

# A PARENT'S CHILD AND THE STATE'S FUTURE CITIZEN: JUDICIAL AND LEGISLATIVE RESPONSES TO THE TENSION OVER THE RIGHT TO DIRECT AN EDUCATION

TODD A. DEMITCHELL\* & JOSEPH J. ONOSKO†

## I. INTRODUCTION

Who should direct the education of our nation's youth? This question is important because education is of prime concern to parents and the state. As the United States Supreme Court observed in *Meyer v. Nebraska*, "The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted."<sup>1</sup> Parents have a legitimate and long-recognized primary role in directing the education of their children. The Supreme Court in *Troxel v. Granville* stated, "[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>2</sup> In many ways, educating a child is the essence of parenting. In *Wisconsin v. Yoder*, the Supreme Court asserted, "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now

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\* Professor of Education & Lamberton Professor of Justice Studies, University of New Hampshire; B.A., M.A.T., University of La Verne; M.A., University of California at Davis; Ed.D., University of Southern California; Post-Doctorate, Harvard Graduate School of Education.

† Associate Professor of Education, University of New Hampshire; B.S., M.A., & Ph.D., University of Wisconsin.

1. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). *See also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973) ("[T]he grave significance of education both to the individual and to our society cannot be doubted . . ."); *State v. Bailey*, 61 N.E. 730, 732 (Ind. 1901) ("One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth. . . . The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education.").

2. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

established beyond debate as an enduring American tradition.”<sup>3</sup> However, an equally enduring American tradition is the idea of a commonwealth or community comprised of educated public citizens capable of enlightened, democratic self-government. As political philosopher Michael Sandel observed, “good citizens are made, not found.”<sup>4</sup> For this reason, public education is perhaps the state’s most important function.<sup>5</sup>

Maintaining an appropriate balance between the parental right to control their child’s education and the community’s obligation to create future citizens has been a persistent conundrum. Parents seek to mold their children in ways consistent with their ideals, social understandings, and aspirations, while communities and the state seek to form the ideal citizen through discourse and the democratic process. It is not surprising that these visions often collide.<sup>6</sup> For example, in 1988, the Lowell Elementary School District in Wheaton, Illinois adopted the Holt Basic Reading series, *Impressions*, as a supplemental reading program for its kindergarten through fifth grade students. Some parents brought suit against the school district when the district refused to discontinue its use. This case illustrates the tension between parents’ rights and an elected school board’s broad discretion to establish its curriculum.<sup>7</sup> The reading series includes a “variety of stories [which] serves to stimulate a child’s senses, imagination,

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3. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“We can accept it as settled, therefore, that, however strong the State’s interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.”).

4. MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT* 319 (1996).

5. *See, e.g., Yoder*, 406 U.S. at 213 (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. . . . Providing public schools ranks at the very apex of the function of a State.”); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“We have recognized ‘the public schools as a most vital civic institution for the preservation of a democratic system of government,’ and as the primary vehicle for transmitting ‘the values on which our society rests.’”) (citations omitted); *Sch. Dist. Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (“Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.”); *Brown v. Bd. of Educ.*, 347 U.S. 484, 491–93 (1954) (“Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education.”).

6. In the early days of the fight to establish the common school, the content of the common curriculum became a matter of great debate and a spark for the Philadelphia Bible Riots of 1844. Bruce Dorsey, *Freedom of Religion: Bibles, Public Schools, and Philadelphia’s Bloody Riots of 1844*, HIST. SOC’Y OF PA., <http://hspapp06.hsp.org/node/2911> (last visited May 22, 2013). Irish Catholics objected to the use of the King James Bible in the public schools and, most importantly, to a curriculum “where textbooks and the entire slant of the teaching was very much anti-Irish and anti-Catholic.” Carl F. Kaestle, *Introduction to Part One: 1770–1900, The Common School*, in *SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION* 11, 33 (Sarah Mondale & Sarah B. Patton eds., 2001).

7. *Fleischfresser v. Dirs. of Sch. Dist. No. 200*, 15 F.3d 680, 683, 686 (7th Cir. 1994).

intellect, and emotions” as the “best way to build reading skills.”<sup>8</sup> The parents sought to have the reading materials removed from the curriculum claiming that the series “indoctrinates children in values directly opposed to their Christian beliefs by teaching tricks, despair, deceit, parental disrespect and by denigrating Christian symbols and holidays.”<sup>9</sup> The court noted that the disputed texts and many other elementary classroom experiences involve fantasy and make-believe. “The parents would,” the Court argued, “have us believe that the inclusion of these works in an elementary school curriculum represents the impermissible establishment of pagan religion. We do not agree.”<sup>10</sup> The Seventh Circuit Court of Appeals held “that the government’s interest in providing a well-rounded education would be critically impeded by accommodation of the parents’ wishes.”<sup>11</sup> Similarly, some parents in Jacksonville, Florida protested a school’s practice of passing out a “Hogwarts Certificate of Accomplishment” to students exhibiting skilled reading.<sup>12</sup> Regarding the certificates, one parent was quoted as saying:

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8. *Id.* at 688. The reading series included such authors as C.S. Lewis, A.A. Milne, Dr. Seuss, Ray Bradbury, L. Frank Baum, and Maurice Sendak. *Id.* The *Impressions* reading series was adopted by more than fifteen thousand school districts and was used by more than eight million students in all fifty states. MARGARET BALD, *BANNED BOOKS: LITERATURE SUPPRESSED ON RELIGIOUS GROUNDS* 142 (rev. ed. 2006).

9. *Fleischfresser*, 15 F.3d at 683.

10. *Id.* at 688.

11. *Id.* at 690. See also *Brown v. Woodland Joint. Unified Sch. Dist.*, 27, F.3d 1373, 1377 (9th Cir. 1994) (parental challenge to thirty-two possible reading sections as religious ritual endorsing witchcraft in the *Impressions* series, out of a total of ten-thousand sections); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1066 (6th Cir. 1987) (exposing students to objectionable ideas in the standard curriculum did not impose a substantial burden on religion without proof that the students were required to conform or take some action contrary to their religious beliefs); Louise Adler & Kip Tellez, *Curriculum Challenges from the Religious Right: The “Impressions” Reading Series*, 27 *URBAN EDUC.* 152 (1992).

12. The Harry Potter series, written by J.K. Rowling, is a very popular and frequently challenged series of seven books detailing the education of a young orphaned wizard who was raised by non-wizard relatives, called Muggles, until he was invited to study at the Hogwarts School of Witchcraft and Wizardry. Michael O’Brien captured the controversy in this way: “Because the Harry Potter series presents the world of witchcraft and sorcery in a positive light, it has sparked a minority reaction ranging from outright alarm to sober analysis.” Michael O’Brien, *Harry Potter and the Paganization of Children’s Culture*, LIFESITENEWS.COM (July 31, 2001, 11:15 AM) <http://www.lifesitenews.com/resources/harry-potter-and-the-paganization-of-childrens-culture>.

For a discussion of the legal challenges of the Harry Potter series, see Todd A. DeMitchell & John J. Carney, *Harry Potter and the School Library*, 87 *PHI DELTA KAPPAN* 159 (2005) and Todd A. DeMitchell & John J. Carney, *Harry Potter, Wizards, and Muggles. The First Amendment and the Reading Curriculum*, 173 *EDUC. L. REP.* 363 (2003).

We have read portions of the books and we find the books to be very objectionable . . . They focus on witchcraft, which is very evil in our view. They focus on death and dying, disrespect of parents, which we also find totally objectionable. . . You shouldn't be teaching children to read things that are evil and are ungodly, and if there is anything that is ungodly, it is witchcraft.<sup>13</sup>

When parents assert their right to make educational decisions regarding their children it can frequently encroach on the state's educational processes, programs, and goal of promoting the general welfare by preparing students for responsible participation in the broader society.<sup>14</sup> Conversely, educational experiences and outcomes in the public schools may undermine or directly contradict values and other beliefs taught at home. This tension is inevitable in a pluralistic, democratic society in which individuals and groups have different and often competing visions of the "good society." A pendulum swing too far toward parents' rights will undermine the pursuit of the important, publicly determined goals administered by the government through its public schools. A pendulum swing too far in the direction of state control of public education implicates the concern voiced by the Supreme Court in the landmark student free speech case, *Tinker v. Des Moines Independent Community School District*: "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."<sup>15</sup>

The tension between parent and state found its way to the courts in the early part of the twentieth century, persisted over many decades, and has now moved from the courts to the legislative halls of the states and the federal government.<sup>16</sup> This Article will examine the perennial tension between the parents' right to direct the upbringing of their children and the state's right to establish and control the curriculum for the education of its

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13. *Library's 'Witchcraft' Certificate Endorsed Religion, Group Says*, FREEDOM FORUM (Sept. 13, 2000), <http://www.freedomforum.org/templates/document.asp?documentID=3740>.

14. For an example of the depth the conflict can take, see *Singer v. Wadman*, 595 F. Supp. 188 (D. Utah 1982), *aff'd*, 745 F.2d 606 (10th Cir. 1984). In *Singer*, a couple fought to home school their children while refusing to allow the school to assess or review the academic achievement of the children. *Id.* Writing to the school board, the father of the children stated, "[a]lso, knowing that my God is more powerful than you & your illegal laws & that only slaves will bow under those conditions; therefore, all I can say is go to Hell you & your kind for such unrighteous demands." *Id.* at 195-96.

15. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 511 (1969).

16. See Ralph D. Mawdsley, Commentary, *Parents' Right to Direct Their Children's Education: Examining the Interests of the Parents, the Schools, and the Students*, 258 EDUC. L. REP. 461, 477 (2010).

citizens.<sup>17</sup> Part II will provide a brief history of the role of government in providing and requiring that youth receive an education. The discussion will start with the Puritans in New England and extend only to the rise of the common school movement in the nineteenth century, as the purpose is to highlight the origins and ascendancy of government in the education of its citizens. Part III will discuss Supreme Court precedents that established the right of parents to direct the education of their children. Part IV will analyze lower court cases by applying the right discussed in the preceding section. These discussions are confined to federal cases in order to maintain a common frame of constitutional reference. Part V will review the statutory response at both the federal and state level regarding the issue of parents' right to direct his or her child's education. Part VI will conclude with a few summary remarks.

## II. A BRIEF HISTORY OF AMERICAN EDUCATION: THE PURITANS AND THE COMMON SCHOOL MOVEMENT

### A. COLONIAL EDUCATION

Lawrence Cremin, one of the preeminent historians of American education, asserted that important questions in education go “to the heart of the kind of society we want to live in and the kind of society we want our children to live in.”<sup>18</sup> Thus, the control of public education has great consequences for every individual and community, as well as for the nation as a whole. The history of education in the United States chronicles the struggle over who has the power to decide which aspects of education are of the greatest worth, including where, when, and what children shall be taught. This issue has its roots in the formation of the American public system of education.

The American system had its genesis in the English colonization of North America. “Insofar as the colonists transplanted the English village community to America, they transplanted an educational configuration of household, church, and school . . . .”<sup>19</sup> A fourth element of education was the printing press, which was initially confined to Massachusetts before it spread through the colonies.<sup>20</sup> New England had more culturally

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17. The issue of home schooling is beyond the limits of this Article. For an excellent discussion of the issue of parental rights and home schooling, see generally Robert C. Cloud, Commentary, *Balancing Parental Rights and State Interests in Home Schooling*, 235 EDUC. L. REP. 697 (2008).

18. LAWRENCE A. CREMIN, PUBLIC EDUCATION 74–75 (1976).

19. LAWRENCE A. CREMIN, TRADITIONS OF AMERICAN EDUCATION 12 (1977).

20. *Id.* at 14–18.

homogenous communities than the rural southern colonies or the diverse middle colonies.<sup>21</sup> The Massachusetts Bay School Law of 1642,<sup>22</sup> the first education legislation enacted in the American colonies, stated that a good education was important to the Commonwealth and required town selectmen to keep a vigilant eye over their neighbors so that children could be taught. The law was used “to maintain the authority of the government and religion. People were taught to read and write so they could obey the laws of God and the state.”<sup>23</sup> While the law allowed for fines, it did not require that an education be offered or that attendance be compelled. However, five years later the Massachusetts General School Law of 1647, commonly called the Old Deluder Act, required townships of at least fifty households to provide someone to teach all of the children to read and write.<sup>24</sup> If the town had one hundred households, it was required to set up a school. The requirement of schooling was “accomplished through parental initiative and informal, local control of institutions.”<sup>25</sup> In short, as the colony grew, parent-directed child rearing included a community demand for more formal learning.

According to Cremin, the family carried the greatest educational burden followed by the church, with formal schooling a marginal third. During this time, few youngsters attended school<sup>26</sup>—formal schooling was not the dominant delivery system of education.<sup>27</sup> Nonetheless, the initial idea that community government had a stake in developing an educated citizenry was established as public law in seventeenth-century Massachusetts. This was the exception, however, as “[s]chooling and

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21. L. DEAN WEBB, ARLENE METHA & K. FORBIS JORDAN, *FOUNDATIONS OF AMERICAN EDUCATION* 162 (3d ed. 2000).

22. *Massachusetts Bay School Law (1642)*, CONST. SOC’Y, <http://www.constitution.org/primarysources/schoollaw1642.html> (last visited May 22, 2013).

23. JOEL SPRING, *THE AMERICAN SCHOOL* 11 (7th ed. 2008).

24. *Old Deluder Act (1647)*, CONST. SOC’Y, <http://www.constitution.org/primarysources/deluder.html> (last visited May 22, 2013). The Act begins, “It being one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures.” *Id.*

25. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC* 3 (1983).

26. CREMIN, *supra* note 19, at 12–13. Dame Schools are an example of primary or petty schools, in which women provided instruction in reading and rudimentary math, often in their kitchens, and were one of the ways by which an elementary education was delivered to students. Boys who could afford to pay continued their education in Latin grammar schools. See DAVID MILLER SADKER & KAREN R. ZITTELMAN, *TEACHERS, SCHOOLS, AND SOCIETY* 238 (9th ed. 2009).

27. CREMIN, *supra* note 19, at 28 (“Most were taught via apprenticeship, in their own households or in other households . . . . Well under half were likely to have had any formal schooling . . .”).

teaching were neither uniform nor institutionalized during the first century and a half of Europeanized life on the American continent.”<sup>28</sup> Colonists believed that the education of its citizenry was important but they had not yet created a well-organized and extensive educational system.

While education was primarily a family responsibility, schooling was somewhat “marginal, in the scope of its obligations and in the intensity of its influence.”<sup>29</sup> Attendance at the petty schools was irregular and was haphazardly supported, primarily by parents and to a lesser degree churches.<sup>30</sup> Some students attended a grammar school for up to seven years, which may have prepared them for Oxford or Cambridge, or the fledgling Harvard College. Schooling was not extensive; it was either controlled by parents hiring tutors or coordinated by groups of parents to establish subscription schools, or voted in town meetings to hire a teacher and support a school on a year-to-year basis.<sup>31</sup> They were funded through a hodge-podge of financial schemes, and school curricula were as varied as the teachers who delivered them.<sup>32</sup> However, by 1787 the importance of formal education in America was on the rise, and is clearly reflected in the Northwest Ordinance of 1787, Article 3, which declared, “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>33</sup> “As education assumed a role in creating the American Republic, it inevitably became involved in defining the American people.”<sup>34</sup>

## B. THE COMMON SCHOOL MOVEMENT

Following the American Revolution, and particularly after the War of 1812, there was great hope about the new republic, and education was to have a dominant place in that new order.<sup>35</sup> The republic needed an intelligent and virtuous citizenry; thus common schools were crafted as an

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28. DAN C. LORTIE, *SCHOOLTEACHER: A SOCIOLOGICAL STUDY* 2 (2d ed. 2002).

29. CREMIN, *supra* note 19, at 13.

30. *Id.*

31. Carl F. Kaestle, *Introduction*, in *SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION* 11, 12 (Sarah Mondale & Sarah B. Patton eds., 2001).

32. See DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974).

33. ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT art. III, *reprinted in* 1 U.S.C. at LV, LVII (2006).

34. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876*, at 7 (1980).

35. *Id.* at 5 (“[I]t was an age of exuberant faith in the power and possibility of education.”).

instrument of government to create informed citizens and sound public policies that addressed social, economic, and political problems. Horace Mann, one of the architects of the common school movement, sought to build a common school experience for all people.<sup>36</sup> A cornerstone of the common school was universal schooling, in which all children were required to attend a tax-supported school and learn a common curriculum.<sup>37</sup> This led to strong opposition against the common school that, at times, was bitter and lasted several decades.<sup>38</sup> Education was considered by many to be a private matter of parents that should be bought and paid for according to one's desires and finances—not a public matter to be supported by the government.<sup>39</sup> Additionally, many wealthy individuals were opposed to the idea of funding free education for less well-off families.<sup>40</sup> One opponent to free schools said “he would ‘fill the belly’ or ‘cover the back’ of a pauper, but he would never send him to school.”<sup>41</sup>

The new common school challenged the autonomy of rural district schools and sought to alter the role of urban charity schools. Urban charity schools arose in coastal and industrial cities as America experienced the beginning waves of immigration and the advent of industrialization. They were a response “to problems of poverty and vice.”<sup>42</sup> Originally, charity schools educated only the indigent and the poor, however, they soon sought and gained governmental aid from cities and states. Independent pay schools continued to flourish and serve the wealthy, but the “growing charity-school movement expressed the anxieties of the social elite about public morality and cultural harmony.”<sup>43</sup> Charity schooling sought to interject itself between parents and their children, thus mediating the child's family, often considered to be alien, poor and inferior.<sup>44</sup>

Education at the time was neither universal nor compulsory. The school reflected not a recognized institution and instrument of the state, but

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36. LAWRENCE A. CREMIN, *THE TRANSFORMATION OF THE SCHOOL* 8–10 (1961).

37. *Id.*

38. *Id.* at 13.

39. LAWRENCE A. CREMIN, *POPULAR EDUCATION AND ITS DISCONTENTS* 3 (1989) (“The editor of the Philadelphia *National Gazette* argued in the 1830s that free universal education was nothing more than a harebrained scheme of social radicals, and claimed that it was absolutely illegal and immoral to tax one part of the community to educate the children of another.”).

40. RUSKIN TEETER, *THE OPENING UP OF AMERICAN EDUCATION* 59–60 (1983).

41. *Id.*

42. Kaestle, *supra* note 31, at 14.

43. KAESTLE, *supra* note 25, at 56.

44. *Id.* at 55.



rather the interests of those families that sent their children to school. There was no buffer of professionalism<sup>45</sup> between teachers and parents, no bureaucracy to blunt outside criticism and thwart quick and quixotic changes. Free and uniform textbooks in rural schools were non-existent, with most textbooks provided by the parents. As education historian Carl Kaestle asserted, "The diversity of textbooks undermined efficiency and professional expertise."<sup>46</sup> Local control was firmly vested in the parents, and in most communities there was no system of publicly supported schools. Teachers were "boarded around," staying in the homes of their students, which increased the parents' control over teachers' lives, both professional and personal.<sup>47</sup> "Not until education was viewed as a government function, as opposed to a family function, did organized systems of schooling appear."<sup>48</sup> This new state function sowed the seeds of tension between parents and the state over who should direct the education of children. A Boston advocate for compulsory attendance laws wrote, "the parents are unfit guardians of their own children."<sup>49</sup>

Compulsory education of the common school movement prevailed.<sup>50</sup> As one noted education historian wrote, "The effort to professionalize, homogenize, and organize common schooling threatened highly prized local control."<sup>51</sup> The result was a shift in the locus of educational decision making as schooling evolved into a government function with a professional teaching force, a more centralized curriculum, and a reliable funding source through a uniform tax base, primarily on property. A

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45. TYACK, *supra* note 32, at 19 ("With no bureaucracy to serve as a buffer between himself and the patrons, with little sense of being a part of a professional establishment, the teacher found himself subordinated to the community."). *See also* CREMIN, *supra* note 34, at 398 ("Whether or not it was intended, professionalization served to create an almost exclusively male elite and thereby assured continuing male control of an increasingly female occupation.")

46. KAESTLE, *supra* note 25, at 134. What readers that were available shifted after 1783 from religious prose and poetry to a more diverse selection of "stories about animals, birds, and children, frequently with a message to be conveyed or a moral to be drawn." CREMIN, *supra* note 34, at 392.

47. For a fictional account of boarding around and life as a school teacher during the common school movement, see EDWARD EGGLESTON, *THE HOOSIER SCHOOL-MASTER* (1871). When Ralph Hartsook, the new schoolmaster moved to Pete Jones's house, Pete described his accommodations in the following way: "P'rhaps you'd like [a] bed. Well jest climb up the ladder on the outside of the house. . . . You'll find a bed in the furdest corner. My Pete's already got half of it, and you can take t'other half." *Id.* at 66.

48. SPRING, *supra* note 23, at 42.

49. TYACK, *supra* note 32, at 68.

50. MICHAEL S. KATZ, *A HISTORY OF COMPULSORY EDUCATION LAWS 17* (1976) (noting that Massachusetts was "the leader in establishing common schools and in securing voluntary attendance passed the first compulsory attendance law" in 1852).

51. KAESTLE, *supra* note 25, at 158.

transfer of authority from the parent to the newly institutionalized and bureaucratized school was being made.<sup>52</sup> A school official in the 1880's captured this sea change, writing, "[o]ne might trust 'parental instinct' to educate an individual child, but the state required homogeneity; 'the right of preservation of the body politic' took precedence over all other rights."<sup>53</sup>

Education in America was transformed in the latter half of the nineteenth century. Common school reformers sought to use the power of a state-supported system of education to respond to three newly emerging problems that America faced after the War of 1812: (1) how to preserve republican civic values; (2) how to rid urban centers of poverty and crime; and (3) how to Americanize waves of immigrants.<sup>54</sup> As students were increasingly enrolled in common schools, power shifted to the state to define what knowledge was of the greatest worth and who was qualified to deliver this knowledge. The common school with its compulsory education "resulted in patterns of education that were remarkably uniform in purpose, structure, and curriculum, despite the reality of local control in hundreds of thousands of separate communities."<sup>55</sup> Public education became an instrument of government initiatives and policies.<sup>56</sup> It also became a public good, not just a private benefit of the fortunate. As the nation grew and cities and states asserted more control over the form and function of public schooling, challenges to government power in the arena of public education were brought to the courts by concerned parents.

### III. PARENTS' RIGHTS: THE LEGAL PRECEDENTS

The tension between parental and government ownership of what students are to learn has been a feature of American education since the rise of state-supported schooling.<sup>57</sup> In small, homogenous communities, parents exerted significant influence on school practices. American education consisted of "local parental control of school governance, parental support

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52. *Id.*

53. TYACK, *supra* note 32, at 75. *See also* HERBERT M. KLIBARD, *THE STRUGGLE FOR THE AMERICAN CURRICULUM, 1893-1958*, at 1 (3d ed. 2004) ("Rather they became an ever more critical mediating institution between the family and a puzzling and impersonal social order, an institution through which the norms and ways of surviving in the new industrialized society would be conveyed.").

54. Todd A. DeMitchell, *Educating America: The Nineteenth Century Common School Promise in the Twentieth Century: A Personal Essay*, 9 INT'L J. EDUC. REFORM 79, 81 (2000).

55. DAVID TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE* 17 (1982).

56. For a critique of the common school movement's "noble story," see generally MICHAEL B. KATZ, *THE IRONY OF EARLY SCHOOL REFORM* (1970).

57. *See, e.g.*, RONALD W. EVANS, *THE SOCIAL STUDIES WARS* (2004); KLIBARD, *supra* note 53.

of curriculum, parental choice of teachers, and parental support of religious teachings of the school.”<sup>58</sup> Katz wrote, “[w]hile the role of formal instruction did become more important in the eighteenth century, the family remained the most important agency in passing on knowledge, skills and moral values from one generation to the next. Until the middle of the nineteenth century, the duty to educate one’s child remained firmly placed with the child’s parents or master.”<sup>59</sup> The common school movement shifted power to a more standardized, centralized, professional bureaucracy and away from decentralized, loosely-structured village schools.<sup>60</sup> “Ambiguity of authority and diffusion of control” which characterized the rural district schools, was giving way to a bureaucratized, government run system of education.<sup>61</sup>

One federal district court in New York summarized the evolving tension in the following way: “[O]ur nation has enjoyed a long history of encouraging families to take responsibility for the instruction of their own children, while at the same time, making school attendance compulsory and granting control of the curriculum to state and local officials.”<sup>62</sup> Parents’ interests represent the private benefit of education and the state’s interests represent the public good of education. Both groups have legitimate yet competing spheres of influence over the education of a child, and, of no surprise, the courts are asked to weigh in when disputes arise.<sup>63</sup>

Advocates for strengthening parental rights over the education of their children often cite two major United States Supreme Court decisions: *Meyer v. Nebraska*<sup>64</sup> and *Pierce v. Society of the Sisters*.<sup>65</sup> Prior to these two cases, “courts tended to rely on a common law presumption of the soundness of parental judgment in making educational decisions pertaining to their children.”<sup>66</sup> In 1877, for example, the Illinois Supreme Court

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58. Diana Buell Hiatt, *Parental Involvement in American Public Schools: An Historical Perspective 1642–1994*, 4 SCH. COMTY. J. 27, 28 (1994).

59. KATZ, *supra* note 50, at 13.

60. TYACK, *supra* note 32, at 28.

61. *Id.* at 34. “Efficiency, rationality, continuity, precision, impartiality became watchwords of the consolidators. In short they tried to create a more bureaucratic system.” *Id.* at 28–29.

62. *Immediato v. Rye Neck Sch. Dist.*, 873 F. Supp. 846, 849 (S.D.N.Y. 1995).

63. For an interesting discussion of the role of the courts in educational policymaking and complex social issues, see MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* (1982).

64. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

65. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

66. Ralph D. Mawdsley & Daniel Drake, Commentary, *Involving Parents in the Public Schools: Legal and Policy Issues*, 76 EDUC. L. REP. 299, 301 (1992).

reflected this presumption in favor of parents by stating that even if parental decisions resulted in a misfortune for the child, the parents' decision would be upheld if it did not "affect the government of the school or incommode the other students or the teachers."<sup>67</sup> In other words, the court held that parents have primary rights over their children's education.

The hold of parents over the education of their children slipped as the State took on a larger and larger role of establishing not just schools, but school systems through general taxation, compulsory attendance, and adopted curricula. Concerned parents have had two major avenues to counter the power of town, city, state, and federal educational systems: (a) legislation, which would codify their preferences, and (b) the courts to secure what they consider to be their rights. We will begin with a review of early court challenges that sought to reaffirm the parental right to direct the education of their children.

#### A. *MEYER V. NEBRASKA*

After World War I, the drive for common schooling accelerated. "The populists' notions of leveling American society through common schooling found a sympathetic ear in nativists, those who demanded '100-percent American' and opposed further immigration to the United States."<sup>68</sup> Common schooling was supposed to homogenize the population through single-language instruction, Christian ethics, a curriculum emphasizing cultural "unum" and the "melting pot," and professionally trained educators. Caught up in this sentiment, Nebraska legislators passed a statute on April 9, 1919, imposing criminal penalties on public or private school teachers who taught languages other than English to students below the high school level or who taught in any language except English.<sup>69</sup> This legislation "was born of the animosity against alien groups aroused by World War I; in Nebraska, the target was Germans generally, and the German language in particular."<sup>70</sup> The stated purpose of the legislation was to promote civic development by teaching students American ideals through the English language before exposing them to foreign languages

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67. *Trs. of Sch. v. People ex rel. Van Allen*, 87 Ill. 303, 309 (1877).

68. Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. U.L. REV. 887, 893 (1996). "One Flag, One School, One Language" was a rallying cry. *Id.*

69. *Meyer*, 262 U.S. at 397. Section 3 of the law established that a violation of the law was a misdemeanor resulting in a fine of not less than twenty-five dollars or more than one hundred dollars or confinement in county jail for up to thirty days for each offense. *Id.*

70. MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 22 (4th ed. 2002).

and cultures.<sup>71</sup> The avowed purpose of the legislation was that English would be the “mother tongue” of all children reared in Nebraska.<sup>72</sup> A teacher in Zion Parochial School was convicted under this statute for teaching German to children before they passed the eighth grade.<sup>73</sup> In an amazing reach, the law also implicitly denied the rights of parents to have their children learn a foreign language before the eighth grade in either public or private school.<sup>74</sup>

Four years later, the United States Supreme Court invalidated the law and overturned the instructor’s conviction.<sup>75</sup> The Court recognized the power of the state to impose compulsory education, to reasonably regulate all schools, and to prescribe a curriculum for the public schools.<sup>76</sup> However, the Court held that the Nebraska law exceeded those powers and unreasonably infringed on the plaintiff’s liberty as guaranteed by the Fourteenth Amendment’s Due Process Clause.<sup>77</sup> The Court, in much quoted language defining the contours of the liberty interest protected by the Fourteenth Amendment, wrote:

Without doubt, it denotes not merely freedom from bodily restraint but also 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 of free men.<sup>78</sup>

After establishing the general parameters of the liberty interest, the Court, referring to the teaching of German, stated “[h]is right thus to teach and the right of parents to engage him so to instruct their children, we think

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71. *Meyer*, 262 U.S. at 401. Similar to the legislation in *Meyer*, Hawaii passed a law in 1920 aimed at the many foreign language schools that served the large and growing immigrant population. *Farrington v. Tokushige*, 273 U.S. 284, 291 (1927). Students, according to the law, could not attend foreign language schools unless they regularly attended a public school or an approved private school. The United States Supreme Court held the Hawaiian legislation to be unconstitutional. *Id.* at 299. The Court, acknowledging *Meyer*, found that a Japanese parent “has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.” *Id.* at 298.

72. *Meyer*, 262 U.S. at 401.

73. *Id.* at 396.

74. *Id.* at 397.

75. *Id.* at 403.

76. *Id.* at 402.

77. *Id.* at 399.

78. *Id.*

are within the liberty of the amendment.”<sup>79</sup> The Court found that the statute was “arbitrary and without reasonable relation to any end within the competency of the state.”<sup>80</sup>

Thus, the Court found that parents had the right to contract for the teaching services they wanted for their children.<sup>81</sup> However, the recognition of a parental right to contract for a child’s educational services cannot be read to mean that this right trumps the right of the public school to prescribe their curricula. The Court noted that the case did not contain a challenge to the “state’s power to prescribe a curriculum for institutions which it supports.”<sup>82</sup> There is nothing in the language of the case to suggest that parents have the right to control the public school curriculum to meet their wishes. Parents, simply, have the right to contract for educational services in a school setting without unreasonable interference from the state, even if the state does not support what is being taught. Clearly, *Meyer* does not diminish the power of the state to control its curriculum.

#### B. *PIERCE V. SOCIETY OF THE SISTERS*

On November 7, 1922, Oregon voters approved the Compulsory Education Act of 1922.<sup>83</sup> The law required that all of Oregon’s children attend public schools between the ages of eight and sixteen.<sup>84</sup> The law would effectively close down parochial schools.<sup>85</sup> The referendum campaign was organized and promoted primarily by the Ku Klux Klan and the Scottish Rite Masons.<sup>86</sup> The Ku Klux Klan’s strategy was to “Americanize” the schools in response to a wave of immigration.<sup>87</sup> One

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79. *Id.* at 400.

80. *Id.* at 403.

81. *Id.* at 396–97.

82. *Id.* at 402.

83. *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 530 (1925).

84. *Id.*

85. PAULA ABRAMS, CROSS PURPOSES: *PIERCE V. SOCIETY OF SISTERS* AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION 93 (2009) (noting that prior to the intended enactment on September 1, 1926, of the School Bill, the Oregon Catholic schools suffered a fifty percent devaluation of their properties).

86. Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 675–76 (1998). For a discussion of the influence of the Ku Klux Klan on Oregon’s Compulsory Education Act, see generally David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 (1968).

87. Viteritti, *supra* note 86, at 676 (“For some reason, the Klan—whose members believed in the superiority of white Protestants and the inferiority of blacks, Jews, Catholics, and immigrants—had come to the conclusion that forcing all of these groups to attend school together under the supervision of public authority would fortify American democracy.”).

Klansman succinctly stated the underlying rationale for the referendum: “Somehow these mongrel hordes must be Americanized; failing that, deportation is the only remedy.”<sup>88</sup> The referendum narrowly passed and threatened to eliminate the availability of private education in Oregon.

Two plaintiffs brought suit to stop the implementation of the law. The first was the Society of the Sisters, an Oregon corporation organized in 1880 with the power to “care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal property.”<sup>89</sup> The schools run by the Society of the Sisters taught the subjects usually pursued in the public schools, and also provided systematic religious instruction according to the tenets of the Roman Catholic Church.<sup>90</sup> The passage of the Compulsory Education Act of 1922 resulted in the withdrawal of students and a decline of the Society’s income.<sup>91</sup> The second plaintiff was the Hill Military Academy, a private school operated for profit.<sup>92</sup> The Academy owned and operated an elementary, college preparatory, and military training school for boys from ages five to twenty-one.<sup>93</sup> It too lost money because of the pending implementation of the Compulsory Education Act.<sup>94</sup>

Both plaintiffs argued that the state had deprived them of property— income from their schools—without the due process of law guaranteed by the Fourteenth Amendment.<sup>95</sup> Specifically, plaintiffs argued that implementing the Act would cause the destruction of their schools.<sup>96</sup> The plaintiffs also argued that compelling attendance at public schools interfered with parents’ and guardians’ right to “direct the education of children by selecting reputable teachers and places”;<sup>97</sup> the same liberty right of parents that had been affirmed in *Meyer v. Nebraska* only a year earlier.

The United States Supreme Court’s ruling in *Pierce* was similar to its ruling in *Meyer*. In both cases, the Court recognized the state’s power to mandate compulsory attendance in school for a specified period of time.

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88. ABRAMS, *supra* note 85, at 105.

89. *Pierce*, 268 U.S. at 531–32.

90. *Id.* at 532.

91. *Id.*

92. *Id.* at 532–33.

93. *Id.* at 533.

94. *See id.*

95. *Id.*

96. *Id.*

97. *Id.* at 534.

The Court also recognized the state's broad power to determine the content of a public school education, with the Court asserting that the state could reasonably "regulate all schools."<sup>98</sup> The Court's language was unequivocal about the extent of the state's teaching power. The Court wrote:

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children or proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.<sup>99</sup>

Although the Supreme Court afforded the state extensive teaching powers, its right to educate was not without limits. Writing for the majority, Justice McReynolds enunciated a now famous limitation on the state's teaching power: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>100</sup> The Court found that Oregon's Compulsory Education Act exceeded the state's powers because it unreasonably interfered with "the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>101</sup> Couching the educational right of parents as a liberty interest, the Court opined that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."<sup>102</sup> On the one hand, the Court found that the state had broad powers to establish and direct public schools. On the other hand, the Court also found that parents had the primary right and "high duty" to direct the upbringing and education of their children.<sup>103</sup> The Supreme Court had identified two legitimate interests, but how to balance those competing interests was left unresolved.

Parents' reliance on *Pierce* to argue in favor of parental control over public school curriculum is misguided. In *Pierce*, the Supreme Court recognized the power of the state to establish and direct its public schools.

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98. *Id.*

99. *Id.*

100. *Id.* at 535.

101. *Id.* at 534–35.

102. *Id.* at 535.

103. *Id.*



The issue in *Pierce* had nothing to do with parental rights to modify or to direct the public school curriculum; rather the issue was whether Oregon could strip parents of their right to educate their children in a private school. The Supreme Court upheld the fundamental right of parents to choose where their children would be educated. The Supreme Court did not give parents the authority to control the curriculum of a public school, nor did it grant parents the right to not educate their child. In short, compulsory education and the authority to determine the curriculum were clearly left to the state. The Supreme Court merely resolved the issue of whether it is reasonable for the state to compel a student to attend only a public school. The decision did not exempt parents from reasonable regulations that communities might develop for their public schools. However, *Pierce* also preserved the right of parents to direct where their child will be educated; parents had the liberty to choose the educational setting, public or private, that best suited their needs.<sup>104</sup>

Both *Meyer* and *Pierce* can be read as standing for the proposition that government has limits to its compulsory education laws and the degree of control that it can assert over its students.<sup>105</sup> They can also be read as acknowledging that parents have cognizable rights to make the most fundamental decisions regarding the education of their children, including where they will be educated and in what language. However, the two Supreme Court cases cannot be read as granting either a parental veto over the curricular decisions of the public school or the right to direct the curriculum and instruction their children receive. Allan Osborne and Charles Russo, two noted school law commentators, succinctly wrote, “Parents do have substantial rights to direct their children’s education in terms of being able to choose where their offspring will attend school even if they cannot necessarily dictate the curricula within those venues.”<sup>106</sup> We will explore the application of *Meyer* and *Pierce* below.

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104. *But see* *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding that the parent’s liberty interest was outweighed by the state’s interest in enforcing compulsory education and child labor laws).

105. *See* *Tinker v. Des Moines Indep. Comty Sch. Dist.*, 393 U.S. 503, 511 (1969) (“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.”).

106. Allan G. Osborne & Charles J. Russo, *Educational Decision-Making in K-12 Schools When Divorced Parents Disagree: What is in the Best Interests of the Child?*, 273 EDUC. L. REP. 1, 7 (2011).

## IV. THE PARENTAL RIGHT TO DIRECT AND THE LOWER COURTS

Although it is not mentioned in the U.S. Constitution, the Court in both *Meyer* and *Pierce* found an inherent liberty interest that conferred on parents a broad right to direct the education of their children.<sup>107</sup> For many parents, this newly articulated right held great promise as a vehicle to assert control of their child's public education and push back against curriculum and instructional practices that they believed were contradictory to the principles and religious precepts they wished to instill in their children. In the years after the *Meyer* and *Pierce* decisions, parents have repeatedly attempted to extend the holdings of those cases to include a right to exert some parental control over the day-to-day operations of public schools.<sup>108</sup> But, as will be shown, parents have consistently been on the losing end of state and federal court rulings. The cases that followed *Meyer* and *Pierce* underscored the broad right of the public school to establish the curriculum for all children in contrast to the very limited right of parents to demand a replacement curriculum of their choosing.

For example, in 1987, the Sixth Circuit Court of Appeals in *Mozert v. Hawkins County School District* upheld a school district's refusal to accommodate a parent's request for an alternative to the reading series used in the public schools based on the parent's religious objections to the material.<sup>109</sup> The record in the case showed that the school board intended the reading program "to acquaint students with a multitude of ideas and concepts."<sup>110</sup> The appellate court held that requiring students to be exposed to objectionable ideas in the standard curriculum does not impose a substantial burden on religion without proof that the student was required to conform or engage in some action contrary to their religious beliefs.<sup>111</sup>

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107. Because the word "education" is not found in the Constitution, the Court found this liberty interest by analysis and extension of enumerated rights. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

108. Kevin Rogers & Richard Fossey, *Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children Out of Curricular Discussions About Sexual Orientation and Same-Sex Marriage?*, 2011 BYU EDUC. & L.J. 423, 427 (2011).

109. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1078 (6th Cir. 1987).

110. *Id.* at 1060.

111. *Id.* at 1069. *See also* *Grove City v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1543 (9th Cir. 1985) ("[D]istinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion."). In a case brought by parents to stop a Halloween dress up day at Hidden Valley Elementary School and the placement of Halloween decorations on a class wall, a Florida Court of Appeals wrote, "these activities have been displayed in a secular and non-

Judge Boggs, in his concurring opinion, discussed the burden of opt-out requests based on the religious beliefs of the parents. While offering a sympathetic understanding of the parents' position, he concluded:

It is a substantial imposition on the schools to *require* them to justify each instance of not dealing with students' individual, religiously compelled, objections (as opposed to *permitting* a local, rough and ready, adjustment), and I do not see that the Supreme Court has authorized us to make such a requirement.<sup>112</sup>

Judge Boggs's concurring opinion identifies the burden placed on schools when parents seek to control or adapt the curriculum to meet their desired ends. Similarly, the Supreme Court earlier in *Wisconsin v. Yoder* clarified the reach of *Pierce* when it asserted that it lent "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society."<sup>113</sup>

Discussed below is a representative set of cases that reveal the limited contour and reach of parents' ability to direct the curriculum and instructional techniques for their child. They demonstrate the breadth and consistency of judicial rulings on the state's right to direct the education of a child in public schools. Several of the cases involve the application of the Equal Protection Clause of the Fourteenth Amendment. There are three recognized tests that are used by the courts when a governmental statute or regulation is challenged. The most stringent test of the three for government to pass is "strict scrutiny analysis," and it is triggered when a fundamental right is implicated or the individual is a member of a suspect class.<sup>114</sup> Not surprisingly, plaintiffs normally assert the court should use strict scrutiny when resolving issues of parent liberty rights. Under strict

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sectarian fashion and there has been no attempt to teach or promote wicca, satanism, witchcraft or any form of religion." *Guyer v. Sch. Bd. of Alachua Cnty.*, 634 So. 2d 806, 809 (Fla. Dist. Ct. App. 1994).

112. *Mozert*, 827 F.2d at 1080 (Boggs, J., concurring).

113. *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972). One exception to the courts' consistent denial of parents' right to direct the public school curriculum is that specific state statutes generally permit parents to opt out of sex-related topics. See Roger & Fossey, *supra* note 108; Shane Ramsey, Comment, *Opting Out of Public School Curricula: Free Exercise and Establishment Clause Implications*, 33 FLA. ST. U. L. REV. 1199, 1200 (2006) (supporting opt-out provisions because there are "situations in which individual interests and rights outweigh a state's interest in providing education.")

114. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17 (1973). The Court defined a suspect class as a group that has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

scrutiny, the challenged legislation is held unconstitutional unless government can show that the legislation is justified by a compelling state interest and is narrowly drawn to meet that interest. The intermediate test, “heightened scrutiny,” is a relatively new standard, and is still being developed by the courts. It is generally applied when a regulation impacts on a “sensitive” classification such as gender,<sup>115</sup> age,<sup>116</sup> and undocumented aliens.<sup>117</sup> Under this standard, a rule or regulation is invalid unless it can be shown that it serves an important state interest and that the classification is substantially related to that interest. The last and weakest test is “rational basis.” It is considered the standard test. As opposed to strict scrutiny, the rational basis test places the burden of proof on the person challenging the classification. In order for the state to pass the rational basis test, the state action must simply serve a legitimate state interest and be rationally related to that purpose. Legislation examined under the rational basis test “carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.”<sup>118</sup> The challenger of legislation under rational basis has a heavy burden, so much so that one scholar quipped, the “application of the rational basis test has become almost a rubber stamp of approval.”<sup>119</sup>

#### A. THE PATCHWORK CURRICULUM: *DAVIS V. PAGE*

In *Davis v. Page*,<sup>120</sup> parents brought suit against the Jaffrey-Rindge School District because school officials would not agree to their demand to excuse their children from music classes, health classes, and lessons in which audio-visual aids were used.<sup>121</sup> The parents were Apostolic Lutherans who objected to the aids and classes on religious grounds.<sup>122</sup> The Apostolic Lutheran community comprised 20 percent of the student body.<sup>123</sup> Until 1971, the school district had accommodated the parents’ wishes and allowed students who voiced a religious objection to classroom activities to leave the classroom. Due to the large number of students

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115. *United States v. Virginia*, 518 U.S. 515 (1996).

116. *Ma. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

117. *Mathews v. Diaz*, 426 U.S. 67 (1976).

118. *Hodel v. Indiana*, 452 U.S. 314, 331-332 (1981).

119. Brent L. Caslin, *Gender Classification and the United States v. Virginia: Muddying the Waters of Equal Protection*, 24 PEPP. L. REV. 1353, 1357 (1997).

120. *Davis v. Page*, 385 F. Supp. 395, 395 (D.N.H. 1974).

121. *Id.* at 397.

122. *Id.* The plaintiffs’ faith made it sinful to watch movies and television, listen to the radio, engage in play acting, singing, or dancing, study evolution, or take part in sex education classes. *Id.*

123. *Id.*

opting out of the classes throughout the day and the attendant disciplinary problems, the school board adopted a new policy: students were not allowed to leave the classroom, but when an offending lesson was presented, the students could place their heads on their desks, turn their chairs away, or stand in the back of the room.<sup>124</sup> The plaintiffs found these alternatives unacceptable because they objected to both the sounds and the pictures from the lessons at issue. The Davis family brought suit seeking “an order from [the] court which [would] require school officials to excuse their children from a classroom whenever nonsectarian activities conflict with their religious tenets.”<sup>125</sup> They did not seek to change the curriculum or stop the use of audio-visual equipment. Simply put, they did not want the school to require their children to be physically in the room “where religiously offensive activities” take place in violation of the children’s constitutional guarantees.<sup>126</sup>

The District Court ruled that the state has an interest in maintaining and sustaining a coherent curriculum and that the “responsibility for the adoption of the school curriculum is statutorily vested in the School Board.”<sup>127</sup> Parents can voice objections to their school board, but the court held that final decisions about the curriculum and related instructional strategies reside with the school board. The court further stated that “[d]espite parental objections, courts have been unwilling to make patchwork exceptions to the School Board’s curriculum.”<sup>128</sup>

B. MANDATORY COMMUNITY SERVICE: *IMMEDIATO V. RYE NECK SCHOOL DISTRICT*

Rye Neck School District in New York established a mandatory community service requirement for graduation from its high school. The program required high school students to perform forty hours of community service during their four years of high school.<sup>129</sup> According to the regulations, students could not receive pay for their services and the

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124. *Id.*

125. *Id.* at 398.

126. *Id.* at 397–98.

127. *Id.* at 405.

128. *Id.* This statement is reminiscent of Justice Jackson’s concurring opinion in *Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois*, 333 U.S. 203 (1948). In that opinion, Justice Jackson stated, “If we are to eliminate everything that is objectionable to any [person] or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.” *Id.* at 235 (Jackson, J., concurring).

129. *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 457 (2d Cir. 1996).

services had to be performed for people in need. Daniel Immediato, a student at Rye Neck High School, and his parents brought suit against the school district challenging the constitutionality of the program.<sup>130</sup> The plaintiff parents alleged that they possessed a constitutional right to “have their children opt out of programs that are contrary to the beliefs and values they seek to impart.”<sup>131</sup> Their objections were secular—charitable work, while admirable, was to be left to an individual’s conscience and not mandated by the public school. The plaintiffs argued that *Meyer* and *Pierce* established that the upbringing of a child is a fundamental right, thus requiring the use of strict scrutiny analysis.<sup>132</sup> The court rejected the argument by finding that the Supreme Court has only considered parental challenges under the Fourteenth Amendment and, therefore, used a reasonableness or “rational basis” standard.<sup>133</sup>

By not applying the more stringent strict scrutiny test, the district court easily found that the program had a reasonable relation to purposes within the competency of the state. Because the service program was rationally related to the legitimate state interest of education, the court upheld the school district’s program. The court went beyond the rational basis test to discuss the potential impact on public policy if the courts allowed parents to seek intervention by the courts whenever an educational decision clashed with values held by parents. The court found that bypassing the duly elected board of education would usurp “the legitimate authority of school officials to perform their duties in educating citizens” in contravention of public policy.<sup>134</sup> The court concluded its analysis of parental rights with the following assertion: “Plaintiff parents may not use this Court to interpose their own way of life or their own philosophy, however laudable, as a barrier to reasonable state and local regulation of

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130. For our purposes, only the plaintiffs’ assertion that the program violated their parental rights will be explored.

131. *Immediato v. Rye Neck Sch. Dist.*, 873 F. Supp. 846, 852 (S.D.N.Y. 1995), *aff’d*, 73 F.3d 454 (2d Cir. 1996).

132. *Id.* at 851.

133. *Id.* at 852. The Supreme Court had applied the reasonableness standard in both *Meyer* and *Pierce*. Of *Meyer*, the *Immediato* court stated that “the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.” *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923)). In using *Pierce*, the District Court cited the Supreme Court’s statement that state regulation “unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control.” *Id.* (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925)).

134. *Id.*

the educational curriculum.”<sup>135</sup> The district court’s decision was upheld by the Second Circuit Court of Appeals.<sup>136</sup> The Second Circuit recognized the Fourteenth Amendment liberty interest of parents in the upbringing of their children, but also analyzed *Meyer*, *Pierce*, and *Yoder* for the proposition that reasonableness of the regulation was the touchstone and, therefore, rational basis was the proper equal protection standard to apply.<sup>137</sup> By using the standard of rational basis rather than strict scrutiny, the courts indicated that the right to direct the upbringing of a child under *Meyer* or *Pierce* was less than fundamental.<sup>138</sup>

C. CONDOM AVAILABILITY POLICY: *ALFONSO V. HERNANDEZ* AND THE USE OF STRICT SCRUTINY ANALYSIS

The New York City School Board of Education approved a condom availability program as part of an AIDS education program. Unlike the community service program discussed above, the condom availability program was not mandatory. Students who wanted to participate could obtain condoms from the health resource room located within the school building. Students were not required to obtain parental permission before obtaining a condom. No student was required to request or obtain a condom. In *Alfonso v. Hernandez* parents brought suit seeking to prohibit the implementation of the program, arguing, in part, that the program violated their due process rights to raise their children.<sup>139</sup>

The trial court found that parents had a constitutional right to direct the upbringing of their children, but that right was not absolute. The court argued that a corollary, or restraining factor in this right are the constitutional rights of the children “which must be protected by all, including parents.”<sup>140</sup> The court concluded that the voluntary nature of the condom availability program did not infringe upon the parents’ rights to

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135. *Id.* at 853.

136. *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996).

137. “We thus conclude that where, as here, parents seek for secular reasons to exempt their child from an educational requirement and the basis is a claimed right to direct the ‘upbringing’ of their child, rational basis review applies” *Id.* at 462.

138. In *Herndon v. Chapel Hill-Carrboro City Board of Education*, 89 F.3d 174 (4th Cir. 1996), the school district similarly implemented a graduation service requirement and parents alleged that it violated their right to direct and control the upbringing and education of their children. Once again, the Court of Appeals eschewed the use of the plaintiff’s request to use strict scrutiny analysis for a violation of their fundamental right and instead used rational basis to conclude that their right to control their children’s education was not unreasonably infringed. *Id.* at 179.

139. *Alfonso v. Fernandez*, 584 N.Y.S.2d 406 (N.Y. Sup. Ct. 1992).

140. *Id.* at 412.

raise their children. There was no coercive effect to the program and the existence of the program merely exposed students to other ideas. The court added that even if an opt-out provision were adopted, exposure would still be present since the program would continue in the school. The plaintiffs appealed.<sup>141</sup>

The New York appellate court reversed the lower court's holding.<sup>142</sup> The condom availability program, the majority opined, was different from situations in which parents disagree with school authorities on what is to be taught or that which their children should be exposed.<sup>143</sup> Because parents are compelled to send their children, the plaintiffs argued, "into an environment where they will be permitted, even encouraged to obtain a contraceptive device," the students were not "just exposed to talk or literature on the subject of sexual behavior; the school offers the means for students to engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases."<sup>144</sup>

The appellate court cast the issue in terms of a health service and not an educational service, noting that distributing condoms was not "an aspect of education in disease prevention, but rather is a means of disease prevention. Supplying condoms to students upon request has absolutely nothing to do with education, but rather is a health service occurring after the educational phase has ceased."<sup>145</sup> The court separated the condom availability program from the educational program but it did review the relationship between the services provided by the school in pursuit of its educational programs and the rights of parents to control their children's participation in and access to a school program.

The court looked at what test to employ in balancing the competing rights of parent to direct the education of their children and the public school's requirement to educate its minor citizens. The court acknowledged that parents have a liberty interest in "rearing and educating their children."<sup>146</sup> However, the court distinguished parental complaints about the exposure of their children to ideas or points of view with which they disagree, writing, "[w]e would agree that, standing alone, such opposition

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141. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993).

142. *Id.* at 260.

143. *Id.* at 266.

144. *Id.* at 265–66.

145. *Id.* at 263 ("This is clearly a health service for the prevention of disease which requires parental consent.").

146. *Id.* at 265.



would falter in the face of the public school's role in preparing students for participation in a world replete with complex and controversial issues."<sup>147</sup> This brings *Alfonso* in line with other cases in which the right to direct is not a trump to the educational programs of the public school. However, does the parental right to direct the education of their children extend beyond the curriculum and instruction to encompass the school's wider programs?

Referring to the differentiation of an education program to a health related service, the court found that the school's program interfered with "parental decision making in a particularly sensitive area."<sup>148</sup> The court proceeded with its application of strict scrutiny analysis without identifying the required standard, fundamental interest or suspect classification, and why the facts meet the established criteria for its use as opposed to the other two tests, heightened scrutiny and rational basis. Strict scrutiny analysis asks whether a compelling state interest is involved and, secondly, whether this program is necessary to meet it. The court easily found that there is a compelling interest in controlling AIDS,<sup>149</sup> however, the second prong asks, are the means used by the condom availability program necessary to meet the compelling state interest? The court argued that they are not. If the program did not exist, students would still be able to acquire condoms without difficulty, thus the program in the public schools was not necessary. The court concluded that the condom availability program violated the parents' right to direct the upbringing of their children.<sup>150</sup> The court held that the distribution policy could go forward as long as the parents could opt out by instructing the school board to not distribute condoms to their children without their consent.<sup>151</sup>

The court found that controlling AIDS is a compelling state interest; that is the first prong in strict scrutiny analysis. But the trigger of a fundamental right or a suspect class is missing from the analysis. Does the governmental action of establishing a voluntary condom availability

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147. *Id.* at 266.

148. *Id.*

149. *Id.* at 263 ("It cannot be disputed that 'the State has a compelling interest in controlling AIDS, which presents a public health concern of the highest order. Nor can there be any doubt as to the blanket proposition that the State has a compelling interest in educating its youth about AIDS.'").

150. *Id.* ("We do not find that the policy is essential. No matter how laudable its purpose, by excluding parental involvement, the condom availability component of the program impermissibly trespasses on the parental rights by substituting the respondents *in loco parentis*, without a compelling necessity.").

151. *Id.* at 267.

program for students violate a fundamental right of the parents? The court held that the policy violated the parents' constitutional right to due process, but it did not assert that it constitutes a fundamental right.<sup>152</sup> The following passage is the closest the court comes to finding a fundamental right; "In light of our determination that the condom availability component lacks common-law or statutory authority, and violates the petitioners' civil rights to rear their children as they fit" they are entitled under strict scrutiny analysis to an opt-out provision.<sup>153</sup> However, lacking common law or statutory authority, and violating an unstated civil rights, does not elevate the right of parents to direct the upbringing of their children to a fundamental right in itself. So, on what basis here is the parent's right to direct fundamental?

Judge Geraldine T. Eiber offered an interesting dissent. First, as a threshold matter, she disagreed with the majority that the condom availability policy "constitutes a 'health service' of the same nature as the invasive medical, dental, health and hospital treatment."<sup>154</sup> If the condom availability policy is not a health service then it logically follows that it is part of the educational program.<sup>155</sup> If it is part of the educational program, then, according to the majority and other court precedents, parents cannot successfully assert a fundamental right to control the education of their children. If there is no fundamental right involved in the controversy,<sup>156</sup> then rational basis is the correct analytical tool to use.<sup>157</sup> This is counter to the majority, which used strict scrutiny analysis, the least deferential test to government. Second, while the majority used strict scrutiny analysis to strike down the condom availability program as health related and not

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152. *Id.*

153. *Id.* at 268.

154. *Id.* at 269 (Eiber, J., dissenting). Judge Eiber was concerned about the reach of the majority opinion, writing, "Thus, a broad interpretation of the term 'health services' to preclude distribution of condoms to minors without parental consent would have a significant impact upon the ability of minors to obtain condoms, and thus violate their constitutionally recognized right to make such decisions privately." *Id.* at 271.

155. *Id.* at 274 (noting that "the distribution of condoms in the public schools is entirely consistent with the accepted role schools have traditionally assumed in regard to health education, i.e., preventive health care. Clearly, it is not the proper role of the educational system to ignore reality.").

156. "[T]he mere fact that parents are required to send their children to school does not vest the condom distribution program with the aura of 'compulsion' necessary to make out a viable claim of deprivation of a fundamental constitutional right." *Id.* at 272.

157. Judge Eiber uses the reasonableness language of rational basis, concluding, "I further disagree with the majority's conclusion that the condom distribution program unreasonably interferes with the petitioner parents' liberty interest in directing the upbringing and education of their children." *Id.* at 271.

educational, the dissent would have used rational basis to uphold the program, which it considered as part of the educational role of the schools.

Regardless, this case is clearly an outlier in its use of strict scrutiny analysis, as other courts have repeatedly used a rational basis test. In its broadest reach, both the majority and the dissent found that the school has the right to develop and offer its curriculum over the veto of parents. They disagreed over the extent of what constitutes the educational program, the condom distribution policy as a health service or health education, and the use of strict scrutiny analysis.

D. THE AIDS ASSEMBLY: *BROWN V. HOT, SEXY AND SAFER PRODUCTIONS, INC.*

Chelmsford High School sponsored a mandatory school-wide assembly consisting of a ninety-minute presentation that was characterized as an AIDS awareness program.<sup>158</sup> Plaintiff students and their parents brought suit in federal court seeking declaratory and monetary relief. They alleged a violation of parents' right to direct and control the upbringing of their children.<sup>159</sup> The district court granted the defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and the plaintiffs appealed.<sup>160</sup>

On appeal, the First Circuit Court of Appeals skirted the issue of whether the right was fundamental and held that "even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude on this right."<sup>161</sup> Referring to the seminal cases of *Meyer* and *Pierce*, the First Circuit wrote:

[W]e think [they] evince the principle that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education."<sup>162</sup>

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158. *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995).

159. *Id.* at 530.

160. *Id.*

161. *Id.* at 533.

162. *Id.*

Having stated the principles of *Meyer* and *Pierce*, which form the basis of the parental right to direct the upbringing of children, the court found that parents do not possess a “fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.”<sup>163</sup>

Interestingly, after concluding that the plaintiffs did not have a fundamental right, thus negating the need for strict scrutiny analysis, the court did not conduct a rational basis analysis. Instead, the court simply made some general and conclusory remarks regarding the extent of the parental right to direct the upbringing of their child. In their conclusion, the court offered the following statement:

If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school’s choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.<sup>164</sup>

Following *Brown*, the First Circuit decided another parent’s rights case in *Parker v. Hurley*.<sup>165</sup> In *Parker*, two sets of parents objected on religious grounds to a curriculum that included portraying gays, lesbians, and same-sex marriages in a positive light.<sup>166</sup> The parents requested an opt-out provision so that their children would not be exposed to the curriculum,<sup>167</sup> including the teacher reading aloud to the class.<sup>168</sup> The court

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163. *Id.* For an argument supporting a heightened scrutiny review of public school actions when parental wishes conflict with the curricular requirements of the public school, thereby allowing for their child to be exempted from the “hostile” curriculum, see Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart after 20 Years*, 38 J.L. & EDUC. 83, 133 (2009).

164. *Brown*, 68 F.3d at 534.

165. *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

166. *Id.* at 90. The court distinguished *Parker* from *Brown* because of the age of the children, elementary school age in *Parker* and high school in *Brown*. *Id.* at 100. However, the parental rights outcome of *Parker* is consistent with the parental rights outcome of *Brown*.

167. The court, responding to the plaintiffs’ claim of indoctrination, wrote:

[T]he mere fact that a child is exposed on occasion in public school to a concept offensive to a parent’s religious belief does not inhibit the parent from instructing the child differently. A parent whose “child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family’s moral or religious context, or to supplement the information with appropriate materials.”

*Id.* at 105 (quoting *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3d Cir. 2005)).

of appeals, upholding the district court's decision in favor of the school district, wrote: "Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them."<sup>169</sup>

The courts in *Davis*, *Immediato*, and *Brown* were unwilling to find that the liberty interest of parents articulated in *Meyer* and *Pierce* elevates that interest to a fundamental interest requiring strict scrutiny analysis of the school district's curricular and instructional decisions.<sup>170</sup> These three courts acknowledged the right of parents to direct the upbringing of their children but did not expand this right to direct the public school curriculum. The courts found the State's role as educator to be expansive, as long as it is reasonable and relates to legitimate ends. However, one case, *Alfonso*, did not follow the analysis of the other courts. The *Alfonso* court did not explicitly state that parents had a fundamental constitutional right, instead choosing to cloak the right in other rights. The case also revolved around, from the majority's view, a non-educational program characterizing the condom distribution policy as health related.

#### E. SUMMARY OF SELECTED CASES

The courts have acknowledged that parents have broad autonomy to rear their children.<sup>171</sup> However, parents have never been entitled to "suspend all rules imposed by social institutions if those rules are at odds with the parents' preferences."<sup>172</sup> Professor Susan Clark argues that the parental right to direct a child's education is "not without limitation."<sup>173</sup> Parents do not have unfettered access to their children or the right to be present on school property.<sup>174</sup> If they do not have unfettered access to their

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168. *Id.* at 93. The superintendent issued a public statement explaining the district's position that it would not provide parental notification for "discussions, activities, or materials that simply reference same-gender parents or that otherwise recognize the existence of differences in sexual orientation." *Id.*

169. *Id.* at 106.

170. More recently, in *Bailey v. Virginia High School League, Inc.*, 488 F. App'x 714, 716 (4th Cir. 2012), parents asserted an interference in their fundamental right to direct their son's education when an athletic league upheld its transfer rule and denied his eligibility to participate in interscholastic activities. The court, in affirming the judgment of the district court, wrote, "The Baileys' right to control individual components of their son's education, including his participation in interscholastic sports and other activities, is not constitutionally protected, and the district court correctly dismissed this claim."

171. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion).

172. *Byars v. City of Waterbury*, 795 A.2d 630, 645 (Conn. Super. Ct. 2001).

173. Susan G. Clark, *Parental Access to the Classroom*, 282 EDUC. L. REP. 753, 754 (2012).

174. *Id.* (citing *Schmidt v. Des Moines Pub. Sch.*, 655 F.3d 811 (8th Cir. 2011)).

children, can they have unfettered control over the curriculum and the instruction their children receive?

Courts have regularly held that parental rights are far from absolute in the context of controlling public school curricula. The Tenth Circuit held that “parents simply do not have a constitutional right to control each and every aspect of their children’s education and oust the state’s authority over that subject.”<sup>175</sup> Similarly, the Second Circuit stated that the right of parents to control the upbringing and education of their children does not include “the right to tell public schools what to teach or what not to teach him or her.”<sup>176</sup> And the Sixth Circuit summed the application of *Meyer* and *Pierce* by noting that, “[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child.”<sup>177</sup>

In short, the federal courts have consistently ruled against extending a parent’s right to direct the education of her or his child by molding the school curriculum, no matter how deeply held, religiously<sup>178</sup> or personally based,<sup>179</sup> their beliefs may be.<sup>180</sup> After a legion of losses in the courts, some parent rights advocates have turned to legislation as the instrument to fulfill the promise they believe *Meyer* and *Pierce* held out to them.

#### V. LEGISLATING THE PARENTAL RIGHT TO DIRECT

Parents and advocacy groups, such as the Christian Coalition and the Family Research Council, have turned from the courtroom to legislative bodies to expand the parental right to direct the upbringing of their children.<sup>181</sup> One educational commentator in the mid-1990s noted that this

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175. *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694, 699 (10th Cir. 1998).

176. *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003).

177. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005).

178. *See Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311, 1318 (8th Cir. 1980) (“public schools are not required to delete from the curriculum all materials that may offend any religious sensibility”); *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (“the state has no legitimate interest in protecting any or all religions from views distasteful to them”).

179. *See United States v. Seeger*, 380 U.S. 163, 166 (1965) (asserting that a person’s religious beliefs need not be based in the traditional concept of “God,” but may instead be grounded in a belief in something that “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God”).

180. *See DeGroff, supra* note 163, at 88 (“[T]he courts have consistently rejected efforts by parents and children to dictate the content of the public school curricula.”).

181. For a discussion critical of parental rights legislation, see PEOPLE FOR THE AM. WAY FOUND., PARENTAL RIGHTS: THE TROJAN HORSE OF THE RELIGIOUS RIGHT ATTACK ON PUBLIC EDUCATION, <http://www.pfaw.org/media-center/publications/parental-rights> (last visited May 23,

“nationwide movement to write ‘parental rights’ into law has raised questions about how big a role parents should play in determining what happens in public schools.”<sup>182</sup> Proponents of parental rights legislation cite instances “where schools have violated parents’ wishes by making condoms available, exposing students to sexually explicit materials, and giving counseling without their parents’ consent.”<sup>183</sup>

State legislatures and Congress have become venues for change as parents and special interest groups seek what the courts have consistently denied them: a strengthened right to direct the education of their children in public schools. For example, there is currently a move to amend the U.S. Constitution to “protect children by empowering parents” by passing the Parental Rights Amendment.<sup>184</sup> Section 1 of the amendment, sponsored by South Carolina Senator Jim DeMint reads, “The liberty of parents to direct the upbringing, education, and care of their children is a fundamental right.”<sup>185</sup> This change would import the principles parental-rights activists

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2013); Larry Kaseman & Susan Kaseman, *Yes – Parental Rights No – Constitutional Amendment*, HOME EDUC. MAG. (July–Aug.2009), available at <http://homeedmag.com/HEM/264/parental-rights.php>. For a discussion supporting parental rights legislation, see FAM. RES. COUNCIL, <http://www.frc.org> (last visited May 23, 2013) and PARENTALRIGHTS.ORG, <http://www.parentalrights.org> (last visited May 23, 2013).

182. Scott Willis, *Parental Rights: Proposed Laws Would Affect Parent-School Relationships*, 39 EDUC. UPDATE 1 (Jan. 1997).

183. *Id.* at 6. This Section explores the legislative responses to strengthening parental rights. Another possible avenue to strengthen parental rights is party politics. For example, the Texas Republican 2012 Platform has great potential to strengthen parental rights in general and to support parents who want specific parts of the curriculum eliminated. See 2012 REPUBLICAN PARTY OF TEX., REPORT OF PLATFORM COMMITTEE 10 (2012), available at [http://s3.amazonaws.com/texasgop\\_pre/assets/original/2012Platform\\_Final.pdf](http://s3.amazonaws.com/texasgop_pre/assets/original/2012Platform_Final.pdf). The Platform includes a Parental Rights and Responsibilities plank which states in part, “We strongly support a Parental Rights Amendment to the U.S. Constitution.” *Id.* at 10. The Platform in its “Educating Our Children” plank states in pertinent part that the party believes “the current teaching of a multicultural curriculum is divisive” and that it opposes the “teaching of Higher Order Thinking Skills (HOTS) (values clarification), critical thinking skills and similar programs that are simply a relabeling of Outcome-Based Education (OBE) (mastery learning) which focus on behavior modification and have the purpose of challenging the student’s fixed beliefs and undermining parental authority.” *Id.* at 12. The Platform advocates that parents have an enumerated Constitutional right to direct the education of their children, to keep their children from learning about other cultures, and to be assured that their children would not be taught critical thinking skills.

184. PARENTALRIGHTS.ORG, *supra* note 181. Parentalrights.org reports that there are eighty-six cosponsors to the “Parental Rights Amendment” in the House of Representatives, as well as thirteen cosponsors in the Senate. See *id.* (last visited May 23, 2013).

185. S.J. Res. 42, 112th Cong. (2012). Senator DeMint has since retired from the Senate to accept the position of President of the Heritage Foundation. Paul Kane & David Fahrenthold, *Jim DeMint Resigning from Senate to Head Conservative Think Tank*, WASH. POST, Dec. 6, 2012,

read in *Meyer* and *Pierce* into the Constitution, thus elevating the right of a parent to direct a child's education to a fundamental interest, meaning that any infringement of that right would need to be analyzed by a court using the exacting strict scrutiny standard rather than the deferential rational basis standard. This would be a clear departure from the majority of cases that have used rational basis, which have eschewed the use of strict scrutiny by holding that the parental right to direct the education of their children is not a fundamental right.<sup>186</sup> In short, what advocates for robust parental rights over the curriculum could not win in the courts they are now seeking through legislation.

The history of legislative attempts to expand parental rights through laws and constitutional amendments has consistently failed, except for a 2012 law passed in New Hampshire, which is discussed below. As evidenced by the following discussion on federal and state legislation, despite persistent failure, advocates continue to pursue this path undeterred. The following two discussions highlight recent efforts, at both the federal and state level, to achieve through legislation what has not been achieved through litigation. A legislative approach to enhancing individual parental control over a child's education is fraught with risk. Overreach is easy when fashioning legislation that idealizes the individual parent's right; for example, when hundreds of parents each claim a statutory right to have the school's curriculum meet their needs. Which parent prevails when there are competing parental demands for a particular type of instruction, a specific curriculum, or the elimination of a curricular topic? The practical realities of a classroom teacher catering to the curricular demands of every parent could be overwhelming, and, in all likelihood, would not be pedagogically sound. When contemplating the potential aftermath of a legislated right, such as the *Parental Rights and Responsibilities Act of 1995* discussed below, one is reminded of Justice Jackson's concurrence in *McCullum v. Board of Education*, in which he stated: "If we are to eliminate everything that is objectionable to any [person] or is inconsistent with any of their doctrines, we will leave the public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant lawsuits."<sup>187</sup>

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[http://articles.washingtonpost.com/2012-12-06/politics/35649614\\_1\\_de-mint-senate-conservatives-fund-republican-senate-candidates](http://articles.washingtonpost.com/2012-12-06/politics/35649614_1_de-mint-senate-conservatives-fund-republican-senate-candidates).

186. See *supra* Part III.

187. *McCullum v. Board of Education*, 333 U.S. 203, 235 (1948) (Jackson, J. concurring).



## A. FEDERAL LEGISLATION

On June 29, 1995, Iowa Senator Charles Grassley and Oklahoma Representative Steve Largent introduced Senate Bill 984, *Parental Rights and Responsibilities Act of 1995*.<sup>188</sup> The purpose of the bill was “to protect the right of parents to direct the upbringing of their child as a fundamental right.”<sup>189</sup> The bill explicitly refers to *Meyer* and *Pierce* to suggest that the Supreme Court had regarded this right as a “fundamental right implicit in the concept of ordered liberty.”<sup>190</sup> When the bill was introduced, Senator Grassley argued that “[w]hile the Supreme Court’s intent to protect parental rights is unquestionable, lower courts have not always followed this high standard to protect the parent-child relationship.”<sup>191</sup> Senator Grassley specifically cited *Brown v. Hot, Sexy and Safer Productions, Inc.* as an example of the lower courts’ failure to protect the parent-child relationship and an indication of an assault on the parent’s right to direct the upbringing of their children.<sup>192</sup>

Senate Bill 984 defined the right of a parent to direct the upbringing of a child as encompassing but not limited to: “(i) directing or providing for the education of the child; (ii) making a health care decision for the child . . . ; (iii) disciplining the child, including reasonable corporal discipline . . . ; and (iv) directing or providing for the religious teaching of the child.”<sup>193</sup> According to the bill, any action by the state usurping or interfering with those rights was to be reviewed using strict scrutiny analysis.<sup>194</sup>

Senate Bill 984, invites mischief through the vagueness of its language which some could assert gives parents potentially unlimited control over the curriculum for their children but to the detriment of other children and to the community. The unclear meaning of the right to “direct” the education of a child is particularly troublesome. Does the parent have the right to direct only their child or does the parent also have the right to direct the school that provides the child’s education? A child’s learning is

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188. Parental Rights and Responsibilities Act of 1995, S. 984, 104th Cong. (1995), available at <http://www.gpo.gov/fdsys/pkg/BILLS-104s984is/pdf/BILLS-104s984is.pdf>.

189. *Id.* § 2(b)(1).

190. *Id.* § 2(a)(1).

191. 141 CONG. REC. S9422-02 (daily ed. June 29, 1995) (statement of Sen. Charles Grassley) 1995 WL 390400.

192. *Id.*

193. S. 984 § 3(4)(A).

194. *Id.* § 5.

augmented by the peers with whom she or he interacts. “Social scientists have long recognized that peer effects may be among the most important determinants of student outcomes.”<sup>195</sup> Could a parent require the presence of particular students in their child’s classroom to augment their child’s learning or, the reverse, to keep a student out of their child’s class as part of the parent’s right to direct their child’s education? If the right to direct the education of a child was considered fundamental, that right could persuasively be argued to include the right to direct the school. This could lead to difficult decisions for a school faced with a challenge to its instruction or curriculum. For example, if parents did not want their child taught certain histories or scientific principles, must the public school honor their request and not offer instruction on the world’s major religions or scientific understanding of the evolution of life forms past and present? Additionally, must a school comply if a parent directed the school to teach their child that all religions except the parent’s preferred faith involved the worship of false gods or that creationism was based on proven science? Neither the child nor the public would benefit from being taught discredited history, or that evolution and creationism are interchangeable scientific theories. Attempts to legislate a parental right to direct a child’s education must not usurp the need for scientifically literate citizens, especially given that analysis and discourse of public issues frequently requires scientific understanding—both substantive and procedural.

Another problem with the language of Senate Bill 984 is that the strict scrutiny standard might be impossible to satisfy in the school setting. Teachers also direct the education of their pupils through the selection, pacing, and sequencing of lessons. If the parents’ right to direct became fundamental under federal legislation, then a teacher’s decision would only

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195. Victor Lavy, M. Daniele Paserman & Analia Schlosser, *Inside the Black of Box of Ability Peer Effects: Evidence From Variation in Low Achievers in the Classroom* 3 (Nat’l Bureau Econ. Res., Working Paper No. 14415, Oct. 2008). See also, C. Kirabo Jackson, *Can Higher-Achieving Peers Explain the Benefits to Attending Selective Schools?: Evidence from Trinidad and Tobago* 1–2 (Nat’l Bureau Econ. Res., Working Paper No. 16598, Dec. 2010) (“[I]f students benefit directly from higher-achieving classmates, part of the benefit to attending a selective school may be attributed to the direct benefits of having higher-achieving peers.” (internal citation omitted)); Mary A. Burke & Tim R. Sass, *Classroom Peer Effects and Student Achievement* 25 (Nat’l. Cntr. for Analysis of Longitudinal Data in Educ. Res., Working Paper No. 18, June 2008) available at [http://www.urban.org/UploadedPDF/1001190\\_peer\\_effects.pdf](http://www.urban.org/UploadedPDF/1001190_peer_effects.pdf) (“We find positive and highly significant peer effects within every level of schooling and for both reading and math.”); Caroline M. Hoxby & Gretchen Weingarth, *Taking Race out of the Equation: School Reassignment and the Structure of Peer Effects* 27 (Harv. Univ., Malcolm Wiener Inequality & Social Policy Seminar Series, 2006) available at <http://www.hks.harvard.edu/inequality/Seminar/Papers/Hoxby06.pdf> (“all else equal, a higher achieving peer is better than a lower achieving one”).

be upheld if a school district could satisfy strict security review by demonstrating that a challenged decision was “essential to accomplish a compelling Government interest and that the Government’s method of interfering was the least restrictive means to accomplish its goal.”<sup>196</sup> Given the myriad educational decisions that a teacher makes daily, it would be difficult to characterize all or even many as essential. Most pedagogical decisions involve the exercise of professional judgment in light of various options. Very seldom is there one bright, illuminated pedagogical path; some may be better than others, but agreement is often difficult to reach. The debate over phonics and whole language is indicative of how difficult it is for the profession to arrive at the one best and essential instructional strategy.<sup>197</sup> In fact, it is doubtful that any pedagogical decision could meet the high standard of “essential.” What happens if educators cannot show that their contested pedagogical decisions are essential? Must the school’s curriculum and pedagogy be balkanized to meet the wishes of every parent?

Additionally, even if parents’ rights were made fundamental, and if teaching decisions would only be upheld if they satisfied strict scrutiny review, the question remains what remedies are entitled to parents. Could teachers be liable if the parent’s educational wishes are not satisfied, including the use of reasonable discipline when the child misbehaves? Could the principal also be liable? Rights have remedies. What is the remedy if the parents’ directives on what to teach and how to teach their child are not met?<sup>198</sup>

It is extremely difficult, if not impossible, to see how this type of legislation could be implemented in our public schools. Which master does the teacher serve if parents are given the fundamental right to direct the education of their child, the parent or the elected school board

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196. 141 CONG. REC. S9422-02 (daily ed. June 29, 1995) (statement of Sen. Charles Grassley) 1995 WL 390400.

197. For a discussion of the reading war over phonics and whole language approaches, see James F. Baumann et al., *Where Are Teacher's Voices in the Phonics/Whole Language Debate? Results from a Survey of U.S. Elementary Classroom Teachers*, 51 *READING TEACHER* 636 (1998); Jon Reyhner, *The Reading Wars* (Dec. 13, 2008) available at [http://jan.ucc.nau.edu/~jar/Reading\\_Wars.html](http://jan.ucc.nau.edu/~jar/Reading_Wars.html); and Sharon Cromwell *Whole Language and Phonics: Can They work Together?*, *EDUCATIONWORLD*, (1997) [http://www.educationworld.com/a\\_curr/curr029.shtml](http://www.educationworld.com/a_curr/curr029.shtml).

198. For a discussion of the increase in the potential for viable educational malpractice suits, see Ethan Hutt & Aaron Tang, *The New Education Malpractice Litigation*, 99 *VA. L. REV.* 419 and Todd A. DeMitchell, Terri A. DeMitchell & Douglas Gagnon, *Teacher Effectiveness and Value-Added Modeling: A Pathway to Educational Malpractice?*, 2012 *BYU EDUC. & L.J.* 257 (2012).

representatives? Also, what happens when one parent's concept of directing the education of their child clashes with the wishes of another parent; how is the issue resolved? If every parent controls the public education of his or her child, what remains of the "public good" in public education? Possibly because of these very questions, Senate Bill 984 failed to be enacted into law when neither the House nor the Senate voted on the measure after the bill was introduced.<sup>199</sup>

## B. STATE LEGISLATIVE ACTIONS

As discussed above, proponents for strengthening the parental right to direct the education of their children hit a roadblock in their federal legislative attempt. Consequently, they turned to individual states to enact the legislation. Three state actions are discussed below. Two of the three failed; a constitutional amendment in Colorado and a state statute in New Hampshire. The section closes with what has been described as an outlier in parental rights legislation, the passage of a New Hampshire statute over the veto of the Governor. Problems with the New Hampshire law, House Bill 542, will be explored.

### 1. Colorado

Colorado voters in November of 1996 were asked to vote on Amendment 17 Parental Rights.<sup>200</sup> This ballot measure, similar to Senate Bill 984, would have added to the bill of rights in the Colorado Constitution a statement assuring the "inalienable rights . . . of parents to direct and control the upbringing, education, values, and discipline of their children."<sup>201</sup> The measure was strongly endorsed by conservative Christian groups, who advocated for nationwide parental rights amendments "as a way to reverse what they considered unwarranted and unacceptable intrusion by public school systems and other government bureaucracies

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199. *S. 984 (104th): Parental Rights and Responsibilities Act of 1995*, GOVTRACK, <http://www.govtrack.us/congress/bills/104/s984> (last visited June 2, 2013).

200. COLO. CONST. art. II, amend. XVII (proposed 1996) available at [http://www.state.co.us/gov\\_dir/leg\\_dir/96bp/text17.html](http://www.state.co.us/gov_dir/leg_dir/96bp/text17.html).

201. *Id.*

into family life and childrearing.”<sup>202</sup> It was expected that a victory in Colorado would propel passage of similar amendments across the nation.<sup>203</sup>

The argument for the constitutional amendment asserted that it would “establish additional legal protection for parents when faced with excessive actions of the government.”<sup>204</sup> Relating specifically to education, the non-partisan Legislative Council stated in its analysis of the arguments for the amendment,

Parents could use this amendment to assert their right to direct and control the education of their own children. Colorado public schools will be more accountable to parents and not be allowed to infringe on parental values and authority. The amendment is not intended to give one parent the right to dictate curriculum decisions to an entire classroom because that would violate the rights of other parents. The amendment clearly states that parents have the right to direct the education of their children, not other children. Yet, schools could continue to maintain their rightful authority to set reasonable standards for curriculum and discipline.<sup>205</sup>

The amendment was designed to expand parental control of their child's education while not infringing on the rights of other parents or undermining the right and responsibility of the school to determine its curricular and instructional practices. Just how this triangular tightrope could be traversed remained unanswered.

Opponents of the amendment argued that one of the primary targets of the ballot was the public school system.<sup>206</sup> Education officials feared that the amendment would significantly alter the curriculum.<sup>207</sup> Deborah Fallin, a spokesperson for the Colorado Association of School Boards, said it

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202. Patricia Donovan, *The Colorado Parental Rights Amendment: How and Why It Failed*, 29 FAM. PLAN. PERSP. 187, 187 (1997), available at <http://www.guttmacher.org/pubs/journals/2918797.pdf>. The Virginia-based conservative group Of The People provided the funding and the Coalition for Parental Responsibility submitted 83,000 signatures, 30,000 more than was required for the ballot initiative. *Id.*

203. *Id.*

204. COLO. GEN. ASSEMBLY, LEGISLATIVE COUNCIL, ANALYSIS OF 1996 BALLOT PROPOSALS: AMENDMENT 17, PARENTAL RIGHTS (1996), [http://www.state.co.us/gov\\_dir/leg\\_dir/96bp/amd17.html](http://www.state.co.us/gov_dir/leg_dir/96bp/amd17.html) [hereinafter ANALYSIS OF BALLOT PROPOSALS].

205. *Id.*

206. *Id.*

207. Kerry A. White, *Colo. Voters Reject Parent-Rights Measure*, EDUC. WK., Nov. 13, 1996, <http://www.edweek.org/ew/articles/1996/11/13/11ref.h16.html?tkn=VTMFuNeIVeaLFc29vBvryF7kv1x71IRHX4f6>.

would precipitate ideological battles in the schools “with individual parents pushing for their child’s individual needs.”<sup>208</sup> The Legislative Council’s analysis of the arguments against the amendment included the concern that it was too broad and would raise uncertainty—“the words ‘discipline,’ ‘values,’ and ‘upbringing,’ . . . [were] unclear.”<sup>209</sup> A more pointed educational argument identified by the Council suggested that “Carefully balanced decisions of local school boards, acting with parental support, may be delayed indefinitely or overturned completely by the actions of any parent that disputes these decisions,” and that the amendment could be interpreted in such a way to give parents rights of approval over not only curriculum and teaching methods, but also over the hiring and firing of teachers.<sup>210</sup> Taking the amendment to its logical extreme, the Council noted “Schools may be required to tailor an individual education plan for each student whose parent challenges the curriculum.”<sup>211</sup>

Despite favorable poll results heading into the November 5 election,<sup>212</sup> the amendment was defeated, with 57 percent of voters opposed.<sup>213</sup>

## 2. New Hampshire, 1996

A year after Colorado’s failed constitutional amendment on parental rights, the New Hampshire legislature debated Senate Bill 653-FN, also known as the *Parent and Pupil Rights Act*.<sup>214</sup> The bill included a requirement that all schools distribute a model letter to every parent or guardian explaining their rights and the rights of their children.<sup>215</sup> The model letter stated in part:

Parents have the right to be assured that their children’s beliefs and moral values are not undermined by the schools. Pupils have the right to have and hold their values and moral standards without direct or indirect manipulations by the schools through the curricula, textbooks, audio visual materials or supplementary assignments.<sup>216</sup>

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208. *Id.*

209. ANALYSIS OF BALLOT PROPOSALS, *supra* note 204.

210. *Id.*

211. *Id.*

212. White, *supra* note 207.

213. Donovan, *supra* note 202, at 187.

214. A copy of the bill is in the possession of the authors, who may be reached at todd.demitchell@unh.edu, and is available upon request.

215. PEOPLE FOR THE AM. WAY FOUND, *supra* note 181.

216. *See supra* note 214.

Furthermore, the bill listed topics and activities that a student could not participate in without prior written consent of the parent. A partial list of the curricular topics and pedagogical approaches needing written consent included: “auto criticism strategies designed for self-disclosure, including the keeping of a diary, journal, or log book; curricula pertaining to drugs and alcohol; nuclear war and nuclear policy; globalism and one-world government; education in sexuality including population control; and organic evolution.”<sup>217</sup> The inclusion of these topics in class discussions, as well as teacher responses to the questions initiated by students, required prior parent permission.

The Education Department of the University of New Hampshire passed a motion opposing the bill, arguing that the bill restricted access to ideas in the very place that should be the marketplace of ideas—the public school classroom. The bill would also chill classroom discussions on important topics such as nuclear policy, and it would be unworkable for teachers to keep track of which students could discuss what topics or answer questions pertaining to a guarded topic, and what could be done with the students who opted out of a topic. The main argument advanced by the faculty was that this type of legislation aimed at strengthening the control that parents have over education had an unacceptable trade-off of restricting the flow of information in our public schools.<sup>218</sup> Due to the added burden and impracticability of keeping track of all parental permissions, the likely outcome of this measure would have been the elimination of many lessons for all students, not just for children of objecting parents due to the likelihood of school districts becoming enmeshed in competing lawsuits.<sup>219</sup>

The proposed bill managed to make it through the New Hampshire Senate with some amendments, but was ultimately struck down by the House Education Committee.<sup>220</sup>

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217. See *supra* note 214.

218. Author DeMitchell has a copy of the motion in his files and can be reached at tood.demitchell@unh.edu.

219. Courts in other districts have also recognized the grave potential for liability caused by these types of statutes. See, e.g., *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1030 (9th Cir. 1998) (“The number of potential lawsuits that could arise from the highly varied educational curricula throughout the nation might well be unlimited and unpredictable. Many school districts would undoubtedly prefer to ‘steer far’ from any controversial book and instead substitute ‘safe’ ones in order to reduce the possibility of civil liability and the expensive and time-consuming burdens of a lawsuit—even one having but a slight chance of success.”).

220. PEOPLE FOR THE AM. WAY FOUND, *supra* note 181.

### 3. New Hampshire, 2012

Despite the failure of Senate Bill 653-FN, sixteen years later a new parental rights bill passed in New Hampshire. On January 4, 2012, the New Hampshire House of Representatives and Senate voted to override Democratic Governor John Lynch's veto of House Bill 542.<sup>221</sup> House Bill 542 requires school districts to (a) allow for exceptions to specific course material based on a parent's "determination that the material is objectionable" and (b) to devise an alternative that allows the child to still meet state requirements for education in the particular subject area of the objection and is acceptable to the parent.<sup>222</sup>

The broad sweep of the bill provides little guidance for school officials who are tasked with enforcing the new law.<sup>223</sup> The potential infirmities of the law include overreach, as any objection (whether reasonable or not) requires a response from school authorities that diverts scarce resources, such as personnel, toward the development of an alternative plan agreeable to the parent. In addition, while the law compels action on the part of school authorities there is no timeline for the action. And, it is contradictory in that parents are required to pay for the costs of implementing their preferred curriculum or instructional method, however, there is a well-established state law that requires school districts to provide a free education.

Parental objection to course materials under House Bill 542 can be based on religious, philosophical, pedagogical, other reasons or, possibly, no reasons at all, because there is no definition as to what constitutes the

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221. *Bill Status System Docket of HB 542*, N.H. GEN. COURT, [http://gencourt.state.nh.us/bill\\_status/bill\\_docket.aspx?lsr=828&sy=2011&sortoption=&txtsessionyear=2011&txtbillnumber=hb542&q=1](http://gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=828&sy=2011&sortoption=&txtsessionyear=2011&txtbillnumber=hb542&q=1) (last visited May 23, 2013).

222. H.B. 542-FN, 162nd Gen. Court, 2011 Sess. (N.H. 2011) (codified at N.H. REV. STAT. ANN § 186:11 IX-c (2013)).

IX-c. Require school districts to adopt a policy allowing an exception to specific course material based on a parent's or legal guardian's determination that the material is objectionable. Such policy shall include a provision requiring the parent or legal guardian to notify the school principal or designee in writing of the specific material to which they object and a provision requiring an alternative agreed upon by the school district and the parent, at the parent's expense, sufficient to enable the child to meet state requirements for education in the particular subject area. The name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the material shall not be public information and shall be excluded from access under RSA 91-A.

223. For an interesting take on the legislation, see *Should Parents Control Curriculum? Students React*, PBS NEWSHOUR EXTRA (Feb. 17, 2012) [http://www.pbs.org/newshour/extra/speakout/us/jan-june12/newhampshire\\_02-17.html](http://www.pbs.org/newshour/extra/speakout/us/jan-june12/newhampshire_02-17.html).



basis for an objection. In other words, the objection does not have to be grounded in a deeply held belief or based on the unique developmental needs of the child; any objection will do, and no justification will be demanded. The reach of a parental objection is without limit in this legislation, negating any tension between a parent's right to educate their child and the community's right to cultivate public citizens and ignoring a century of legal precedents. Representative J.R. Hoell, the author of House Bill 542, has stated that the law allows parents to "address both moral and academic objections to parts of the curriculum," noting specifically that parents may object to programs such as "whole language" or "Everyday Math." Furthermore, Representative Hoell stated, "What if a school chooses to use whole language and the parent likes phonics, which is a better long-term way to teach kids to read."<sup>224</sup> How does a teacher or a school provide an alternative to a whole language approach to reading instruction? How many different approaches must a teacher provide to a class of twenty-five students? With every new objection that results in an alternative plan, the school's curriculum becomes increasingly balkanized, contradictory, costly, and undeliverable. Similarly, how does a school respond to parental requests to replace the teaching of evolution with Creationism or Intelligent Design? The school either violates the New Hampshire law or the Establishment Clause.<sup>225</sup>

The legislation does not specify how any disagreement between the parent and the school is to be resolved. Similarly, there is no specification as to what curriculum or instructional practice is to be used with the child between the time of the objection and the time when the parent and school reach an agreement. There is also no provision informing districts what to do during the agreement process; must students be removed from the curriculum and associated instruction, or is the teacher to continue to deliver the community's agreed upon curriculum? Clearly, the legislation cannot stand for the proposition that a parent of one child can place a hold on the education of all students whose parents do not object to the materials. Furthermore, can other parents object to the alternative plan if it

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224. John Celock, *New Hampshire Lawmakers Pass Law Allowing Parental Objections to Curriculum*, HUFFINGTON POST (Jan. 4, 2012, 6:15 PM), [http://www.huffingtonpost.com/2012/01/04/new-hampshire-legislature-curriculum-objection-law\\_n\\_1184476.html?ref=education-reform](http://www.huffingtonpost.com/2012/01/04/new-hampshire-legislature-curriculum-objection-law_n_1184476.html?ref=education-reform).

225. See, e.g., *Edwards v. Aguilar*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp. 2d 707 (M.D. Pa. 2005); *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

has any impact on their child, thus perpetuating a cycle of objections based on objections?

The legislation does require parents to pay for the costs of the alternative educational experience, and it shields parents from any public disclosure of their names. The requirement that parents pay for the requested curriculum revisions runs afoul of a well-established state law guaranteeing a free public education to the children of the State.<sup>226</sup> Educators are on the horns of a dilemma; they can invoice the parents for the demanded curricular change and violate state law guaranteeing students a free public education, or they do not require a payment, cost the school district extra money, and force the community to fund a parent's personal desires for their child's education.

House Bill 542 gives all parents the right to demand changes to any and all parts of (a) the curriculum, (b) the instruction used to implement the curriculum, and (c) the activities designed as part of the instruction. The parental right to control the education of their child appears to be virtually complete. The potential for hundreds of parents in a school to control what is taught their child is unworkable. The reasonable authority of the community and state to control the education it provides the public is turned on its head. An articulated curriculum with a coherent scope and sequence becomes disarticulated in response to the parental demands of House Bill 542.

We believe the New Hampshire Governor got it right in vetoing House Bill 542, and that the state's House of Representatives and Senate got it wrong. Governor Lynch in his veto message wrote, "This legislation in essence gives every individual parent of every student in a classroom a veto over every single lesson plan developed by a teacher."<sup>227</sup> Speaking to the general proposition of parental control over the curriculum, and anticipating Governor Lynch's arguments, one commentator noted that, "were parental rights to dominate school interests, public education would become untenable, as each parent would effectively hold veto power over

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226. N.H. REV. STAT. ANN. § 189:1-a(I) (2013) ("It shall be the duty of the school board to provide at district expense elementary and secondary education to all pupils who reside in the district until such time as the pupil has acquired a high school diploma or has reached the age of 21, whichever comes first . . .").

227. H. 162-54, 2011 Sess., (N.H. 2011), available at [http://www.gencourt.state.nh.us/house/caljournals/calendars/2011/houcal2011\\_54.html](http://www.gencourt.state.nh.us/house/caljournals/calendars/2011/houcal2011_54.html).

the school's curriculum."<sup>228</sup> The school board has the statutory authority and responsibility to adopt the curriculum for the school district and all of its students.<sup>229</sup> Yet, under House Bill 542, this authority has been ceded to parents who object to the curriculum or the instructional practice and demand that their alternative be implemented. This statute transforms the legitimate authority of the school board from a requirement to simply a suggestion for parents to accept or reject. While the statute may appeal to the value of choice in education,<sup>230</sup> it violates nearly one hundred years of state and federal court rulings on parental rights and school board responsibilities in our public schools.<sup>231</sup> House Bill 542 contradicts and effectively eviscerates the long-standing civic and legal responsibility of educational communities to prepare their young for public participation in our democratic way of life.

House Bill 542 stands as an outlier among legislative attempts to enshrine a robust parental right to direct the education of their child. The legislative arm of our democratic process has not supported the elevation of parental interests and wishes, no matter how strongly held, above the collective wisdom of elected school board members and professional educators who are employed to fashion an education that serves a private benefit as well as a public good. It is unknown if House Bill 542 will face a legal challenge in the future. If it does, the history of judicial rulings suggests its status as a legislative outlier will come to an abrupt end.<sup>232</sup>

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228. Elliott M. Davis, *Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 27 *F.3d 1197* (9th Cir. 2005), 29 *HARV. J.L. & PUB. POL'Y* 1133, 1133 (2006).

229. N.H. REV. STAT. ANN. § 189:1-a(II) (2013) ("Elected school boards shall be responsible for establishing the structure, accountability, advocacy, and delivery of instruction in each school operated and governed in its district. To accomplish this end, and to support flexibility in implementing diverse educational approaches, school boards shall establish, in each school operated and governed in its district, instructional policies that establish instructional goals based upon available information about the knowledge and skills pupils will need in the future.").

230. For a discussion of the educational policy values of choice, excellence, equity, efficiency, and security, see Todd A. DeMitchell & Casey D. Cobb, *Policy Responses to Violence in Our Schools: An Exploration of Security as a Fundamental Value*, 2003 *BYU EDUC. & L.J.* 459 (2003).

231. See KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 338 (8th ed. 2011) ("Most precedents indicate that the courts, though sympathetic with the intentions of the parent, generally defer to authorized and trained educational experts in matters of school policy.").

232. See *Derry v. Marion Cmty. Schs.*, 790 F.Supp2d 839, 850 (N.D. Ind. 2008) ("While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child.").

## VI. CONCLUSION

Parental input is vital to keeping the public in our public schools. Parents must be active participants in their children's education, but that participation must not be allowed to turn the public school into a private tutor for the hundreds of parents in any given school.<sup>233</sup> Their concerns must be carefully listened to and considered, however, the elected school community and state representatives must oversee parent's requests. It is not practical to deliver a curriculum "on demand" for every student. The Supreme Court of New Hampshire's ruling in the 1879 case of *Kidder v. Chellis* remains instructive today. In *Kidder* the court wrote:

[T]he power of each parent to decide the question what studies the scholars should pursue, or what exercises they should perform, would be a power of disorganizing the school, and practically rendering it substantially useless. However judicious it may be to consult the wishes of parents, the disintegrating principle of parental authority to prevent all classification and destroy all system in any school, public or private, is unknown to the law.<sup>234</sup>

Courts have consistently placed the educational rights of parents beneath the rights of communities to create public schools deemed beneficial for the general welfare.<sup>235</sup> Public schools must be allowed to reasonably pursue the educational goals of the community as established through the democratic process of electing school board members,

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233. This Article focuses on individual parents' rights to direct the education of their child. An emerging policy response to the parental right to direct their child's education, but beyond the scope of this Article, is the passage of Parent Trigger laws in states such as California that allows parents through a petition process to take over an academically failing school that has failed to meet its Adequate Yearly Progress goals for at least three consecutive years and convert it into a charter school, which has to accept all of the students in the low performing school, or fire educators. CAL. EDUC. CODE § 53300 (West 2013). For more information on Parent Trigger Laws and their impact, see *California's Parent Trigger Law*, PARENT REVOLUTION, <http://parentrevolution.org/content/californias-parent-trigger-law-0> (last visited May 23, 2013) and Lyndsey Layton, *Parent Trigger: School Tests California Law that Allows Takeover Via Petition*, WASH. POST, March 5, 2012, [http://www.washingtonpost.com/national/parent-trigger-school-tests-california-law-that-allows-takeover-via-petition/2012/02/23/gIQA19gYtR\\_story.html](http://www.washingtonpost.com/national/parent-trigger-school-tests-california-law-that-allows-takeover-via-petition/2012/02/23/gIQA19gYtR_story.html).

234. *Kidder v. Chellis*, 59 N.H. 473, 476 (1879).

235. See *Fogg v. Bd. of Educ. of Union Sch. Dist. of Littleton*, 82 A. 173, 174-75 (N.H. 1912). The New Hampshire Supreme Court held the primary purpose of maintaining a public school system to be "the promotion of the general intelligence of the people constituting the body politic."

unencumbered by the particular desires parents may have for their children.<sup>236</sup>

The public school system works for American society because it is a unique public good. While we cannot take the public out of the public school, we also cannot take the public good out of the school and focus solely on the private benefit. "Public schools are not merely schools *for* the public, but schools of publicness: institutions where we learn what it means to *be* a public and start down the road toward common national and civic identity."<sup>237</sup> Shredding the curriculum in response to every parent objection, religious or secular, no matter how deeply held and cherished, is not in the best interests of students or the community. For example, the intersection of religion and the state requires what Justice White in his concurring opinion in *Wisconsin v. Yoder* called "a delicate balance of important but conflicting interests."<sup>238</sup> This is true whether the belief or interest is grounded in religious or personal convictions.

Parents are the best advocates for their child's education and the state is the best advocate for the education of all students. Educators must be sensitive to the needs and interests of parents and strive to work with them in the best interests of their child. Similarly, parents must realize that the public cannot simply turn over control of its curriculum to every parent. *Meyer* and *Pierce* give parents the fundamental right to select the system of education, not the specifics of the curriculum or the methods of instruction. Parents have choices, and, if they select a public school, there are procedures in place to allow them to influence the curriculum and instruction their child receives. A school district's democratically elected representatives and hired professional educators must be allowed to fashion a curriculum that comports with the community's political and educational decisions about what knowledge is of the greatest worth for its citizens.

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236. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 163 (1976) (stating in dicta, "The Court has repeatedly stressed that while parents have a constitutional right to send their children to private school and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.").

237. Benjamin R. Barber, *Public Schooling: Education for Democracy*, in *THE PUBLIC PURPOSE OF EDUCATION AND SCHOOLING* 21, 22 (John I. Goodlad & Timothy J. McMannon eds., 1997).

238. *Wisconsin v. Yoder*, 406 U.S. 205, 237 (1972) (White, J., concurring).

