stopped all progress in public education. *Id.*, at 427-428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112-132, 175-195. Compulsory school

attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563-565.

[1.5] *Slaughter-House Cases*, 16 Wall. 36, 67-72 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880):

> "It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but [347 U.S. 483, 491] declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

See also *Virginia v. Rives*, 100 U.S. 313, 318 (1880); *Ex parte Virginia*, 100 U.S. 339, 344-345 (1880).

[1.6] The doctrine apparently originated in *Roberts v. City of Boston*, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[1.7] See also *Berea College v. Kentucky*, 211 U.S. 45 (1908).

[1.8] In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

[1.9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F. Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

[1.10] A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A. 2d 862, 865.

[1.11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of [347 U.S. 483, 495] Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., (1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).

[1.12] See *Bolling v. Sharpe*, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

[1.13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment (a) would a decree necessarily follow providing that, within the [347 U.S. 483, 496] limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? 5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b), (a) should this Court formulate detailed decrees in these cases; (b) if so, what specific issues should the decrees reach; (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees; (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[1.14] See Rule 42, Revised Rules of this Court (effective July 1, 1954). [347 U.S. 483, 497]

Missouri Revised Statutes 168.104–168.129

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