# WHEN INSIDERS BECOME OUTSIDERS: PARENTAL OBJECTIONS TO PUBLIC SCHOOL SEX EDUCATION PROGRAMS

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## ABSTRACT

*This Note argues that parents' fundamental right to direct their children's moral and educational upbringing includes the right to exempt their children from objectionable sex education programs in public schools. Schools usurp parents' fundamental rights when they unilaterally introduce children to topics of human sexuality without parental notice or permission. Alleged violations of these rights merit strict scrutiny review from courts. When parents' objections are confined to discrete, tangible events, parents are constitutionally entitled to exempt their children from objectionable activities. The efficacy of this constitutional relief is more limited, however, when parental objections are pervasive and unassociated with a particular aspect of the school's program or curriculum.*

## INTRODUCTION

Public education has deep roots in America.[1] The state has an interest in ensuring that its citizens receive an education that enables them to be productive and useful citizens.[2] But the child is not the creature of the state, and parents have a fundamental right to direct



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1. *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

2. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State."); *Brown*, 347 U.S. at 493 ("[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship.").

their children's educational, moral, and religious upbringing.[3] Public education creates opportunities for tension between parents and the state because each seeks to influence child development. In the context of public education, when states make administrative and policy decisions to educate students effectively, parents' individual preferences must yield by some degree—exactly how much, however, is an open question.

The contours of parental rights in the context of public schools are ambiguous. The Supreme Court has long held that parents have a fundamental right to control the upbringing of their children.[4] This right, often referred to as the *Meyer-Pierce* right,[5] is rooted in the substantive due process protections afforded by the Fourteenth Amendment.[6] In light of Supreme Court jurisprudence, some parameters of parental rights are clear: the state cannot force parents to enroll their children in public school,[7] and parents cannot legitimately dispute reasonable regulations or curriculum requirements.[8] But uncertainty abounds in the legal terrain between these extremes. The Supreme Court has not addressed what happens when parents wish to exempt their child from certain public school

3. *E.g.*, *Yoder*, 406 U.S. at 232; Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see also* Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality opinion) (summarizing the Supreme Court's parental rights jurisprudence and concluding, "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children").

4. *See supra* note 3.

5. *E.g.*, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1204 (9th Cir. 2005). Because it was articulated in its earliest forms in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Note will use the terms "*Meyer-Pierce* right," "*Meyer-Pierce* doctrine," and "parental rights" to refer to parents' fundamental right to control the upbringing of their children.

6. *E.g.*, *Troxel*, 530 U.S. at 65–66 (plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). Substantive due process rests on the notion that some rights are so fundamental to the Fourteenth Amendment's concept of liberty that they are "to a great extent . . . immune from federal or state regulation or proscription." Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled on other grounds by* Lawrence v. Texas, 539 U.S. 558 (2003).

7. *E.g.*, *Pierce*, 268 U.S. at 535.

8. *See, e.g.*, *id.* at 534 ("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 of 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.").

programs or when, if ever, public schools transgress their legitimate authority as educators and usurp the parental role.

Perhaps the tensions between parents and state educators are best illustrated by the Sixth Circuit case, *Mozert v. Hawkins County Board of Education*.[9] Christian fundamentalist parents brought the suit, alleging that the series assigned for a "critical reading" course violated their right to control their children's moral and religious upbringing.[10] The court rejected the parents' claim, holding that the program did not amount to a violation because it did not compel students to affirm or deny any antithetical beliefs[11] and because public schools need not tailor their curricula to accommodate specific parental preferences.[12]

Although the Sixth Circuit's opinion would suggest that the school's victory was relatively straightforward,[13] the claim was in fact much more complex.[14] Professor Nomi Maya Stolzenberg articulates the unique problem posed by the dispute:

> Because the plaintiffs did not represent themselves as insular outsiders seeking to inhabit a perfectly separated sphere, their right to exit the public school system completely did not respond to their complaint. Conversely, because they did not seek to reshape or convert the public sphere, the school authorities could not readily dismiss their claim as an interference with the right of other students to be free from religious impositions. The *Mozert* plaintiffs were neither outsiders nor insiders. They sought to be both—and this

9. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

10. The plaintiffs' parental rights claim was premised on their assertion that the reading series was antithetical to their religious beliefs. *Id.* at 1060–61; *see also* Nomi Maya Stolzenberg, *"He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 595–97 (1993) (listing twenty-eight violations alleged by the plaintiffs).

11. *Mozert*, 827 F.2d at 1070.

12. *Id.* at 1064.

13. *Id.* at 1074 (Boggs, J., concurring) ("Under the court's assessment of the facts, this is a most uninteresting case. . . . The court reviews the record and finds that the plaintiffs actually want a school system that affirmatively teaches the correctness of their religion, and prevents other students from mentioning contrary ideas. If that is indeed the case, then it can be very easily resolved. It would obviously violate the Establishment Clause for any school system to agree with such an extravagant view.").

14. *See* Stolzenberg, *supra* note 10, at 591 ("Although the *Mozert* plaintiffs identified particular offensive 'teachings,' . . . their quarrel with the assigned series of textbooks was broader than that. They explicitly objected to the school's presentation of differing values and beliefs. . . . In other words, the plaintiffs objected to the very principles—tolerance and evenhandedness—traditionally used to justify liberal education.").

> posture made their resistance to exposure to diversity particularly difficult to understand.[15]

In essence, then, the question is what happens when parents seek to be both insiders and outsiders. If a goal of public education is exposure to diverse views,[16] then ushering those with minority viewpoints to the exit is counterproductive. To what extent can a purportedly liberal education system refuse to accommodate minority views without betraying its liberal label?

The questions posed by *Mozert* remain live issues, particularly in the context of sex education ("sex-ed"). Although states claim that sex-ed fits within the ambit of their educational mission,[17] many parents are concerned that public schools' introduction of human sexuality to young students usurps their parental right to direct their children's moral and religious upbringing.[18] Schools resist granting exemptions on the grounds that accommodation impermissibly submits public education to parental preferences.[19] As in *Mozert*, the parents who bring these suits are both insiders and outsiders: they desire public education's benefits for their children, but not at the expense of their parental rights.

This Note uses sex-ed programs to explore the contours of parental rights and constitutional remedies in the context of public schools.[20] Sex-ed programs provide an especially apt vehicle for this

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15. *Id.* at 590–91; *see also Mozert*, 827 F.2d at 1060–61 (noting that the parents only brought their challenge when the school discontinued an "alternative program" that had enabled the plaintiffs' children to opt out from the critical reading class).

16. *E.g.*, Stolzenberg, *supra* note 10, at 659.

17. Twenty-one states require public schools to educate their students about sexuality, disease prevention, or reproduction, and ten states permit (but do not require) such instruction. David Rigsby, *Sex Education in Schools*, 7 GEO. J. GENDER & L. 895, 895–96 (2006).

18. Parents undisputedly have the sole legal right to provide for children's spiritual and religious development. Establishment Clause jurisprudence forbids public schools from contributing to the religious upbringing of children, even at parents' behest or approval. *See, e.g.*, Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1984) (holding that a public school's approval of voluntary religious instruction during the school day violated the First and Fourteenth Amendments).

19. *See, e.g.*, Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 534 (1st Cir. 1995) ("If all parents had a fundamental constitutional right to dictate individually what schools teach their children, the schools would be forced to cater to a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter.").

20. It is undisputed that parents have the right to enroll their child in a private educational curriculum. *E.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925). When parents are able and willing to make that choice, they presumably retain a maximum control over their child's religious and moral upbringing. The more interesting question, however, and the focus of this Note, is the extent of parents' rights within public schools.

discussion because they often implicate deeply held beliefs,[21] they incite political controversy,[22] and they are arguably at the margins of schools' core educational functions.[23] Supreme Court jurisprudence leaves the extent of parents' constitutional rights in this context uncertain, and legal scholarship has given little attention to the question of constitutional remedies within public schools.[24] This Note argues that parents are constitutionally entitled to exempt their children from objectionable sex-ed programs and activities. Part I discusses the legal posture of parental rights by highlighting relevant Supreme Court case law and then analyzing several circuit court decisions that involve parental challenges to sex-ed programs. Part II demonstrates that sex-ed falls within the scope of parents' fundamental rights and that parental rights merit strict scrutiny judicial review. Part III develops and defends a bright-line rule that parents are constitutionally entitled to exempt their children from discrete objectionable activities or programs. Part IV discusses the limitations of judicial remedies in situations in which parents' objections are "not neatly tied to considerations of curriculum or educational environment."[25]

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21. *See infra* note 108 and accompanying text.

22. *E.g.*, Megan Boldt, *Lawmakers Let Sex Ed Debate Rage*, ST. PAUL PIONEER PRESS, June 11, 2007, at A1; Erin Richards, *Milwaukee Area School Districts Grapple with Sex-Ed Policies: Districts Shy Away*, MILWAUKEE J. SENTINEL, Aug. 6, 2008, at B1, *available at* http://www.jsonline.com/news/education/29428549.html.

23. *See infra* Part III.C.

24. A number of law review articles have commented on the tensions between parental rights and liberal education. *E.g.*, Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 937–1034 (1996); Stolzenberg, *supra* note 10, at 589–667; Tyll van Geel, *Citizenship Education and the Exercise of Religion*, 34 AKRON L. REV. 293, 372–81 (2000). Scholarship regarding a constitutional entitlement to exemptions is, however, more limited and does not specifically address the problems posed by parents' objections to sex-ed or other discrete aspects of public education. *See, e.g.*, Keith Brough, Note, *Sex Education Left at the Threshold of the School Door: Stricter Requirements for Parental Opt-Out Provisions*, 46 FAM. CT. REV. 409, at 412–13 (2008) (arguing that opt-out provisions are not constitutionally necessary); Elliott M. Davis, Recent Case, *Unjustly Usurping the Parental Right:* Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005)*, 29 HARV. J.L. & PUB. POL'Y 1133, 1143–44 (2006) (lamenting courts' failure to adequately protect parental rights); Heather M. Good, Comment, *"The Forgotten Child of Our Constitution": The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 641–79 (2005) (arguing for a more robust hybrid rights doctrine); Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2237–41 (2005) (arguing in favor of a more robust hybrid rights analysis to protect parental rights).

25. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 183 (3d Cir. 2005).

## I. THE LEGAL POSTURE OF PARENTAL RIGHTS IN PUBLIC SCHOOLS

When parents enroll their children in public school, they surrender a substantial degree of control over how and what their children are taught.[26] In the midst of a dearth of Supreme Court guidance regarding the scope of parental rights, the question is whether parental rights retain vitality once children cross the schoolhouse door. This Part discusses the current legal climate regarding parental rights and sex-ed. Section A presents the Supreme Court decisions that form the legal foundation for parental rights. Section B then illustrates the uncertainty and disagreement among federal circuit courts regarding the scope of parents' rights, particularly with respect to sex-ed programs in public schools.

### *A. Parental Rights and the Supreme Court*

The Supreme Court has said that "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[27] There is consequently a "private realm of family life which the state cannot enter."[28]

In *Pierce v. Society of Sisters*,[29] the Supreme Court invalidated a law requiring children to attend public school.[30] The law impermissibly restricted parents' substantive due process rights, which, the Court declared, included the choice to enroll their children in private schools.[31] The *Pierce* decision came on the heels of an earlier parental rights decision, *Meyer v. Nebraska*,[32] in which the Court struck down a law prohibiting schools from teaching any foreign language prior to eighth grade because it interfered with

26. For instance, parents generally cannot challenge a school's academic calendar, graduation requirements, or curriculum decisions (such as teaching the multiplication table in the second grade). *E.g.*, Parker v. Hurley, 514 F.3d 87, 102 (1st Cir. 2008); *C.N.*, 430 F.3d at 182; Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1204 (9th Cir. 2005); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395–96 (6th Cir. 2005); Leebaert v. Harrington, 332 F.3d 134, 141 (2d Cir. 2003); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 291 (5th Cir. 2001); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 702 (10th Cir. 1998).

27. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

28. *Id.*

29. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

30. *Id.* at 534–35.

31. *Id.*

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

parents' substantive due process right to educate their children.[33] Elaborating on *Meyer,* the *Pierce* Court held that, "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."[34] These additional obligations "include the inculcation of moral standards, religious beliefs, and elements of good citizenship."[35] The *Pierce* language suggests that these realms may be the exclusive province of parents; however, the Court also affirmed the state's power to require that "certain studies plainly essential to good citizenship must be taught."[36] Thus, both parents and the state are charged with equipping children for the elements of good citizenship, but parents appear to have a constitutional monopoly over children's moral and spiritual development.[37]

A final iconic Supreme Court decision respecting parental rights is *Wisconsin v. Yoder*.[38] In *Yoder*, the Court exempted Amish parents from compulsory schooling laws.[39] *Yoder* is therefore broader than *Meyer* and *Pierce* because the Amish parents sought to excuse their children from formal schooling requirements altogether.[40] In granting the exemption, the Court relied on both free exercise and substantive due process grounds.[41] *Yoder* thus stands as a significant building block for parents' constitutional right to direct their children's education and to control their children's moral and religious upbringing.

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33. *Id.* at 400–01.

34. *Pierce*, 268 U.S. at 535.

35. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

36. *Pierce*, 268 U.S. at 534.

37. States clearly cannot contribute to children's spiritual upbringing, for that would run afoul of the Establishment Clause. *E.g.*, Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 209–11 (1948); *see also, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992) (holding that a school graduation prayer violated the Establishment Clause). Given the connection between morality and religion, states at least must tread lightly and carefully when directing children's moral upbringing.

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

39. *Id.* at 234.

40. *Id.* at 209 ("[A]ttendance at high school, public or private, was contrary to the Amish religion and way of life.").

41. *Id.* at 233 ("[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely 'a reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.").

In its most recent decision regarding parental rights, *Troxel v. Granville*,[42] the Supreme Court reaffirmed that parents' right to direct their children's upbringing "is perhaps the oldest of the fundamental liberty interests recognized by [the] Court."[43] In *Troxel*, the Court struck down a law permitting any person to petition for visitation rights at any time as violating parents' substantive due process right to direct the "care, custody, and control of their children."[44] Unlike the statutes at issue in its predecessor cases, which involved flat prohibitions, the statute in *Troxel* did not take the children away from their mother, but instead limited her decisions regarding their child custody, care, and control by prescribing a particular visitation time with particular people.[45] *Troxel* can therefore be read as establishing that parental rights are implicated not only when the state flatly prohibits certain conduct, but also when the state *obstructs* parental decisionmaking.[46]

### *B. Disagreement among the Circuits about the Proper Role of Parental Rights with Respect to Sex-Ed*

Although Supreme Court precedent clearly establishes parents' right to control the moral and religious upbringing of their children, federal circuit courts disagree as to whether the *Meyer-Pierce* right retains any vitality once children cross the public schoolhouse door. This Section examines several federal circuit court decisions that illustrate the nebulous nature of parental rights in the context of public schools' sex-ed programs. Whereas the First and Ninth Circuits construe parental rights very narrowly, the Third Circuit offers an expansive view.

1. *"Keep Out": Parents' Rights Stop at the School's Door.* The First and Ninth Circuits have adopted a limited view of parental

42. Troxel v. Granville, 530 U.S. 57 (2000) (plurality opinion).

43. *Id.* at 65.

44. *Id.*

45. *Id.* at 72; *see also* Gruenke v. Seip, 225 F.3d 290, 306 (3d Cir. 2000) (recognizing that parental rights are implicated not only in the face of proscriptions but also when the state limits parents' options).

46. Several lower federal courts, however, have read *Meyer* and *Pierce* as merely a constitutional limitation on situations involving flat prohibitions on parental conduct. *E.g.*, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1205–06 (9th Cir. 2005); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 533–34 (1st Cir. 1995); *see also infra* Part I.B.1.

rights, holding that the *Meyer-Pierce* right is satisfied when parents choose whether or not to enroll their children in public school.

In *Fields v. Palmdale School District*,[47] parents of elementary school children alleged that the administration of a psychological harms survey to their children violated their parental rights.[48] Among other things, the survey asked the children how often they think about having sex, touch their own "private parts," and think about touching "other people's private parts."[49] Although the school sought and obtained parental permission before administering the survey, it neither conveyed the sexual nature of the survey nor offered parents an opportunity to review it before consenting to their child's participation.[50] The parents claimed that had they known about the survey's sexual nature, they would not have allowed their children to participate.[51]

In rejecting the parents' claim, the Ninth Circuit expanded the parameters of school authority at the expense of parental rights. The court held that although parents have a "right to inform their children when and as they wish on the subject of sex," they cannot "prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so."[52] Parents and schools therefore have equal authority to discuss sexual matters with children. Noting the logistical and administrative difficulties of accommodating parents' moral and religious preferences,[53] the court seemed chiefly motivated by a broad understanding of school authority. Because "education is not merely about teaching the basics of reading, writing, and arithmetic"[54] but also includes fostering children's mental health,[55]

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47. Fields v. Palmdale Sch. Dist., 427 F.3d 1197 (9th Cir. 2005).

48. *Id.* at 1203. The survey was administered to students in the first, third, and fifth grades. *Id.* at 1201.

49. *Id.* at 1202. The sexual references included the following statements, among others: "Touching my private parts too much;" "Thinking about having sex;" "Having sex feelings in my body;" and "Can't stop thinking about sex." *Id.* at 1202 n.3 (presenting the comprehensive list of references that gave rise to the lawsuit).

50. *See id.* at 1201 & n.1 (reproducing the language of the permission letter); *id.* at 1202 & n.3 (reproducing the survey questions that contained references to sex).

51. *Id.* at 1202.

52. *Id.* at 1206.

53. *Id.*

54. *Id.* at 1209.

55. *Id.*

the court found that the survey fell within the school's educational mission.[56]

In its narrowest sense, *Fields* means that parents and schools have equal authority to introduce children to sexual matters. More broadly, however, *Fields* stands for the proposition that parents, once they enroll their children in public school, have exercised the full extent of their constitutional rights.[57] They relinquish their exclusive right to direct their child's upbringing and instead share that authority with the state. If matters of mental health and sexuality are appropriately within the state's purview, then parents acquiesce to the state teaching their children about such matters.[58] Consistent with this reasoning, the Ninth Circuit rejected the parents' claim. The court explained that when they chose to enroll their children in the Palmdale School District, they also "chose" each decision that the school would make regarding their child's education, including its decision to administer the challenged sex survey.[59] The parents therefore had no constitutional complaint.[60]

Although the parents in *Fields* did not allege a free exercise claim, it is unlikely that they would have fared any better if they had. In a decision on which *Fields* relies heavily,[61] the First Circuit rejected

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56. *Id.* at 1211.

57. *See id.* at 1206 ("[O]nce parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished."). The court's original opinion states that "the *Meyer-Pierce* right does not extend beyond the threshold of the school door." *Id.* at 1207. The Ninth Circuit affirmed its holding en banc but amended the opinion to delete that line. Fields v. Palmdale Sch. Dist., 447 F.3d 1187, 1190–91 (9th Cir. 2006) (en banc). That modification, however, seems more an effort to placate public outcry, *e.g.*, Andrew Trotter, *House Criticizes Court's School Sex-Survey Ruling*, EDUC. WEEK, Nov. 30, 2005, at 28, than a substantive alteration. The Ninth Circuit still affirmed the rest of its *Fields* opinion, *Fields*, 447 F.3d at 1190, which strongly suggests that the *Meyer-Pierce* right is vindicated when parents enroll their children in public school, *see Fields*, 427 F.3d at 1206–07 (noting the limits on judicial scrutiny once parents have chosen to send their children to public school and "affirm[ing] that the *Meyer-Pierce* right does not extend beyond the threshold of the [public] school door").

58. *See Fields*, 427 F.3d at 1207 ("[W]hat *Meyer-Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself, a choice that ordinarily determines the type of education one's child will receive. The School District's design and administration of the survey in no way interfered with that right.").

59. *Id.* ("Indeed, it was only because the parents had selected the school they did that their children were asked the questions to which the parents objected.").

60. *See id.* at 1211 ("[P]arents are possessed of no constitutional right to prevent the public schools from providing information on [matters of and relating to sex] to their students in any forum or manner they select.").

61. *Id.* at 1205.

a "hybrid"[62] parental–free exercise claim. In *Brown v. Hot, Sexy and Safer Productions*,[63] parents challenged a public high school's assembly on AIDS awareness.[64] The mandatory, ninety-minute assembly consisted of "sexually explicit monologues" and "sexually suggestive skits" in which students chosen from the audience participated.[65] After "[telling] the students that they were going to have a 'group sexual experience, with audience participation,'" the instructor gave a sexually explicit presentation, using profanity, advocating various forms of sexual behavior, and making sexual comments about students.[66] Although the school had a policy of obtaining parental permission for any "instruction in human sexuality," it did not notify parents about the assembly or give them an opportunity to excuse their children.[67] The parents sued the school district, alleging, among other claims, that the assembly violated their free exercise rights and their right to direct and control the upbringing of their children.[68]

The court rejected the parents' claim, holding that the *Meyer-Pierce* right is limited to parents' choice of whether or not to send

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62. The notion of hybrid rights comes from the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In holding that neutral laws of general applicability trigger rational basis review in the face of free exercise challenges, *id.* at 879–80, the Court distinguished prior cases in which it had applied strict scrutiny: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children." *Id.* at 881 (citation omitted). This "hybrid rights" doctrine has produced much confusion among the circuits. *See, e.g.*, Lechliter, *supra* note 24, at 2222–34 (discussing the three approaches to hybrid rights claims that have been adopted by the circuit courts).

63. Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525 (1st Cir. 1995).

64. *Id.* at 529.

65. *Id.*

66. *Id.* ("Specifically, the complaint alleges that Landolphi: 1) told the students that they were going to have a 'group sexual experience, with audience participation'; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as 'erection wear'; 6) referred to being in 'deep sh–' after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up; 8) encouraged a male minor to display his 'orgasm face' with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a 'nice butt'; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.").

67. *Id.* at 530.

68. *Id.*

their children to public school.[69] It grounded its holding in the logistical ramifications of a free-sweeping right to dictate public school curricula, which the court feared would force schools "to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."[70]

The court also rejected the parents' free exercise challenge.[71] In its hybrid rights analysis, the court required that the free exercise claim be conjoined with an independently viable constitutional claim[72]—an approach reflecting the most stringent construction of hybrid rights.[73] The court dismissed the parents' free exercise claim on two grounds: first, because it was not conjoined with an independently viable constitutional claim, and second, because the parents did not allege that the program "threatened their entire way of life."[74] This requirement is somewhat bizarre given that Supreme Court precedent does not require that a claimant's entire way of life be threatened to trigger the free exercise clause's protections.[75]

*Brown* and *Fields* significantly restrict the scope of parental rights. Although it is unremarkable that parents do not have the right to dictate public schools' curricula, those plaintiffs sought considerably narrower relief. In each instance, the parents objected to a discrete activity or event.[76] They did not endeavor to force the school to teach their own views; rather, they requested only advance

69. *See id.* at 533 ("The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program . . . . We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.").

70. *See id.* at 534 (rejecting parents' right to "dictate" the public school curriculum of the school their child attends).

71. *Id.* at 539.

72. *Id.*

73. *See, e.g.*, Lechliter, *supra* note 24, at 2222–34 (discussing the three approaches to hybrid rights claims that have been adopted among the circuit courts).

74. *Brown*, 68 F.3d at 539.

75. *See* Employment Div. v. Smith, 494 U.S. 872, 886–87 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field.").

76. In *Brown*, the parents objected to a single, ninety-minute assembly. *Brown*, 68 F.3d at 529. In *Fields*, the survey lasted one hour. *See* Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1201 n.1 (9th Cir. 2005) ("The assessment will consist of three, twenty-minute self-report measures, which will be given to your child on one day during the last week of January.").

notice and an opportunity to exempt their children.[77] Like the parents in *Mozert*, they sought to be both insiders and outsiders.[78]

2. *"Parents Welcome": Absent a Compelling State Interest, Parents' Decisions Prevail.* Other circuits have rejected the First and Ninth Circuits' view that parental rights do not extend to the public school setting.[79] Most notably, the Third Circuit has affirmed a robust view of parental rights by requiring schools to yield to parental authority absent a compelling state interest.[80]

In *Gruenke v. Seip*,[81] a high school swimming coach allegedly pressured a student to take a pregnancy test after observing that she had decreased energy and poor performance at practice.[82] The coach discussed the results of the test with other members of the school community, but not with the student's parents.[83] In holding that the school had violated the parents' right to direct their child's upbringing, the court affirmed that certain spheres—including moral and religious education—are the exclusive province of parents. The court wrote:

> It is not educators, but parents, who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights. State deference to parental control over children is underscored by the Court's

77. These requests would impose, at most, a de minimis burden on schools. In *Brown*, the school had a policy of notification and exemption that it failed to follow in the situation giving rise to the parents' claims, *Brown*, 68 F.3d at 530, so the policy is presumptively not burdensome. In *Fields*, the parents were given inadequate notice. *See Fields*, 427 F.3d at 1201 ("The letter did not explicitly state that some questions involved sexual topics . . . .").

78. *See supra* note 15 and accompanying text.

79. *See, e.g.*, Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005) ("[T]his right [to direct the education and upbringing of one's children] plainly extends to the public school setting . . . ."); Arnold v. Bd. of Educ., 880 F.2d 305, 312–13 (11th Cir. 1989) (holding that a public school violated parents' constitutional right to direct their child's moral and religious upbringing when the school prevented a minor couple from consulting with their parents about the decision to obtain an abortion); Rhoades v. Penn-Harris-Madison Sch. Corp., 574 F. Supp. 2d 888, 898 (N.D. Ind. 2008) ("This court agrees with *C.N.* that the approach in *Fields* would gut parental rights on the issue of education of any content other than choosing a school."); Scheck v. Baileyville Sch. Comm., 530 F. Supp. 679, 688 (D. Me. 1982) ("Parents do not surrender their right to 'control the education of their own [children]' by enrolling them in public school, except to the extent that the prescribed curriculum serves legitimate educational purposes." (alteration in original) (quoting Meyer v. Nebraska, 262 U.S. 390, 401 (1923))).

80. Gruenke v. Seip, 225 F.3d 290, 305 (3d Cir. 2000).

81. Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000).

82. *Id.* at 295–96.

83. *Id.* at 297.

> admonitions that "the child is not the mere creature of the State," and that it is the parents' responsibility to inculcate "moral standards, religious beliefs, and elements of good citizenship."[84]

According to the Third Circuit, the parental right does not wane when parents decide to enroll their children in public school. Public school officials do retain legitimate authority to impose standards on students' conduct to "maintain order and a proper educational atmosphere."[85] But when there is a conflict, the Third Circuit affords deference to parental rights rather than to school policies:

> It is not unforeseeable . . . that a school's policies might come into conflict with the fundamental right of parents to raise and nurture their child. But when such collisions occur, the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest.[86]

Although *Gruenke* apparently strengthens parental rights claims, its ultimate influence remains to be seen.[87] *Gruenke* presents particularly unusual facts that are likely to be easily distinguishable from future cases. Coercing a student to take a pregnancy test and then widely discussing the results is damaging to a child in a way that a mandatory assembly or survey is not.[88] Indeed, in its rejection of a parental rights challenge to a sex survey, the Third Circuit distinguished *Gruenke* based on its uniquely egregious facts.[89]

In *C.N. v. Ridgewood Board of Education*,[90] parents challenged a survey given to middle and high school students.[91] Although the school notified parents of the survey and provided parents an opportunity to review its content,[92] the parents sued because the school administered the survey in a manner that suggested to students

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84. *Id.* at 307 (citations omitted).

85. *Id.* at 304.

86. *Id.* at 305.

87. *See generally* Robert Kubica, Issues in the Third Circuit, *Let's Talk About Sex: School Surveys and Parents' Fundamental Right to Make Decisions Concerning the Upbringing of Their Children*, 51 VILL. L. REV. 1085, 1104 (2006) (arguing that the Third Circuit typically favors schools in parental rights cases).

88. This is true if only because a child is especially vulnerable when facing an unexpected pregnancy.

89. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005).

90. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159 (3d Cir. 2005).

91. *Id.* at 161.

92. *Id.* at 164.

that it was mandatory.[93] The court rejected the parents' claim, finding that it fell short of the constitutional violation in *Gruenke*.[94] Given that the survey was voluntary and parents were notified, this holding is unsurprising. The *C.N.* court did, however, reiterate that parents occupy a unique sphere of authority into which schools cannot encroach[95] and explicitly rejected the narrow view of parental rights adopted by the First and Ninth Circuits.[96] Because the court found no constitutional violation in *C.N.*,[97] the real bite of *Gruenke* remains to be seen.

Nevertheless, *Gruenke* likely has implications beyond its unique facts. The court relied heavily on the finding that the coach's actions actually *prevented* the parents from dealing with their daughter's pregnancy discreetly.[98] When schools introduce young children to sexual matters or advocate sexual behaviors, they preempt parents' decisions about when children should be introduced to those topics (thereby limiting parents' options for how to deal with matters pertaining to sex).[99] Moreover, the First or Ninth Circuits likely would have decided *Gruenke* differently: under the rationale in *Fields*, a school's educational mission includes facilitating students' health, and providing pregnancy tests is reasonably related to that goal.[100]

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93. Although the survey was designed to be voluntary, *id.*, there was a considerable degree of ambiguity as to whether the survey was presented to students as a voluntary activity, *id.* at 175–76.

94. *Id.* at 185.

95. *See id.* at 185 n.26 ("[I]t is primarily the parents' right to 'inculcate moral standards, religious beliefs and elements of good citizenship.'" (quoting Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000))).

96. *Id.* ("In reaching this conclusion, we do not hold, as did the panel in *Fields v. Palmdale School District*, that the right of parents under the *Meyer-Pierce* rubric 'does not extend beyond the threshold of the school door.'" (quoting Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1207 (9th Cir. 2005))). Because the court in *Fields* so heavily relied on *Brown*, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1205 (9th Cir. 2005), the *C.N.* court's explicit rejection of *Fields* is tantamount to a rejection of *Brown* as well.

97. *C.N.*, 430 F.3d at 185.

98. Gruenke v. Seip, 225 F.3d 290, 306 (3d Cir. 2000).

99. *See C.N.*, 430 F.3d at 185 ("We recognize that introducing a child to sensitive topics before a parent might have done so herself can complicate and even undermine parental authority . . . ."); *Gruenke*, 225 F.3d at 307 ("School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children . . . ."); *see also* Tara Dahl, *Surveys in America's Classrooms: How Much Do Parents Really Know?*, 37 J.L. & EDUC. 143, 190 (2008) (suggesting that the plaintiff parents in *Fields* could have prevailed on their claim under the rationale in *Gruenke*).

100. Particularly when, as in *Gruenke*, the coach's action was motivated by concern over the swimmer's performance, *Gruenke*, 225 F.3d at 295–96, the pregnancy test can be considered

Unlike the constricted view of rights in the First and Ninth Circuits, the Third Circuit recognizes that parental rights extend beyond the decision to enroll children in public school. The essential conflict that these cases reveal is whether or not there is a province that uniquely belongs to parents, allowing them to tell a public school to "keep out."

## II. PARENTS' FUNDAMENTAL RIGHTS AND SEX-ED

The Supreme Court has recognized that although public education rests largely in the hands of state and local authorities, courts may appropriately step in when constitutional rights are implicated.[101] The scope of parents' right to direct their children's education and to control their moral and religious upbringing is crucial to understanding the merits of constitutional challenges to sex-ed programs. This Part argues that parents' fundamental right to direct their children's moral and educational upbringing includes the right to decide when and how to introduce them to topics of sexuality. When parents allege that this right has been violated, their claim should trigger strict scrutiny review.

### *A. The Parental Right Encompasses Sex-Ed*

Because views of sexuality are often inextricably linked to one's moral or religious beliefs,[102] parents' fundamental right to direct their

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reasonably related to the school's educational mission. There may, however, be a meaningful distinction between situations like those in *Brown* and *Fields*, which involve a generally applicable program that incidentally infringes on parental rights, and situations like that in *Gruenke*, which involve specific, targeted treatment of an individual student. *Cf.* Arcara v. Cloud Books, Inc., 478 U.S. 697, 704–05 (1986) (holding that a generally applicable public health regulation does not implicate the First Amendment when its effects on speech are merely incidental). *But see infra* Part II.B.

101. *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."). When constitutional rights are implicated, courts have been willing to step in and dictate certain aspects of public schools' curricula. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 871–72 (1982) (holding that school boards cannot remove books from the school library based on disagreement with the ideas they contain); *Epperson*, 393 U.S. at 109 (holding unconstitutional a prohibition against teaching evolution in public schools).

102. *E.g.*, Naomi Rivkind Shatz, Note, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 524–30 (2008).

children's upbringing should encompass their right to direct their children's exposure to sexual topics.

In *Fields* and *Brown*, the courts rejected the parents' claims as beyond the scope of Fourteenth Amendment rights.[103] By confining Supreme Court precedent to situations involving flat prohibitions on parental conduct,[104] the courts distinguished the claims at issue in *Fields* and *Brown* because parents were not altogether *prevented* from talking to their children about sex.[105] The Supreme Court's decision in *Troxel*, discussed in Part I.A, undermines this narrow construction of parental rights.[106] Although sex-ed does not affirmatively prohibit parental teaching about sex, it does "obstruct"[107] the parental right to decide how and when to discuss sexual issues. Sexual behavior and sexuality are controversial topics, and religious beliefs often shape individual views in these areas.[108] A school's unrestricted ability to introduce children to the topic of sex without parental notification or consent effectively preempts and usurps a parent's discretion as to when and how to discuss sex.[109]

Many courts and commentators doubt that a school's authority to teach children about sex without parental notice or consent unconstitutionally burdens parental rights.[110] After all, children are exposed to sexual matters through a multitude of sources, including classmates, television, advertising, and music.[111] Given these realities,

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103. Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1205 (9th Cir. 2005); Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 534 (1st Cir. 1995).

104. *Fields*, 427 F.3d at 1205; *Brown*, 68 F.3d at 533–34.

105. *See Fields*, 427 F.3d at 1206 ("Parents have a right to inform their children when and as they wish on the subject of sex . . . ."); *Brown*, 68 F.3d at 534 (noting that the parents' claim was not based on any flat prohibition).

106. *See supra* notes 42–46 and accompanying text.

107. *Cf.* Gruenke v. Seip, 225 F.3d 290, 306 (3d Cir. 2000) (discussing the allegation that a school counselor's conduct, which led to negative publicity, obstructed the plaintiff parent's right to address her daughter's pregnancy).

108. *E.g.*, Shatz, *supra* note 102, at 524–30.

109. Especially in the elementary school context, parents may decide not to introduce the topic of sex until their children are older. If a school has a unilateral right to teach children about sex, however, then it can preempt parents' decisions about when to initiate any discussions about sexuality.

110. *E.g.*, C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3rd Cir. 2005); Brough, *supra* note 24, at 413.

111. *E.g.*, *C.N.*, 430 F.3d at 185 ("[A] myriad of influences surround middle and high school students everyday, many of which are beyond the strict control of the parent or even abhorrent to the parent."); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 841–46 (2007). *See generally* DIANE E. LEVIN & JEAN KILBURNE, SO SEXY SO SOON: THE NEW SEXUALIZED CHILDHOOD AND WHAT PARENTS CAN DO TO PROTECT THEIR KIDS (2008)

a school's contributions to otherwise widely accessible sexual information may have little marginal effect on parental rights.

There are two flaws in this argument. First, there is a distinction between the incidental, endemic difficulties of childrearing and an affirmative state power to interfere. No other realm of civil rights acquiesces to government violations simply because "everyone else is doing it." The fact that people in society may espouse racist views, for instance, does not render the state's espousal of racism insignificant. Second, because a public school's instruction on sexuality carries the imprimatur of the state, it is uniquely authoritative—at least more so than the general cultural milieu.[112] The Supreme Court has consistently accounted for the impressionability of young children in the Establishment Clause context,[113] and it would be inconsistent to deny that impressionability when it comes to sex-ed.

A related argument is that public schools routinely limit parents' right to control their children through various administrative requirements, such as the hours in a school day, curriculum decisions, and school dress code policies.[114] These types of restrictions are routinely upheld;[115] indeed, without them, schools' educational role would be handicapped by insurmountable administrative burdens.[116] In *Fields*, the Ninth Circuit viewed the challenged survey as analogous to these types of school requirements and thus found parental objections similarly meritless.[117]

One must pause, however, and consider whether all parental rights claims are equal, especially in terms of the nature of the alleged violation. In *Blau v. Fort Thomas Public School District*,[118] the Sixth

(demonstrating that children are being sexualized at increasingly young ages and lamenting the adverse consequences).

112. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 883 (2004) (O'Connor, J., concurring) ("In the marketplace of ideas, the government has vast resources and special status.").

113. *E.g.*, Lee v. Weisman, 505 U.S 577, 592 (1992).

114. *E.g.*, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1204–05 (9th Cir. 2005).

115. *E.g.*, Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 385 (6th Cir. 2005) (mandatory dress code); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 291 (5th Cir. 2001) (mandatory uniform policy); Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694, 696 (10th Cir. 1998) (mandatory full-time attendance policy); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 176 (4th Cir. 1996) (mandatory community service requirements).

116. For a discussion of the argument that parental rights can sometimes appropriately handicap the educational role of schools, see *infra* Part III.C.

117. *See Fields*, 427 F.3d at 1207 (relying in part on *Blau* to conclude that a parent's *Meyer-Pierce* rights do not extend beyond the choice to enroll one's child in public school).

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

Circuit upheld a public high school's dress code against a parental rights claim.[119] The parents' claim in this case was essentially that they had a fundamental right to let their child wear whatever she wanted.[120] This asserted right is an attenuated leap from well-established parental rights, namely the right to direct the upbringing of one's children.[121] Perhaps the *Fields* court overlooked a meaningful difference between a fashion faux pas and conscientious objections. One commentator raised exactly this point:

> Implicitly, the [*Fields*] court equates an alleged right to exempt a child from a dress code with an alleged right to prevent seven-year-olds from taking a sexually laden survey. Though blue jeans might be stylish and comfortable, the parental interest in a child's ability to wear them does not offer a "flattering analogy" to the much more compelling interest in shielding a child from sexual content.[122]

In contrast to challenges to public school administrative guidelines, a parent's role in guiding a child's decisions is stronger when moral and religious precepts are at stake. Society *wants* parents to fulfill their role as moral tutors.[123] Moreover, the consequences of granting an exemption are entirely different in the dress code context, when an exemption would foil the policy's very purpose—uniformity—and impair its benefits.[124] In contrast, exempting one

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119. *Id.* at 395–96.

120. *See id.* at 389–90 ("[T]he Blaus have not met their burden of showing that the First Amendment protects [their child's] conduct—which in this instance amounts to nothing more than a generalized and vague desire to express her middle-school individuality. . . . [T]he First Amendment does not protect such vague and attenuated notions of expression—namely, self-expression through any and all clothing that a 12-year old may wish to wear on a given day.").

121. *See id.* at 393–94 ("The list of fundamental rights . . . does not include the wearing of dungarees . . . . Nor do the fundamental rights that the Court *has* recognized offer a flattering analogy to [the] claim [to wear blue jeans]. Whether it be the right to marry, the right to have children, *the right to direct the educational upbringing of one's child*, the right to marital privacy, the right to use contraception, the right to bodily integrity, or the right to abortion, none of these fundamental rights has much, if anything, in common with the right to wear blue jeans." (citations omitted) (second emphasis added)); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 289 (5th Cir. 2001) ("The fundamental right of filiation and companionship with one's children, which the Supreme Court examined in *Troxel*, is an entirely different balance of interests from the right of parents to send their children to a public school in clothes of their own choosing." (quoting Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 702 (N.D. Tex. 2000))).

122. Davis, *supra* note 24, at 1140.

123. *See infra* notes 142–46 and accompanying text.

124. The purposes of a dress code are to create unity, strengthen school spirit, minimize distractions, enhance safety, promote good behavior, reduce discipline problems, and bridge socioeconomic gaps. *E.g.*, *Blau*, 401 F.3d at 385. Allowing even one student to deviate from the

student from a sex-ed program does not undermine the school's purpose with respect to the other students.[125]

There is thus a strong argument that parents' constitutional right to direct their children's upbringing includes the right to decide when and how their children will learn about sexual matters. A school's decision to teach children about sex burdens that right.

### *B. Parental Rights Claims Merit Strict Scrutiny*

The Supreme Court explicitly has christened as "fundamental" parents' rights to direct the education and religious and moral upbringing of their children.[126] Fundamental rights typically trigger strict scrutiny review,[127] yet the Supreme Court has never been clear about the level of scrutiny it applies to parental rights. In its earliest parental rights cases, the Court apparently applied rational basis review.[128] But in *Troxel*, the Court implies that parental rights to control their children's upbringing trigger some level of heightened

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dress code would at least undermine the school's goals of minimizing distractions and bridging socioeconomic problems. *But see Littlefield*, 268 F.3d at 293 (describing a school district's provision allowing parents to opt their children out of the uniform requirement if they had a bona fide religious or philosophical objection).

125. *See infra* Part III.C. *But see* Parker v. Hurley, 474 F. Supp. 2d 261, 265 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008) ("An exodus from class when issues of homosexuality or same-sex marriage are to be discussed could send the message that gays, lesbians, and the children of same-sex parents are inferior and, therefore, have a damaging effect on those students. It might also undermine the [school officials'] efforts to educate the remaining other students to understand and respect differences in sexual orientation." (citation omitted)); Yuval Simchi-Levi, Note, *Amending the Massachusetts Parental Notification Statute*, 14 CARDOZO J.L. & GENDER 759, 776–79 (2008) (presenting social science data demonstrating the detrimental effects of intolerance on gay, lesbian, and transgender youth and arguing that education on sexual diversity in public schools benefits sexual minorities).

126. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children."); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (labeling "the traditional interest of parents with respect to the religious upbringing of their children" as "fundamental"); *see also* Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

127. *Glucksberg*, 521 U.S. at 721.

128. *See* Meyer v. Nebraska, 262 U.S. 390, 403 (1923) ("[T]he statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."). Under rational basis review, a statute need only bear "a reasonable relation to a legitimate state interest." *E.g.*, *Glucksberg*, 521 U.S. at 722.

scrutiny.[129] Although the circuits are divided on the issue,[130] the traditional application of strict scrutiny protection, coupled with *Troxel*, strongly supports strict scrutiny—or at the very least, heightened review—of infringements of parental rights.[131]

Parents' rights in the context of public school sex-ed fall within the rationale behind strict scrutiny protection. Courts typically apply strict scrutiny in two instances: when fundamental rights are at stake, or when there is a special concern that certain minorities are vulnerable to government oppression.[132] In both instances, strict scrutiny protects citizens by "plac[ing] the matter outside the arena of public debate and legislative action."[133] But because the Court is hesitant to extend the parameters of heightened constitutional protection,[134] it has outlined additional considerations for applying strict scrutiny. The Court primarily looks to whether the fundamental

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129. *See Troxel*, 530 U.S. at 65 (plurality opinion) (explaining "heightened protection [for] certain fundamental rights and liberty interests" and then labeling the parental interest in the care, custody, and control of children as a "fundamental liberty interest[]"); *id.* at 80 (Thomas, J., concurring) ("The opinions of the plurality, Justice Kennedy, and Justice Souter recognize [parents' constitutional right to determine who will educate and socialize their children], but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights."); Good, *supra* note 24, at 658–59 ("[G]iven the plurality opinion, coupled with Justice Thomas's concurrence [applying strict scrutiny]—at least five of the Justices favor at least intermediate scrutiny when a fundamental parental right is at issue.").

130. *Compare* Gruenke v. Seip, 225 F.3d 290, 305 (3d Cir. 2000) (requiring the school's infringing action to be "tied to a compelling interest"), *with* Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 533 n.5 (1st Cir. 1995) ("[T]he [*Meyer* and *Pierce*] opinions indicate that something less than the current 'compelling state interest' test was then used to evaluate a substantive due process challenge involving one of the listed liberty interests . . . ."). Although *Brown* was decided before *Troxel*, the First Circuit's analysis in subsequent cases suggests that it does not read *Troxel* to require strict scrutiny review of parental rights claims. *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 101 (1st Cir. 2008) ("The *Troxel* plurality did not . . . specifically address which standard of review to apply when this due process right is implicated.").

131. *See* Good, *supra* note 24, at 660 ("The question is not whether a heightened standard of review should apply but which heightened form applies: intermediate or strict scrutiny. Presumably strict scrutiny should apply, but at the very least, intermediate scrutiny should be used.").

132. *E.g.*, *Glucksberg*, 521 U.S. at 719–22; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–104 (1980); *see also* United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of [] political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); LUCAS A. POWE JR., THE WARREN COURT AND AMERICAN POLITICS 488 (2000) ("Footnote Four was designed in part to protect religious dissenters, not mainstream religions.").

133. *Glucksberg*, 521 U.S. at 720.

134. *E.g.*, *id.*

right is (1) "deeply rooted in [the] Nation's history and tradition"[135] and (2) "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it] were sacrificed.'"[136]

Parents' right to direct their children's education and moral training satisfies these two criteria.[137] There is a long tradition supporting parental rights and the duty of parents to care for their children. Blackstone described the parent-child relationship as one of the "most universal . . . in nature."[138] Of all parental duties, Blackstone believed that the duty to educate one's children was uniquely important.[139] Indeed, it is the only duty that he thought the state should proactively encourage parents to fulfill.[140] After tracing the development of parental rights over two thousand years, Professor Eric A. DeGroff concludes that "to suggest these values are 'deeply rooted in [the] Nation's history and tradition,' are 'basic values that underlie our society,' and reflect legal rights that have been 'traditionally protected by our society' would be, if anything, an understatement."[141]

Parents' right to control their children's moral and educational upbringing also satisfies the Court's second requirement. Parental care is indispensable to the health of a liberal democracy.[142] Professor DeGroff argues:

> It is difficult to imagine anything more destructive of liberty than a government with the authority to override parental choices concerning the development and values of the next generation—particularly religious or moral values. One of the keys to maintaining American democratic institutions has been the freedom

135. Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)), *overruled on other grounds by* Lawrence v. Texas, 539 U.S. 558 (2003).

136. *Id.* at 191–92 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

137. Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert *After 20 Years*, 38 J.L. & EDUC. 83, 108–28 (2009).

138. 1 WILLIAM BLACKSTONE, COMMENTARIES *446.

139. *Id.* at *450–51 ("The last duty of parents to their children is that of giving them an *education* suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any.").

140. *See id.* at *451 ("Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children.").

141. DeGroff, *supra* note 137, at 124 (footnotes omitted).

142. *See* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 120–22 (2000) (arguing that parental oversight of children's education and development is indispensable to the continuation of a liberal republic).

> of diverse families to choose for themselves what values to hold and what course to follow.[143]

Because parents have the primary responsibility for raising and educating their children, they are in some sense guardians of the republic.[144] It is therefore both natural—from a biological perspective—and beneficial—from a social capital perspective—for parents to educate their children.[145] This firmly rooted tradition is bolstered by the vast body of contemporary social science research showing that parents generally act in their children's best interests and can (and should) be entrusted with their primary care.[146]

The parental right to direct a child's *moral and religious* upbringing is especially deserving of strict scrutiny. This facet of parental rights necessarily implicates the free exercise clause, in addition to substantive due process, because these claims are inescapably hybrid. In *Employment Division v. Smith*,[147] the Supreme Court noted that strict scrutiny is appropriate for "hybrid claims," in which free exercise claims are conjoined with other fundamental rights to challenge a neutral and generally applicable law.[148]

*Smith*'s hybrid rights language has generated considerable confusion, controversy, and commentary among the circuits.[149] Though legitimate ambiguity surrounds the scope and application of hybrid rights, *Smith* unambiguously affirms the concept of hybrid rights set forth in *Wisconsin v. Yoder*. In *Yoder*, the court demanded more than a rational basis—and, indeed, arguably applied strict

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143. DeGroff, *supra* note 137, at 126–27.

144. Garnett, *supra* note 142, at 120–22.

145. Moreover, parents are in the best position to educate children. Professor Stephen G. Gilles argues that the state's incentive to act according to its conception of children's best interests is significantly lower than parents' incentives to act according to *their* conception of their child's interest. Because parents are more likely to effectively raise their children, according to Gilles, the state has an interest in protecting and respecting parental autonomy. Gilles, *supra* note 24, at 953–55.

146. *See generally id.* (citing legal, economic, and social science data supporting the claim that parents are properly entrusted with their children's care).

147. Employment Div. v. Smith, 494 U.S. 872 (1990).

148. *See id.* at 881 n.1 ("[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a reasonable relation to some purpose within the competency of the State is required . . . ." (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (internal quotation marks omitted))).

149. *See, e.g.*, Good, *supra* note 24, at 662–74 (presenting and discussing the circuits' divided approach to hybrid rights claims); Lechliter, *supra* note 24, at 2222–34 (outlining and categorizing the circuit split regarding hybrid rights).

scrutiny[150]—for the state's violation of Amish parents' right to direct the religious upbringing of their children.[151] *Smith* did not overrule *Yoder* but instead specifically preserved it. Professor Heather M. Good explains:

> The hybrid rights doctrine was created in *Smith* precisely for the purpose of distinguishing, *not overruling*, earlier precedent. Thus, while *Smith* requires a rational basis test in most situations, it implicitly requires a separate test, some form of heightened review, for hybrid situations. In articulating a bright-line rule, the Court did not overrule previous precedent. Rather, the Court made explicitly clear that its previous free exercise jurisprudence remained in force.[152]

Whatever its other implications, *Smith*'s hybrid claims language preserves *Yoder*'s heightened scrutiny as the applicable standard for parents' right to direct their children's moral and religious upbringing. Although circuits may disagree about the contours of hybrid rights,[153] they cannot reasonably disagree that a parental right claim conjoined with a free exercise claim merits heightened scrutiny. These considerations, in addition to the fact that parents' right to direct their children's moral and educational upbringing satisfies the Court's traditional criteria for applying strict scrutiny,[154] strongly support the contention that this right merits strict scrutiny review.[155]

## III. ANALYZING PARENTAL OBJECTIONS TO SEX-ED

In *Yoder*, the Supreme Court arrived at its decision by balancing the competing interests of the Amish parents and the state.[156] Because *Yoder* represents the Supreme Court's most comprehensive analysis

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150. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[W]e must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education . . . .").

151. *See id.* at 233 ("[W]hen the interests of parenthood are combined with a free exercise claim . . . more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.").

152. Good, *supra* note 24, at 655.

153. *See supra* note 149 and accompanying text.

154. *See supra* notes 132–46 and accompanying text.

155. Because strict scrutiny permits the government to justify actions with a compelling interest, heightened review will not remove all limits on parental authority. At a minimum, a compelling interest is implicated if parents physically harm their children, regardless of their motivation (religious or otherwise). Garnett, *supra* note 142, at 137–38.

156. *Yoder*, 406 U.S. at 214–29.

of parental rights claims in the context of education,[157] its analytical framework is useful for understanding how constitutional law should treat parents' right to direct their children's moral and religious upbringing in the context of public education.[158] Rather than inspiring judicial discretion, however, *Yoder* more appropriately informs the development of a bright-line rule in favor of granting parental exemptions.[159] The bright-line rule that follows from *Yoder* is that parents are entitled to exemptions when they object to discrete programs or activities in public schools. This Part develops that rule by applying the factors set forth in *Yoder* to sex-ed disputes. Section A addresses the nature of parents' interests in the face of public school sex-ed programs. Section B then discusses the state's interest in providing such information and denying exemptions. Finally, Section C analyzes the likely ramifications of constitutionally required exemptions.

### *A. The* Yoder *Framework*

*Yoder* involved a challenge brought by Amish parents against Wisconsin's compulsory education law.[160] In evaluating the parents' claim, the court promulgated a balancing test that weighed both

157. *See* Daniel J. Rose, Note, *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 B.C. L. REV. 861, 863 (1989) (noting that *Yoder* represents a balancing framework used by the Supreme Court to analyze education conflicts); *cf.* Crystal V. Hodgson, Note, *Coercion in the Classroom: The Inherent Tension Between the Free Exercise and Establishment Clauses in the Context of Evolution*, 9 NEXUS 171, 182 (2004) (arguing that *Yoder* provides an apt framework for evaluating parental objections to evolution curricula in public schools). *Compare Yoder*, 406 U.S. at 213–36 (employing an extended balancing test that measures parental interests against social interests), *with* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925) (discussing parental rights at significantly less length with less painstaking focus on balancing parental and social interests), *and* Meyer v. Nebraska, 262 U.S. 390, 399–403 (1923) (same).

158. Although the Amish parents brought a Free Exercise claim rather than a Fourteenth Amendment parental rights claim, the Court's analysis is applicable because it has since construed *Yoder* as a hybrid claim in which the Free Exercise clause and parental rights worked in tandem. Employment Div. v. Smith, 494 U.S. 872, 881–82 (1990). Moreover, because the Court applied heightened review in *Yoder*, 406 U.S. at 221, its analysis is applicable to parents' fundamental rights, which at the very least trigger heightened review, if not strict scrutiny, *see supra* Part II.B.

159. Because balancing tests confer discretion and spawn unpredictability, a bright-line rule more fully comports with the goals of fairness, efficiency, and predictability. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing that courts should apply bright-line rules rather than discretionary tests).

160. *Yoder*, 406 U.S. at 207.

parental and state interests.[161] The Court also reflected upon the nature and implications of the requested relief.[162] In granting the Amish an exemption, the Court noted that "there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education."[163]

The Court granted the exemption not only because it would not undermine the state's interest; it also implicitly furthered that interest. The Amish children received an education,[164] and the exemption did not hamper the state's administration of public schools. After all, the state does not have an interest in being the exclusive provider of education.[165] Rather, the state's interest is more appropriately described as *enabling parents* to provide for their children's education—by either providing public schools or permitting parents to use alternative education. Perhaps, therefore, state and parental interests coincide more than would initially appear.[166]

### *B. Parents' Interests*

Parents' interest in their children's moral and religious upbringing is significantly compromised if public schools have unilateral authority to introduce young children to and teach them about sex.[167] First, this authority usurps parents' ability to decide when

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161. *Id*. at 214–29.

162. *Id.* at 227.

163. *Id.*; *see also id.* at 234 ("The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.").

164. *Id.* at 223–26.

165. *Id.* at 226 n.14 ("While Jefferson recognized that education was essential to the welfare and liberty of the people, he was reluctant to directly force instruction of children 'in opposition to the will of the parent.'" (quoting Letter from Thomas Jefferson to Joseph Cabell, Sept. 19, 1817, *in* 17 WRITINGS OF THOMAS JEFFERSON 417, 423–24 (Mem. ed. 1904))); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The 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.").

166. The vast amount of social science research that shows the beneficial value of parental involvement in children's lives also bolsters this assertion. *See, e.g.*, Teresa Stanton Collett, *Protecting Our Daughters: The Need for the Vermont Parental Notification Law*, 26 VT. L. REV. 101, 130 n.152 (2001) (noting that parental involvement can be used to curb teen sexual activity).

167. *See supra* Part II.A.

and how to discuss sex with their children. Second, when a school advocates a particular message that conflicts with a parent's message at home, it undermines that parent's ability to direct his child's upbringing. Messages with the government's imprimatur carry particular persuasiveness.[168] Hearing divergent messages from parents and teachers can be detrimentally confusing, especially for young children. As Professor Emily Buss has noted:

> We can trust adults to understand the difference between these ceremonial references and more directive endorsements, because our understanding of self, and state, and our relationship to the state, has matured. Children's immaturity, in contrast, makes them far more vulnerable to a misapprehension of the state message. Indeed, it is impossible to entirely disentangle their emerging understanding of self from their interpretation of these messages from the state.[169]

### *C. State Interests*

The state has an interest in educating its students to be productive and engaged citizens.[170] A school's purview of authority therefore extends beyond mere reading, writing, and arithmetic. To that end, schools must retain some degree of autonomy to set and administer a curriculum for effective education.[171] The state's interest

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168. *E.g.*, McCreary Co. v. ACLU, 545 U.S. 844, 883 (2004) (O'Connor, J., concurring) ("In the marketplace of ideas, the government has vast resources and special status."); Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987); *see also* Parker v. Hurley, 514 F.3d 87, 100–01 (1st Cir. 2008) ("The impressionability of young school children has been noted as a relevant factor in the Establishment Clause context. . . . We see no principled reason why the age of students should be irrelevant in Free Exercise Clause cases.").

169. Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 51.

170. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."); *see also, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982) ("[P]ublic schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" (quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979))).

171. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("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 its basic education."); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395–96 (6th Cir. 2005) (recognizing that state and local authorities retain control over public school curricula and issues relating to "*how* a public school teaches [children]").

is therefore double-faceted and includes both effective administration and the substantive content of educational materials.

The state's interest in administrative efficiency is fairly uncontroversial.[172] To operate with any efficiency, a school's decisions cannot be subject to inexhaustible parental scrutiny and veto. The fact that schools have general administrative authority, however, does not constitute a compelling basis for encroaching on parental rights in all situations.[173] The nature of the interest in a given context is therefore crucial: in other words, the relevant question is not whether a state has administrative authority, but how much an exemption would undermine that authority in a given situation.

The more complicated aspect of parental objections pertains to a state's interest in teaching the objectionable material. Twenty-one states require public schools to educate their students about sexuality, disease prevention, or reproduction, and ten states permit (but do not require) such instruction.[174] Given the rise of sexually transmitted diseases among American youth,[175] the state has a public health interest in ensuring that citizens know about sex and disease prevention.[176] What is less clear, however, is whether this interest is appropriately vindicated through the public school system and at the expense of parental rights.

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172. *E.g.*, *Yoder*, 406 U.S. at 213; Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

173. *See, e.g.*, *Yoder*, 406 U.S. at 221 ("Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim [that a state's interest in compulsory education is compelling]; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption."). Moreover, administrative efficiency arguments do not typically prevail in the face of other civil rights claims. *See*, *e.g.*, Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999) (rejecting the government's administrative efficiency defense in the context of voter communication); United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 473 (1995) (rejecting the government's administrative efficiency defense to a free speech challenge). The disparate deference afforded to administrative concerns in different contexts reflects a general judicial disrespect for parental rights.

174. Simchi-Levi, *supra* note 125, at 770.

175. *See* Ctrs. for Disease Control and Prevention, *STD Surveillance 2006*, http://www.cdc.gov/std/stats06/adol.htm (last visited Apr. 7, 2009) ("Recent estimates suggest that while representing 25% of the ever sexually active population, 15 to 24 years of age acquire nearly half of all new STDs.").

176. *E.g.*, Brough, *supra* note 24, at 411–12.

Courts generally deem any interest within a school's educational mission legitimate.[177] Courts should be cautious when second-guessing a school's determination of its educational mission,[178] but those determinations should not be accepted blindly. Because schools articulate their own educational mission, their authority has no ascertainable limit. Justice Alito has noted:

> The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.[179]

In his concurring opinion in *Mozert*, Judge Boggs highlighted similar problems: "The school board recognizes no limitation on its power to require any curriculum, no matter how offensive or one-sided, and to expel those who will not study it, so long as it does not violate the Establishment Clause."[180]

The cases discussed in Part I.C illustrate the line-drawing problems caused by educational mission defenses. The Ninth Circuit held that the psychological survey in *Fields* fell within the school's educational mission because it was related to protecting children's mental health.[181] Whatever legitimate interest a state has in sex-ed is considerably diminished when a school provides surveys or directs information to young children.[182] When students are in elementary

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177. *See, e.g.*, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1210 (9th Cir. 2005) ("The defendants argue that the survey was intended to gauge the mental health of the School District's students . . . . In this respect, the School District's interest in the mental health of its students falls well within the state's authority as *parens patriae*. As such, the School District may legitimately play a role in the care and nurture of children entrusted to them for schooling.").

178. *See, e.g.*, *Yoder*, 406 U.S. at 235 ("[C]ourts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education.").

179. Morse v. Frederick, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring). In *Morse*, the Court rejected the school district's argument that its censorship authority extended as far as its educational mission. *See id.* ("The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'").

180. Mozert v. Hawkins Co. Bd. of Educ., 827 F.2d 1058, 1073 (6th Cir. 1987) (Boggs, J., concurring).

181. *Fields*, 427 F.3d at 1211.

182. This is because, in contrast to elementary school students, "sex education for adolescents involves pupils who are in a position to put what they learn into practice." Kenneth

school, any benefits of compulsory sex-ed are considerably offset when that education is provided over parents' objections or without their knowledge.[183] And in the case of surveys like those at issue in *Fields* and *C.N.*, the student participants were not "learning" in any traditional sense.[184] The usual information flow is reversed when children are providing information to their schools.[185] In these situations, the state's educational interest is attenuated.[186]

Given that parents and schools both have interests in providing children with sex-ed, the relevant and decisive factor appears to be the nature of the exemption and its effect on the school's interest.

### *D. Granting Relief*

The foregoing analysis is readily adaptable to cases in which parents object to discrete activities or programs[187] that undermine their authority to direct the moral and religious upbringing of their children by teaching them about sex. Parents' interest in directing their children's moral and religious upbringing falls within the scope of their Fourteenth Amendment rights. When parents object to discrete activities or programs that are easily isolated from the rest of

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L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 997 (2003).

183. *See supra* note 169 and accompanying text. Moreover, requiring parental consent would strengthen a school's interest in sex-ed programs. It is rational and useful to involve parents in sex-ed, and notifying parents—even those who would give consent readily—can only help facilitate further discussion. *See* NAT'L GUIDELINES TASK FORCE, GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION 20 (3d ed. 2004), *available at* http://www.siecus.org/pubs/guidelines/guidelines.pdf (announcing, *inter alia*, the following values inherent in the guidelines: "Parents should be the primary sexuality educators of their children"; "Families should provide children's first education about sexuality"; and "Families should share their values about sexuality with their children"). Permitting parents to excuse their children is unlikely to harm whatever pedagogical interest a school has in teaching elementary school children about sex because the children will encounter the information at a later (and arguably more appropriate) age.

184. *See Fields*, 427 F.3d at 1209–10 ("[T]he students who were questioned may or may not have 'learned' anything from the survey itself and may or may not have been 'taught' anything by the questions they were asked . . . .").

185. Davis, *supra* note 24, at 1139–40.

186. The school's interest in children's mental health is at least a step removed from its interest in teaching the core disciplines of reading, writing, and arithmetic.

187. Discrete activities and programs are easily isolated from the rest of the curriculum. Some examples include surveys, assemblies, and sex-ed classes. When parents object to more pervasive practices in the school, then the school's burden in providing an exemption correspondingly increases. *See infra* Part IV.

the curriculum, they are constitutionally entitled to notice and an opportunity to exempt their children.[188]

This Note has discussed the interests of both parents and the state.[189] Parents have an interest in guiding their child's moral and religious development, and instruction on or exposure to sexual matters implicates that interest. Schools also have an interest in educating children about sexual health. But when parents request an exemption, they do not necessarily undermine the school's interest. If parents truly are best equipped to facilitate children's moral well-being,[190] then the *state* has an interest in enabling *parents* to direct their children's moral and religious upbringing. In these instances, as in *Yoder*, an exemption would be especially appropriate.

Even if parent and state interests conflict,[191] however, the de minimis burden that exemptions entail justifies vindicating parental interests.[192] In cases involving objections to discrete events, the school's interest is slight.[193] Parents in these cases have not requested that their views be *taught* in the classroom, but only that they be notified and given an opportunity to exempt their children. In cases like *Brown*, in which the exemption applies only to a short assembly, a school can hardly claim substantial administrative disruption if

188. Parental requests for notice have particularly strong constitutional backing because they inherently implicate procedural due process concerns. Because procedural due process requires notice and a hearing, *e.g.*, Goss v. Lopez, 419 U.S. 565, 579 (1975), constitutional law implicitly entitles parents to notice before public schools teach children about matters that conflict with the parental province, *cf.* Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 584 (1972) (Douglas, J., dissenting) ("'[T]he protection of the individual against arbitrary action . . . [is] the very essence of due process,' but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such arbitrary action." (alterations and omission in original) (citation omitted) (quoting Slochower v. Bd. of Educ., 350 U.S. 551, 559 (1956) (internal quotation marks omitted))). Practically, this would require a school to notify parents about its curriculum and programs, which—in an era of ready access to information via the Internet—should not pose a significant burden.

189. *See supra* Part III.B–C.

190. *E.g.*, Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944); Gilles, *supra* note 24, at 961–65; *see supra* notes 142–46 and accompanying text.

191. Sex-ed programs in public schools are arguably a response to parents' failure to adequately educate their children about sex. Brough, *supra* note 24, at 410.

192. For example, in *Brown*, the school had a policy of notification and exemption which it failed to follow in the situation giving rise to the parents' claims, Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 530 (1st Cir. 1995), so the policy is presumptively not burdensome. *See supra* note 173.

193. *See supra* notes 183–86 and accompanying text.

parents excuse their children.[194] A similarly slight burden arises when surveys are at issue, as in *C.N.* and *Fields*. Even for multi-week health classes, however, the school's burden is minimal.[195] There is no financial burden,[196] and any administrative burden is apparently small. The greatest burden that a school can assert, therefore, is that exemptions undermine its educational mission—which, as discussed, is an inherently circumspect perimeter for authority.[197]

Moreover, granting an exemption serves the broader purpose of making public schools more hospitable to diverse viewpoints.[198] Although objecting parents are often viewed contemptuously as intolerant naysayers, their objections are grounded in firmly held religious and philosophical beliefs. It is ironic that schools would prefer to abandon their mission of educating these children *at all*, rather than to accommodate them in narrow and specific instances.[199] When parents' only options are to subject their children to objectionable lessons and information, or to remove their children from public school, then they often face a Hobson's choice.[200] Moreover, if these children are channeled into alternative educational systems, then the majority loses an opportunity to engage minority

194. Indeed, in *Brown*, the school had a policy requiring notification and an opportunity for exemption but failed to follow that policy in the situation giving rise to the claim. *Brown*, 68 F.3d at 530.

195. Even in *Mozert*, in which parents requested an exemption from an *entire course*, the school initially granted exemptions—apparently without any ensuing administrative burdens. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1060 (6th Cir. 1987).

196. Courts have held that the parental right must give way when the consequences would cause significant financial burdens to the school. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998) (upholding a school's policy that prohibited part-time attendance based on funding constrictions on the ground that "decisions as to how to allocate scarce resources, as well as what curriculum to offer or require, are uniquely committed to the discretion of local school authorities").

197. *See supra* notes 177–80 and accompanying text.

198. Good, *supra* note 24, at 677–78.

199. *See Mozert*, 827 F.2d at 1074 (Boggs, J., concurring) ("Though the [school] board recognized that their allegedly compelling interests in shaping the education of Tennessee children could not be served at all if they drove the children from the school, the board felt it better not be associated with any hybrid [critical reading] program."); Good, *supra* note 24, at 678 ("The upside is that the child and parent are free to exercise their beliefs, but the downside is that those same beliefs become hidden from both majority understanding and critique. Such a system certainly cannot be said to promote diversity and tolerance.").

200. Good, *supra* note 24, at 676; *see also* Morse v. Frederick, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring) ("Most parents, realistically, have no choice but to send their children to public school and little ability to influence what occurs in the school.").

beliefs.[201] The Supreme Court has consistently affirmed the value of diversity in education,[202] and religious and philosophical diversity makes a valuable contribution to education.

Some courts have expressed concern that an exemption for sex-ed programs will open the floodgates for "countless moral, religious, or philosophical objections that parents might have to other [school] decisions."[203] So long as a parent objects to a discrete program, however, there is indeed no constitutional basis for granting or denying relief based on the rationale underlying that objection.[204] An exemption from an assembly or survey discussing violence would not be any more burdensome than exemptions from sex-ed in similarly discrete and isolated situations.[205] A problem arises, however, when parents' objections—regardless of their bases—are so pervasive that an exemption would deprive children of an effective education.

## IV. THE LIMITS OF CONSTITUTIONAL REMEDIES

When parental objections are not tied to discrete events, a court-ordered remedy becomes less feasible. Although courts may grant exemptions without stepping too heavily on schools' toes, judges are ill-equipped to craft educational policy.[206] Courts are appropriately reluctant to interfere with a public school's determination of

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201. Good, *supra* note 24, at 677–78; *see also Mozert*, 827 F.2d at 1073–74 (Boggs, J., concurring) (lamenting that, absent accommodation, public schools are "entitled to say, 'my way or the highway'").

202. *E.g.*, Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

203. Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005).

204. When a parent's objection (whatever its basis) is to a series of classes, however, then an exemption may be inappropriate if it would effectively deprive the child of an education. *See infra* Part IV. Thus a parent's objection to a semester-long sex-ed class (which is arguably beyond the school's core educational functions, *see supra* Part III.C) will more likely be vindicated than a parents' philosophical objection to a math class.

205. For a discussion of the logic underlying slippery slope arguments, see generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003). Specifically, the fear that granting an exemption in one instance would lead to other requests for exemptions is unpersuasive if there is nothing problematic about those additional exemptions—and indeed, if those additional exemptions foster greater respect for diverse viewpoints then they are actually desirable. *See id*. at 1104–05 ("When decision A alters people's attitudes about B, this alteration may be part of a good learning process.").

206. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) ("[C]ourts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education."). Moreover, permitting courts to craft educational policy would be highly discretionary and therefore give rise to unpredictable and potentially arbitrary results. *See supra* note 159 and text accompanying note 179.

curriculum requirements,[207] and they typically reject parents' attempts to exempt children from entire classes, especially when a school has already offered a reasonable compromise.[208] In some cases, parental objections are so extensive that granting an exemption is tantamount to denying their child an education.[209] When parents' objections are pervasive and amorphous (that is, when they cannot be tied to a discrete, tangible event), exemptions provide an unsatisfactory remedy.

*Parker v. Hurley*,[210] a First Circuit case, illustrates the problems that arise with pervasive objections. Parents whose kindergarten and second-grade children were given books depicting same-sex relationships challenged a public school's authority to do so.[211] The court rejected the parents' claims, holding that the parents' *Meyer-Pierce* right does not entitle parents to an exemption from certain books used in public schools[212] and that no free exercise violation had occurred.[213] The court distinguished *Brown* due to factual and legal

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207. *See, e.g.*, Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987) (reversing the district court's grant of an exemption for children whose parents objected to a "critical reading" class); Davis v. Page, 385 F. Supp. 395, 402 (D.N.H. 1974) (denying objecting parents the right to exempt their children from a public school's proposed "Health Education" course).

208. In *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003), a father sought to exempt his son from a public school's seventh grade health class requirement. *Id.* at 135. The school had granted exemptions for the six classes dealing with sexuality but required attendance at the other classes. *Id.* at 136. Despite the father's religious and moral objections to the school teaching his son about drugs and tobacco, *id.* at 137–38, the court held that it would be "difficult or impossible" for a public school to meet the educational needs of its students if every parent had a fundamental right to dictate his child's curriculum, *id.* at 141.

209. *See Davis*, 385 F. Supp. at 401 ("If these children are allowed to leave the classroom whenever audio-visual equipment is being used, then they will be denied an effective education."). In *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974), parents challenged a public school's use of audiovisual equipment as violating their parental rights and free exercise of religion. *Id.* at 398. The court denied the parents' request for an exemption from the use of all audiovisual equipment, but did grant an exemption when audiovisual equipment was being used for entertainment rather than educational purposes. *Id.* at 401.

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

211. *Id.* at 92–93. The parents, however, objected to any mention of same-sex relationships to their children. *See id.* at 105 ("In the present case, the plaintiffs claim that the exposure of their children, at these young ages and in this setting, to ways of life contrary to the parents' religious beliefs violates their ability to direct the religious upbringing of their children. . . . The heart of plaintiffs' free exercise claim is a claim of 'indoctrination': that the state has put pressure on their children to endorse an affirmative view of gay marriage and has thus undercut the parents' efforts to inculcate their children with their own opposing religious views.").

212. *Id.* at 102.

213. *Id.* at 99.

differences,[214] but nevertheless held that parents do not have a right to limit public schools' decisions to expose children to matters relating to sex so long as a school acts within its educational mission.[215]

*Parker* is an especially intriguing case because of the pervasiveness of the parents' objection. Their complaint was not limited to a specific class, event, or educational practice but was instead a much broader objection to the discussion of same-sex relationships.[216] Although same-sex relationships may raise questions among young children, merely referencing them cannot be called sex education.[217] Unlike cases involving discrete events, a school cannot easily predict when or how the subject of same-sex relationships may arise in the course of a school day.

*Parker* illustrates the broader problem that arises when parents object not to a specific incident but rather to the general worldview promulgated by a public school curriculum. The nature of this objection renders notice or exemption impossible. Parental notification would impose insurmountable administrative and logistical challenges on schools, and even if exemptions were feasible, they would necessarily be so broad that children would be deprived of an education. Such pervasive objections simply cannot be tackled by schools, and courts are ill-equipped to devise solutions.

In these situations, parents' obvious choice is to remove their children from the public school system. The problem with that solution, however, is that most parents do not have the economic wherewithal to pursue alternate education, whether at home or through private school.[218] For the vast majority of parents, therefore, the "choice" to remove their children from public school is illusory. And yet it is these parents whose rights are most threatened.[219] A constitutional right with no practical remedy leaves these parents with

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214. *Id.* at 100–01 (noting that *Brown* involved an assembly for high school students whereas *Parker* involved the education of elementary school students).

215. *Id.* at 96 n.7.

216. *Id.* at 90; *see supra* note 211.

217. This is particularly true in Massachusetts, where same-sex marriage is recognized legally. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970–71 (2003) (Greaney, J., concurring) (recognizing same-sex marriage on the basis of an equal protection analysis). Indeed, in the context of Massachusetts's marriage laws, these parents' claim seems especially futile and difficult to accommodate.

218. Good, *supra* note 24, at 676; *see also* Morse v. Frederick, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring) ("Most parents, realistically, have no choice but to send their children to public school and little ability to influence what occurs in the school.").

219. *See supra* note 132 and accompanying text.

little recourse. The stakes are high not only for parents but also for society.[220]

## CONCLUSION

Professor Richard Garnett explains why parents' right to control the moral and religious upbringing of their children must be taken seriously:

> [I]t looks like the emerging consensus in political theory is that the poet, William Ross Wallace, was right (as was the creepy movie): The hand that rocks the cradle rules the world. In other words, those who decide what children may and should learn thereby shape, if not determine, those children's character and commitments, as well as those of the community.[221]

Because parental involvement is vital to the health of a liberal republic, and because children's flourishing is inextricably related to parental involvement, public schools cannot unilaterally usurp the parental role. When parents object to discrete programs and events, they are entitled to notice and an opportunity to exempt their child. Without this right, a parent's "choice" to send his child to public school is meaningless. But this remedy has limitations and cannot offer a satisfactory resolution to the infinite hypothetical conflicts that may arise between parents and schools.

At its core, the inevitable conflict between parents and schools favors school choice. If parents were able to take their money with them, then their right to leave public schools would be significantly more meaningful. This is a job for state legislatures and school districts. If parents can exercise greater choice, then administrative concerns will dissipate as parents freely select the educational environment most consonant with their values and preferences, largely eliminating the need for accommodation through exemptions. School choice is a *truly* liberal solution to the goals of publicly funded liberal education. It respects every viewpoint by actually *enabling* parents to direct their children's education and upbringing according to their individual values and beliefs. This is a sharp contrast to the current system, which gives lip service to parental rights while silencing any attempt to exercise them.

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220. *See supra* Part II.A; *supra* notes 142–46 and accompanying text.

221. Garnett, *supra* note 142, at 121.