

# A Brief Reflection on the Doctrinal Entrenchment of Inequality: *Brach v. Newsom*

Jonathan D. Glater\*

Introduction .....	66
I. Fed-up Pandemic Parents: <i>Brach v. Newsom</i> .....	68
II. Precedents and the Perpetuation of Inequality: The Appellate Panel	
Majority’s Reading of Supreme Court Doctrine .....	70
III. Critique.....	75
Conclusion .....	77

## INTRODUCTION

In spring 2020, many parents of children in California schools closed during the global pandemic had had enough. A group filed a lawsuit challenging the executive orders requiring compliance with state public health directives that in turn mandated the shuttering of schools.<sup>1</sup> The parents asserted that the closures violated rights protected by the Fourteenth Amendment, the Civil Rights Act, the Rehabilitation Act, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act. The trial court judge *sua sponte* granted summary judgment to the defendants. On appeal, a panel of the Ninth Circuit reversed the trial court’s decision with respect to the parents of children who attended *private* schools and upheld it with respect to the parents of children who attended *public* school. Put slightly differently, a majority of the three-judge panel recognized compelling constitutional interests in education for the parents likely to be more privileged—because of their ability to pay for private education—and denied

---

DOI: <https://doi.org/10.15779/Z384X54H7C>

Copyright © 2022 Jonathan D. Glater.

\* Professor of Law, University of California, Berkeley. The author is grateful to Jennifer M. Chacón, Erwin Chemerinsky, Catherine Fisk, and Mark Rosenbaum for both discussing the ideas in this essay and reviewing early drafts

1. First Amended Complaint, *Brach v. Newsom*, 2:20-cv-06472 (C.D. Cal. Jul. 29, 2020) (hereinafter “Complaint”), dkt. 9.

such protection to parents whose children attended public schools. It is perhaps no wonder that as of this writing, the case is headed for *en banc* review.<sup>2</sup>

This brief Essay explores the path taken in the appellate opinion to provide a critique of the different doctrinal treatment of the parents whose children attend public school relative to those whose children attend private schools. The motivation is concern over the potential ramifications of this distinction going forward, especially as both the modality and content of public education become more politically fraught,<sup>3</sup> because the reasoning of the panel majority may be adopted by other courts regardless of what the Ninth Circuit ultimately decides. Lawsuits are simmering over schools' curricula<sup>4</sup> and state lawmakers have acted to constrain what students are taught<sup>5</sup>; it is troubling to think that in disputes between parents and schools, parents' preferences receive more deference if their children attend private schools and less deference if they attend public schools. Such outcomes suggest that money buys not only education itself but a distinct bundle of legally enforceable rights to dictate the terms and subject of that education. Whatever the merits of the underlying issue—and protecting public health is a pretty important underlying issue—the decision of the Ninth Circuit panel is quite troubling.

To be clear, in direct terms the effect of the decision is modest. If the case is returned to the trial court, the district judge will follow the higher court's instructions and likely produce a highly fact-specific—and consequently more reversal-resistant—opinion, likely again upholding the State's restrictions affecting both public and private schools under the extraordinary circumstance of the pandemic. As explained in more detail below, that opinion would have to apply strict scrutiny to the executive orders seeking to protect children from deadly disease and might confront difficult and complex questions, including the limits of the state's police power to protect public health and the application of mootness doctrine, now that schools have widely reopened. But that decision,

---

2. Order, *Brach v. Newsom*, 2:20-cv-06472 (C.D. Cal. Dec. 22, 2021), dkt. 75.

3. One does not have to put much effort into a search for examples of vociferous parental opposition to curricular content. See, e.g., Stephanie Saul, *Energizing Conservative Voters, One School Board Election at a Time*, N.Y. TIMES, Oct. 22, 2021, at A1 (describing parents' political activism in opposition to "prioritizing race and identity" in local schools); Michael Powell, *New York's Private Schools Tackle White Privilege. It Has Not Been Easy*, N.Y. TIMES, Aug. 29, 2021, at A1 (describing tensions among parents, teachers, and students over curricular content addressing race at New York private schools); Kristen Taketa & Anissa Durham, *Battle Over Critical Race Theory Reaches San Diego School Districts*, SAN DIEGO UNION-TRIBUNE, June 21, 2021 (describing parents' attacks on curricular content addressing race in a way that they say constitutes "indoctrination of students").

4. Such litigation has been covered in the media. See, e.g., Douglas Belkin & Jacob Gershman, *Federal Lawsuits Say Antiracism and Critical Race Theory in Schools Violate Constitution*, WALL ST. J., July 1, 2021, at <https://www.wsj.com/articles/federal-lawsuits-say-antiracism-and-critical-race-theory-in-schools-violate-constitution-11625151879>.

5. Jonathan Feingold, *Reclaiming CRT: How Regressive Laws Can Advance Progressive Ends*, 73 S. CAROLINA L. REV. \_\_\_, (forthcoming 2022) (manuscript on file) (at page 7 / Part II describing legislation passed limiting teaching in public schools).

which may yet be the ultimate result of the *en banc* review, would not undo the reasoning and the damage of the appellate panel's initial opinion.

Beyond analyzing the troubling reasoning of the Ninth Circuit panel, this Essay also shows how courts can manipulate distinct strands of ostensibly neutral doctrine in ways that perpetuate inequality in the real world. The panel's reasoning expands upon a reading of precedent granting more power to that relatively small number of parents who tend to have more wealth and power already and denying comparable authority to the vast majority of parents who send their children to public schools.<sup>6</sup> Recognizing different bundles of constitutional rights to control school experiences for people likely to be differently situated socioeconomically reinforces inequality.

The discussion that follows has three Parts. The first Part briefly describes the facts and the plaintiffs' claims challenging the state's shutdown of schools. The second delves into the reasoning of the Ninth Circuit majority to identify both the basis of the differential treatment of claims by parents of students in public schools and by parents of students in private schools and the ways in which the appellate panel went beyond Supreme Court doctrine. The third offers a critique of the reasoning adopted by the panel majority, and the fourth briefly concludes.

## I.

### FED-UP PANDEMIC PARENTS: *BRACH V. NEWSOM*

More than a dozen parents filed the lawsuit challenging the shutdown of in-person schooling and the shift to online, or remote, education.<sup>7</sup> The complaint touched on the ways in which the group was diverse, not only because affected children attended different kinds of schools but because of who they were: one was a recent immigrant from Cameroon, another identified as the Hispanic parent of two boys diagnosed with autism, at least one was a single parent, one was a Black pastor whose child received special education services pursuant to an Individualized Education Plan.<sup>8</sup> They shared dissatisfaction with the efficacy of remote teaching, concern over the impact of social isolation on their children, and frustration with the delay in reopening of their respective schools.

The parents' complaint offered a number of observations attacking the state's policy and its underlying rationale. They argued that reopening would create "minimal"<sup>9</sup> risk; that reopening was supported by federal and medical authorities; that differential access to high-speed internet meant that remote schooling exacerbated learning and academic performance gaps along lines of

---

6. Slightly more than 10 percent of children in the United States attend private schools. Department of Education, DIGEST OF EDUCATION STATISTICS 2020, tbl. 205.15, [https://nces.ed.gov/programs/digest/d19/tables/dt19\\_205.15.asp?current=yes](https://nces.ed.gov/programs/digest/d19/tables/dt19_205.15.asp?current=yes).

7. Complaint ¶¶ 7-21.

8. *Id.*

9. Complaint at ¶ 52.

race and class; that students with disabilities were poorly or not at all served by remote educational offerings; and that children were less safe at home. These harms, the complaint alleged, violated rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment,<sup>10</sup> including the “fundamental right to a basic, minimum education,”<sup>11</sup> and violated both title II of the Americans with Disabilities Act (ADA)<sup>12</sup> and the Individuals with Disabilities Education Act (IDEA).<sup>13</sup> Notably, the complaint did not explicitly distinguish between the harms experienced by the plaintiffs whose children attended public school and those whose children attended private school.

The trial court judge granted the defendants summary judgment on each claim. The judge found that the Due Process clause did not contain a fundamental right to education, which the judge noted was consistent with the Supreme Court’s resolution of *San Antonio Independent School District v. Rodriguez*.<sup>14</sup> Without a fundamental right implicated, the judge went on, the State’s school closure policy only had to survive rational basis review to withstand the plaintiffs’ equal protection challenge, and the policy easily passed that test: curbing the spread of COVID-19 was a legitimate state interest and restricting in-person schooling in pursuit of that goal was not irrational.<sup>15</sup> The judge found the claim under the IDEA was unlikely to succeed on the merits because the plaintiffs had not first exhausted potential administrative remedies.<sup>16</sup> Consequently, the judge also concluded that the plaintiffs were unlikely to succeed on their ADA claims<sup>17</sup> because the relief sought would have been available under the IDEA and so prior exhaustion of administrative remedies was mandated before those claims could be brought to federal court.<sup>18</sup> In short, the trial court judge rejected each and every one of the claims and underlying arguments by the plaintiffs.

---

10. U.S. CONST. Amend. XIV.

11. Complaint at ¶ 110.

12. 42 U.S.C. §12131 et seq.

13. 20 U.S.C. §1400 et seq. The plaintiffs also charged that the State’s treatment of children with disabilities violated the Rehabilitation Act of 1973, 29 U.S.C. §794 et seq, and alleged violations of title VI of the Civil Rights Act of 1964. The trial court judge considered the ADA and Rehabilitation Act claims together, *Brach v. Newsom*, 2020 WL 7222103, \*13 (C.D. Cal. 2020), and separately concluded the Civil Rights Act claim had been abandoned by the plaintiffs because it was foreclosed by precedent. *Id.* at \*10.

14. 411 U.S. 1, 37 (1973).

15. *Brach v. Newsom*, 2020 WL 7222103, \*8 (C.D. Cal. 2020).

16. *Id.* at \*11-12 (citing 20 U.S.C. §1415f).

17. The plaintiffs’ Rehabilitation Act claims were similarly unlikely to succeed, the judge found.

18. *Brach v. Newsom*, 2020 WL 7222103, \*13 (C.D. Cal. 2020).

## II.

PRECEDENTS AND THE PERPETUATION OF INEQUALITY: THE APPELLATE PANEL  
MAJORITY'S READING OF SUPREME COURT DOCTRINE

The appellate panel affirmed the trial court judge's disposition of the claims by the parents of children attending public schools and reversed with respect to the claims by parents of children enrolled in private schools.<sup>19</sup> In drawing this distinction, the appellate majority made dispositive characteristics of the plaintiffs that the trial court did not address at all, engaging in a bit of tricky reasoning: claims made by private school parents only made sense if understood as asserting a harm different from that suffered by public school parents.<sup>20</sup> The judges did not rely on a clearly erroneous reading of doctrine but extended it in a way that appears at least potentially inconsistent with precedent and, more importantly, inconsistent with the promotion of equity. In reaching different conclusions for different claimants, the appellate judges in the majority did not acknowledge the implications of their line-drawing exercise.

The judges agreed with the trial court that the Due Process Clause did not provide a fundamental right to education, citing to Supreme Court decisions declining to recognize such a right.<sup>21</sup> In *San Antonio v. Rodriguez*, the majority noted, the Court rejected just such an assertion and therefore declined to apply strict scrutiny to the public school financing regime in Texas, a decision that allowed disparate funding of schools in wealthier and poorer districts.<sup>22</sup> The Ninth Circuit panel did not address, however, other observations by the justices in *Rodriguez* suggesting that a greater degree of interference in, or denial of, educational opportunity might be unconstitutional. The Court stated:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system

---

19. The panel also grappled with the question of whether the claims were moot in light of changes in the State's policies on in-person schooling and the actual availability of in-person schooling. *Brach v. Newsom*, 6 F.4th 904, 916-921 (9th Cir. 2021). This discussion is not relevant for purposes of this Essay.

20. *Brach v. Newsom*, 6 F.4th at 925. The panel majority reasoned that because none of the plaintiffs could rely on a fundamental right to education grounded in the federal Constitution, the private-school parents' claim could "only be understood as asserting that the state was unconstitutionally interfering with these Plaintiffs' effort to choose the forum that they believed would provide their children with an adequate education," and the right to choose a child's educational "forum" was recognized in a different line of Supreme Court cases. *Id.* Of course, a valid response to the panel majority's rescue effort is not difficult: all the parents in the case sought recognition of a fundamental right to education, and the need to interpret one set of parents' potential claims differently only arose if the fundamental right was not recognized.

21. *Brach v. Newsom*, 6 F.4th at 922 (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

22. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 34 (1973) (finding no implicit or explicit recognition of the special status of education in the federal constitution).

occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.<sup>23</sup>

Thus, although the Court in *Rodriguez* did not find a violation of a fundamental right in the unequal spending on students' schooling, the justices left open the possibility that there might be a fundamental right to some "identifiable quantum" of basic education. The *Brach* panel majority did not address whether the shift to remote education might have resulted in an education that failed to provide that quantum. After all, the closure of in-person schooling itself could have constituted a sufficient deprivation of access to education to violate that right, as might the quality of remote schooling, but the appellate panel declined to recognize any such "novel" right.<sup>24</sup> Instead, citing *Rodriguez*, the majority warned that recognizing a fundamental right to education would open the door to identification of too many other rights that could be characterized as fundamental.<sup>25</sup>

In reaching this conclusion, the panel explicitly sidestepped subsequent decisions of the Court cited by the plaintiffs in which the justices again suggested that some degree of interference in educational opportunity could violate parents' or children's due process rights. In *Plyler v. Doe*, the Court found that a state policy of excluding undocumented children from public schools did not further a "substantial goal of the State," because the policy "impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling [immigration] status."<sup>26</sup> The *Brach* panel rejected the plaintiffs' argument that the majority opinion in *Plyler* called for greater judicial skepticism of the State's proffered rationale for the exclusionary policy because of its lasting and uneven effects. The judges similarly rejected language in other cases cited by the plaintiffs, *Papasas v. Allain*<sup>27</sup> and *Kadmas v. Dickinson Public Schools*,<sup>28</sup> in which the Court appeared expressly to withhold judgment on the question of whether education could ever constitute a fundamental right. The *Brach* majority

---

23. *Id.* at 36-37.

24. *Brach v. Newsom*, 6 F.4th at 923.

25. *Id.* at 922.

26. *Plyler v. Doe*, 457 U.S. 202, 223-224 (1982).

27. 478 U.S. 265, 284 (1986) ("[a]s *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review").

28. 487 U.S. 450, 458 (1988) (the Court has not "accepted the proposition that education is a fundamental right").

offered two reasons for this: first, that the Court had directed courts not to expand the domain of substantive due process lightly, and second, that *Brach* itself would be the wrong case to undertake such expansion because the case was not brought as a class action.<sup>29</sup> So much, then, for the claims of the public-school plaintiffs.

The majority found that the parents with children in private schools, on the other hand, *did* have a fundamental right protected by due process and potentially violated by the school closures. That right did not rest on an argument that education was constitutionally special but on Supreme Court cases recognizing the “fundamental right of parents to choose their children’s educational forum.”<sup>30</sup> The panel majority cited to two seminal Supreme Court cases that provided the contours of this right, *Meyer v. Nebraska*<sup>31</sup> and *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,<sup>32</sup> and to a more recent Ninth Circuit case determining its scope.

In *Meyer*, the Court confronted a state law that prohibited the teaching of languages other than English to students below ninth grade in any<sup>33</sup> school, and concluded that the law violated due process rights of parents protected by the Fourteenth Amendment.<sup>34</sup> In the opinion, the Court placed this right in the context of rights including the “right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>35</sup> The Court found that the right of the teacher convicted of violating the law, and more importantly for present purposes, the right of parents to have the teacher instruct their children in a language other than English, were among those protected.<sup>36</sup> The decision thus recognized decision-making authority of parents over the educational experiences of their children.

In *Pierce*, decided a couple of years after *Meyer*, the operator of private, parochial schools challenged a state law that required the attendance of children between the ages of eight and sixteen at public schools.<sup>37</sup> The justices concluded

---

29. *Brach v. Newsom*, 6 F.4th at 923-924.

30. *Brach v. Newsom*, 6 F.4th at 925.

31. 262 U.S. 390 (1923).

32. 268 U.S. 510 (1925). For a more detailed discussion of the doctrinal history and argument about the contours of the right these two cases describe, see Timothy W. Schubert, *Note: School Closures and Parental Control: Reinterpreting the Scope and Protection of Parents’ Due Process Right to Direct Their Children’s Education*, 90 FORDHAM L. REV. 1817 (2022) (providing a history of the cases following *Meyer* and *Pierce* and ultimately agreeing with the analysis of the panel majority in *Brach v. Newsom*, though not necessarily with the normative wisdom of the outcome. *Id.* at note 35).

33. I.e., public or private.

34. *Meyer*, 262 U.S. at 403.

35. *Id.* at 399.

36. *Id.* at 400.

37. *Pierce*, 268 U.S. at 529-530.

that the law was an “arbitrary, unreasonable, and unlawful interference with [the plaintiff’s] patrons and the consequent destruction of their business and property.”<sup>38</sup> Relevant to *Brach v. Newsom*, in which private school operators were not parties,<sup>39</sup> is the Court’s specification of the “liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>40</sup> Given the facts of the case, this right must extend to the power to choose to send a child to private school. Whether it extended to authority to choose the manner of instruction, the *Pierce* opinion did not say, but the decision further articulated the authority of parents over educational experiences.

After addressing *Meyer* and *Pierce*, the *Brach* majority turned to *Fields v. Palmdale School District*,<sup>41</sup> a Ninth Circuit case decided in 2005, to explain how *Pierce* and *Meyer* together had produced a single parental “*Meyer-Pierce* right” to “make decisions concerning the care, custody, and control of their children,”<sup>42</sup> including decisions about educational forum.<sup>43</sup> The reliance on *Fields* is intriguing because the appellate panel in that case emphasized the extent to which the state may dictate the educational experiences of students, regardless of the preferences of parents, and cited several Supreme Court decisions that the *Brach* panel did not address. For example, the Court ruled in another case that parents did not enjoy a right that would have protected their choice to send their children to private, racially-segregated schools.<sup>44</sup> Although the Court held, in yet another case, that Amish parents could not be penalized for violating a law requiring their children to attend school until they were sixteen, the justices also recognized the state’s authority to “impose reasonable regulations for the control and duration of basic education,”<sup>45</sup> and in a concurrence subsequently cited approvingly by a majority of the justices, one justice clarified that *Pierce* “held simply that while a State may posit [educational] standards, it may not pre-empt

---

38. *Id.* at 535.

39. Although it is interesting to ponder the impact if they were.

40. *Pierce*, 268 U.S. at 534-535.

41. 427 F.3d 1197 (9th Cir. 2005). In *Fields*, a three-judge panel unanimously decided that a survey of public-school students about “sexual topics,” did not violate the parents’ due process rights to control their children’s education. *Id.* at 1200. The panel continued:

[T]here is no fundamental right of parents to be the exclusive provider of information regarding sexual matters to their children, either independent of their right to direct the upbringing and education of their children or encompassed by it. We also hold that parents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students.

*Id.* In the absence of a fundamental right, the panel applied rational basis review, and concluded that the schools’ conduct was rational. *Id.* Thus, although the panel in *Fields* grappled with the due process right asserted by the plaintiffs in *Brach v. Newsom*, the *Fields* court endorsed a more nuanced and restrictive version of that right and reached a different conclusion.

42. *Fields*, supra note 41, at 1204.

43. *Brach v. Newsom*, 6 F.4th at 924-925.

44. *Runyon v. McCrary*, 427 U.S. 160, 176-177 (1976).

45. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

the educational process by requiring children to attend public schools.”<sup>46</sup> Consequently, although the justices in *Pierce* recognized a parental right to choose private education, or even no education, for their children, they did not go so far as to recognize a parental right to dictate all conditions, or any specific aspect, of that education, and there is language in the Court’s jurisprudence suggesting limits on the extent of the parental right.

Instead of navigating this complex doctrinal terrain, the *Brach* panel majority asserted that the *Meyer-Pierce* right had to encompass the right to choose in-person, private instruction because this was “until recently the *only* feasible means of providing education to children.”<sup>47</sup> The pandemic created what the majority must have regarded as an option to receive schooling remotely or in person and once that option existed, any state action that foreclosed parental choice implicated the protected right. Likely because the Supreme Court has focused on the choice to attend private school, but not the choice to attend public school, as constitutionally significant, the panel did not extend its conception of the due process right in favor of parents of children in public schools; if the judges had done so, then they would have had to address the possibility that the shift to remote education interfered with the same right for all parents.

Having found a fundamental right, the judges not only preserved the possibility of a due process claim by the private school parents, they also enabled a potential equal protection claim on the theory that the state had arbitrarily treated children enrolled in private school differently from children enrolled in summer camps or in childcare programs.<sup>48</sup> The appellate panel remanded the case to the trial court, affirming the dismissal of the public school plaintiffs’ claims overall, affirming the dismissal of statutory claims on grounds that applied to both private-school parents and public-school parents, and instructing the district judge to apply strict scrutiny to the State’s policy mandating closure of private schools only, to determine whether either or both parental due process and equal protection rights had been violated. The judges reflected not at all on the implications of their ruling on public-school parents relative to private-school parents.

---

46. *Id.* at 239. The language of the concurrence was cited approvingly by the majority in *Norwood v. Harrison*, which involved a challenge to a state’s practice of providing textbooks to lend to students at public and private schools alike, regardless of whether the private schools engaged in racial segregation. *Norwood v. Harrison*, 413 U.S. 455, 461 (1973). The Court ruled that the state did not have to provide the books for students attending private schools. *Id.* at 462-463 (“That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination”).

47. *Id.* at 929 (emphasis in original). The fact that in the pre-pandemic era in-person instruction was the only option could also support the argument that parents did not “choose” any such thing, because there was no choice to make.

48. *Brach v. Newsom*, 6 F.4th at 933.

Perhaps recognizing the risk of allowing the reasoning of the panel majority to stand, a majority of the Ninth Circuit judges called for *en banc* review of the decision.

### III.

#### CRITIQUE

The reasoning of the appellate panel is troubling, not least because limits on the right that favors the parents sending their children to private school are elusive. The implication of the majority's reasoning is, by deciding to send a child to public school, a parent has relinquished power that the parent might otherwise have to challenge the state over what and how their child is taught. This result, a step beyond what the Court has explicitly stated in the past, raises significant equity concerns.

The concern animating this Essay is that other courts will adopt the analysis of the *Brach v. Newsom* panel even if *en banc* review results in reversal. The panel's reasoning also offers an illustration of how courts can reify inequality in law and reinforce it in society. The favored claimants, who can point to a fundamental right that a school, local government, or state has interfered with, may invoke strict scrutiny of the challenged policy or practice. Parents of public-school children will lack comparable power: if a state imposes a requirement or constraint on all schools, the subset of parents whose children attend private school will be able to draw on this right to resist. The expanded *Meyer-Pierce* right might apply whether parents object to a state health requirement, a curricular requirement, or some other mandate. The appellate panel's broad conception goes beyond what scholars have previously argued a *Meyer-Pierce* right should protect. As James E. Ryan described it, the state has the power to "require that certain classes be taught in private schools" but not "the authority to control completely what transpires in private schools—including the transmission of cultural or religious values that differ from those transmitted in public schools."<sup>49</sup> The choice of learning method, remote or in-person, does not obviously implicate such values.

The *Brach* majority's recognition of a fundamental right that attaches to the choice to send a child to private school entrenches inequality by empowering parents who typically already possess relatively greater socioeconomic power to control the conditions of their children's education. Most children attend public schools; private schooling is often expensive.<sup>50</sup> Public schools may have fewer resources, including resources to comply with state mandates. Parents of children

---

49. James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1391 (2000).

50. Department of Education, DIGEST OF EDUCATION STATISTICS 2020, tbl. 205.50, [https://nces.ed.gov/programs/digest/d20/tables/dt20\\_205.50.asp?current=yes](https://nces.ed.gov/programs/digest/d20/tables/dt20_205.50.asp?current=yes) (reporting, among other data, that the average tuition at a private school in the United States in 2011-2012 was \$10,740 per year).

enrolled in public schools will be relatively disempowered if they disagree with the decisions or policies of their local public school, school district, or state.<sup>51</sup>

The Court has already determined that parents who disagree with public school curricular choices have limited options to object. As Kathleen Cohn has summarized, “[N]o court has upheld the right of parents to dictate public school curriculum or to control the dissemination of information to students.”<sup>52</sup> In addition, in coping with legislative and regulatory requirements, public schools do not have access to the same support from parents, financially or doctrinally, that private schools have. The Ninth Circuit’s reading of doctrine both reinforces inequality along lines of class and race and potentially contributes to a wider divergence between the experience of elementary and secondary education for those who have and those who have less.

To be clear, it is not obvious what the optimal degree of parental control over children’s educational experience is or how it should best be determined. The political process as of this writing raises grave concerns, as parents in some districts press their local schools to revise curricula to exclude disfavored subject matters touching on the Nation’s historical treatment of race and gender.<sup>53</sup> So the question of allocation of authority to make decisions about students’ educational experiences is difficult and in all likelihood will involve both the judicial and legislative branches. But the courts should not act in a way that unjustifiably empowers one disproportionately privileged set of parents and simultaneously leaves another set of parents both more vulnerable to the whims of a majority and less able to assert their interest in their children’s education.

In offering this critique, this Essay has not addressed the question of the propriety of the appellate majority’s decision to base their conclusion on arguments not made explicitly to the district court.<sup>54</sup> That decision itself is a proper subject of scrutiny. This Essay also has not taken up the question of the

---

51. Some of the regulatory and legislative initiatives to which public schools would be subject might be supported by private school parents, who themselves can avoid such mandates.

52. Kathleen Cohn, *Parents’ Right to Direct Their Children’s Education and Student Sex Surveys*, 38 J. L. & EDUC. 139, 148 (2009). In the context of private schooling, battles over curriculum appear to generate less litigation, likely because parents simply move their children to private institutions that provide an education consistent with parental preferences. Public schools, on the other hand, must balance competing interests of a diverse population of parents and students. *Id.* at 149 (explaining that parents at public schools have recourse to politics to change curricula or other aspects of the education provided).

53. See, e.g., Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES, Jan. 31, 2022, at A1 (describing legislation, litigation, and local school board decisions all aimed at eliminating books deemed controversial from school libraries and school curricula).

54. The appellate panel takes pains to argue that the claim by the private-school plaintiffs “must be understood against the backdrop of the relevant caselaw.” *Brach v. Newsom*, 6 F.4th at 925. The private-school parents cannot be arguing that the state did not provide an education but rather that the state has interfered with the education the parents purchased, the panel reasons. The analysis does not hold up: *both* sets of plaintiffs challenge the pivot to remote education. The state’s interference did not change the *identity* of the provider of the affected children’s education but, as lawyers for the state argued, constrained the *manner* of delivery. *Id.*

correct substantive outcome of the case, although in light of the threat posed by COVID-19 and the critical need to protect children in a fast-changing and unpredictable health environment, the decision to close schools seems exactly the kind of state policy decision most deserving of judicial deference. Protecting children from harm is a governmental interest long recognized by the courts, even when the harm is considerably less tangible than a potentially fatal viral infection,<sup>55</sup> so the doctrinally consistent and correct resolution of the plaintiffs' claims on the facts of the moment seems clear.

#### CONCLUSION

In *Brach v. Newsom*, the appellate panel drew a distinction between the rights of parents with children in private school and those of parents with children in public school. By recognizing a fundamental right related to education in one context but not the other, the judges entrenched inequality deeper in doctrine governing accessibility to education. The opinion is thus a disturbing, contemporary illustration of how interpretation and manipulation of strands of doctrine can perpetuate inequality, as well as undermine management of a global pandemic that called for a unified, protective response. This Essay has attempted to highlight the issue, criticize the reasoning, and warn of one consequence should the appellate panel's distinction survive: the undermining of equity and fairness.

---

55. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 408 (2007) (upholding punishment of student in part to protect other students from exposure to possible advocacy of drug use); *Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 825 (2002) (upholding suspicionless urinalysis of student athletes to deter and detect use of illegal drugs). In the former case, the right to free speech was implicated; in the latter case, the right to be free of searches and seizures was implicated. The state's interest overcame each, suggesting that a global pandemic easily ought to overcome any right to in-person schooling whether at a public or private institution.