

# THE LAW AND THE CURRICULUM

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Since schools exist to convey to youngsters certain knowledge, skills, and attitudes deemed necessary to help them develop as individuals and become contributing members of society, the learning experiences afforded children under the aegis of the school are a paramount concern of government. In the United States where the state is the governmental unit responsible for education, it is the state legislature which has the authority to regulate the curriculum. In regard to what must be taught and what must not be taught the power of the state legislature is plenary, so long, of course, as individual liberties protected by the Federal Constitution and its Amendments are not denied and prescriptions of the particular state constitution are observed. In some states there are myriad statutes pertaining directly to the curriculum; in others there are relatively few detailed laws. To varying extents in different states, state boards and state departments of education are granted authority in curricular matters by the legislatures, and they too operate differently in regard to specificity of curricular regulations.

The local board of education is the legal body most closely associated with what is taught to boys and girls. An agency of the state (as differentiated from the local) government, it has the responsibility for conducting the schools in its district within the framework of the state constitution, state statutes, and the state board of education's regulations. Curricular changes, particularly the addition of new courses or activities, usually have originated on the local level. State statutes for the most part have followed rather than preceded curricular innovations in enterprising local districts. In the typical pattern, a local school board, convinced of the educational merit of a proposal, puts it into effect in the absence of a statutory prohibition. If the idea proves sound, it will be adopted by other local school boards. Eventually this "typical" curricular change might be put into a permissive state law and possibly into a state requirement. Frequently a new item is challenged in the courts as an *ultra vires* act of the board or one involving improper use of tax money, thereby depriving the taxpayer of property without due process of law. In an overwhelmingly large percentage of such instances the courts, as pointed out later, have upheld the considered actions of local boards and paved the way for general acceptance of once novel elements in the curriculum. Examples include kindergartens, music, domestic science, modern languages, physical education, and thrift as well as the now firm pillar of public education—the high school.

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## I

## STATUTORY PROVISIONS

## A. Subject Matter

1. *Specific elements.* In a particular state there are three legal conditions which may prevail in regard to a specific curricular item written into the law. First, state law may require that the item be taught in all public schools (perhaps in private schools as well). Most of the statutes pertaining to curriculum are of this nature. Second, permissive legislation specifically may legalize a certain element to be included in the curriculum of a local district at the option of the local board of education. Another form of permissive legislation provides that under certain conditions a pupil may be excused from what otherwise would be a requirement. Third, a certain teaching may be prohibited in all schools in the state. The several states have their peculiar inclusions in these three categories.

In a few states specific curricular matters are mentioned in the state constitutions. The Louisiana Constitution, for example, provides that "There shall be taught in the elementary schools only fundamental branches of study, including instruction upon the constitutional system of State and national government and the duties of citizenship."<sup>1</sup> The New Mexico Constitution prescribes that "The legislature . . . shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to . . . pupils and students [who speak Spanish]."<sup>2</sup> The Utah Constitution orders teaching of the metric system.<sup>3</sup> On the prohibitive side, several state constitutions include statements similar to the following one in Nevada: "No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this constitution."<sup>4</sup>

In state laws the most popular curricular prescription pertains to teaching the Constitution of the United States. All but three states require this, and thirty-two require teaching the appropriate state constitution. Thirty-six states require the teaching of the history of our country in elementary grades, and nineteen in high school.<sup>5</sup> Other rather common curricular mandates include instruction in such specifics as the effects of alcohol and narcotics, arithmetic, spelling, American government, the Declaration of Independence, conservation, driving, health, safety, physical training, and the observance of such occasions as Washington's Birthday and Armistice Day.

One of the more specific of such statutes is the Kansas law stipulating that the following be taught: ". . . the skills and knowledges indicated by the terms reading, writing, arithmetic, geography, orthography, English grammar and composition, history of the United States and of the state of Kansas, civil government and the duties of citizenship, health and hygiene, together with such other subjects as the state superintendent may determine."<sup>6</sup> In Oregon, state law directs the required

<sup>1</sup> LA. CONST. ART. 12, §3.

<sup>2</sup> N. MEX. CONST. ART. 12, §8.

<sup>3</sup> UTAH CONST. ART. 11, §11.

<sup>4</sup> NEV. CONST. ART. 11, §9.

<sup>5</sup> CLARENCE E. SWINGLEY, *THE LEGAL BASIS OF CIVIC EDUCATION IN THE UNITED STATES FROM 1900 TO 1949* 54-55, 74 (unpublished dissertation, University of Chicago, 1950).

<sup>6</sup> KAN. GEN. STAT. ANN. §72-1101 (1949).

physical education program "to develop as minimum essentials normal symmetrical growth, organic vigor, strength and endurance, good posture, skills of bodily movement and coordination, and high levels of such qualities as agility, strength, speed, power, endurance, flexibility, balance, [and] relaxation."<sup>7</sup> Texas has an unusual mandate, namely, that "Suitable instruction shall be given in the primary grades . . . regarding kindness to animals and the protection of birds and their nests and eggs."<sup>8</sup>

Many laws include detailed prescriptions regarding the grades in which a subject should be taught and how many hours should be devoted to it. Indiana, as an illustration, prescribes that "All schools shall provide within the two weeks immediately preceding the day of any general, congressional or state election for all pupils in grades six through twelve inclusive, five full recitation periods of class discussion concerning our system of government in the State of Indiana and the United States, our methods of voting, our party structures, our election laws and the responsibilities of citizen participation in government and in elections."<sup>9</sup> In Delaware on November 11 schools "shall hold appropriate exercises between the hours of eleven A.M. and twelve o'clock noon in memory of 'Armistice Day.'"<sup>10</sup> A few statutes include provisions for examinations in required subjects, *e.g.*, in Georgia "No student in any school or college [in any manner supported by public funds] shall receive a certificate of graduation without previously passing a satisfactory examination upon the provisions and principles of the United States Constitution and the Constitution of Georgia."<sup>11</sup>

Some laws contain provisos for exceptions to requirements. Indiana law, for instance, requires the teaching of hygiene and sanitary science, including special instruction relative to the ways in which dangerous communicable diseases are spread and how to restrict and prevent them. However, "Any person who in writing objects, or any minor whose parent or guardian so objects, to health and hygiene courses on the grounds that such courses conflict with their religious teachings shall be excused from receiving medical instruction or instruction in hygiene or sanitary science, given by lectures or otherwise, in the public schools of the state, and no penalties as to grades or graduation shall result therefrom."<sup>12</sup>

Elements likewise may be excluded from the curriculum by state statute. This prohibitive power has been exercised against teaching the theory of evolution, Communism, "subversive" doctrines, sectarian doctrines, and vivisection. Also giving any instruction using a language other than English may be forbidden.

2. *Ideas, Attitudes, and Influences.* Many state prescriptions go beyond the stipulation of concrete fields of knowledge into the realm of ideas, attitudes, and influences to be placed in the public school curriculum. Most of the less definite mandates are concerned with patriotism and good citizenship. A number of statutes simply include "patriotism" in the list of required teachings, whereas others, like the

<sup>7</sup> ORE. REV. STAT. §336.190 (1953).

<sup>8</sup> TEX. CIV. STAT. ANN. ART. 2911 (1951).

<sup>9</sup> IND. STAT. ANN. §28-3434 (1953 Cum. Pocket Supp.).

<sup>10</sup> DEL. CODE ANN. §4110 (1953).

<sup>11</sup> GA. CODE ANN. §32-706 (1952).

<sup>12</sup> IND. STAT. ANN. §35-2612 (1953 Cum. Pocket Supp.).

following one in Arkansas, go into a description of the goal: "the instilling into the hearts of the various pupils of an understanding of the United States and of a love of country and of a devotion to the principles of American Government."<sup>13</sup> In about one-sixth of the states, teachers have to swear that they will promote patriotism in their classes. "Good citizenship" is another learning that state statutes frequently require. Often this is tied in with patriotism, but it may stand alone as a requirement with or without a description.<sup>14</sup> Nebraska adds a negative twist in that its teachers are bound by state law to teach "opposition to all organizations and activities that would destroy our present form of government."<sup>15</sup>

Several statutes require instruction in the realm of moral conduct. In Virginia, "The entire scheme of training [in the public schools] shall emphasize moral education through lessons given by teachers and imparted by appropriate reading selections."<sup>16</sup> In Florida teachers are bound to "labor faithfully and earnestly for the advancement of the pupils in their studies, deportment and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every Christian virtue."<sup>17</sup> In Illinois, "Every public school teacher shall teach the pupils honesty, kindness, justice, and moral courage for the purpose of lessening crime and raising the standard of good citizenship."<sup>18</sup>

In twenty-one states, laws prevent the teaching of "subversive" doctrines variously defined or described, but related to the overthrow of the government by unconstitutional means.<sup>19</sup> Texas law, more descriptive than many, forbids teachers to advocate ideas or "doctrines which seek to undermine or overthrow by force or violence the republican and democratic forms of the government in the United States, or which in any way seek to establish a government that does not rest upon the fundamental principle of the consent of the governed."<sup>20</sup> Sectarian teachings and influences are barred in most states.

3. *Adjuncts.* A case could be made for the point of view that almost all laws pertaining to the schools affect the curriculum. Finance laws to pay for school operation, building laws to house the operation, and personnel laws to cover those handling the instruction certainly influence the curriculum. Laws concerning transportation, school lunches, and health services impinge more directly. Although such laws will not be treated here, attention must be given to some items not directly a part of what is taught in the schools, but very close to the curriculum even when the term is narrowly interpreted. Among such "adjuncts" are provisions related to reading the Bible, reciting the Lord's Prayer, and pledging allegiance to or saluting the flag. The Bible situation in the various states is one of the most inconsistent, legally speak-

<sup>13</sup> ARK. STAT. tit. 80, §1613 (1947).

<sup>14</sup> Neb. Laws, 1951, Legislative Bill 257, §4.

<sup>15</sup> FLA. STAT. ANN. §231.09(3) (1943).

<sup>16</sup> E. EDMUND REUTTER, JR., THE SCHOOL ADMINISTRATOR AND SUBVERSIVE ACTIVITIES 14-23 (Studies in Educ., Teachers Coll., Columbia University, 1951). See, also, WILLARD S. ELSBREE AND E. EDMUND REUTTER, JR., STAFF PERSONNEL IN THE PUBLIC SCHOOLS 311-316 (1954).

<sup>17</sup> TEX. REV. CIV. STAT. §2908a (1942).

<sup>18</sup> See notes 6 and 9, *supra*.

<sup>19</sup> VA. CODE §22-238 (1950).

<sup>20</sup> ILL. STAT. ANN. §123.1241 (rev. 1940).

ing. As of 1953, twelve states require the reading of the Bible in the public schools as part of opening exercises, four states forbid such use of the Bible, five states have permissive legislation leaving the issue to local determination, and twenty-seven states have no laws on the subject.<sup>21</sup> Some states have legislated permission to recite the Lord's Prayer every morning in school. The flag salute is a part of opening exercises in a number of states despite the fact that the United States Supreme Court has ruled that such an exercise cannot be made compulsory.<sup>22</sup> New Jersey, for example, prescribes recitation of the pledge of allegiance but excuses from participation children with "conscientious scruples against such pledge or salute."<sup>23</sup>

## B. Methods

1. *General.* Many statutes deal with methods to be used in teaching prescribed subjects in the public schools. About two-thirds of the states provide that all instruction be given in English. Occasionally, as in Louisiana,<sup>24</sup> this is a constitutional mandate.

Florida state law imposes on teachers the obligation to "see that such subjects [those prescribed] are efficiently taught by means of pictures, charts, oral instruction, and lectures, and other approved methods."<sup>25</sup> In Minnesota the following methods for teaching "subjects and exercises tending and calculated to encourage and inculcate a spirit of patriotism" are given by statute: "Such exercises shall consist of the singing of patriotic songs, readings from American history and from the biographies of American statesmen and patriots, and such other patriotic exercises as the superintendent or teachers of such school may determine."<sup>26</sup> In Oklahoma a legislative requirement is "the teaching of citizenship in the United States, in the State of Oklahoma, and other countries, through the study of the ideals, history and government of the United States, other countries of the world, and the State of Oklahoma and through the study of the principles of democracy as they apply in the lives of citizens."<sup>27</sup>

The state of Idaho outlines for its teachers detailed instructions regarding the required daily Bible reading. "The teacher shall not comment upon, interpret or construe any of the passages or verses read. In response to questions from any pupil or pupils calling for commentary upon, or explanation, construction or interpretation of any of the verses or passages read, the teacher shall, without comment, refer the inquirer to his parents or guardian for reply."<sup>28</sup>

2. *Texts and Materials.* All states have some sort of legislation relative to textbooks and some have laws pertaining to other instructional materials. Utah is un-

<sup>21</sup> Bolmeier, *What the Courts Say About Church and Public School Relationships*, in LEE O. GARBER, *THE YEARBOOK OF SCHOOL LAW*, 1953, 91.

<sup>22</sup> West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

<sup>23</sup> N.J. STAT. ANN. §18:14-80 (1953 Cum. Ann. Pocket Part).

<sup>24</sup> LA. CONST. ART. 12, §12.

<sup>25</sup> FLA. STAT. ANN. §231.09(1) (1953 Pocket Part).

<sup>26</sup> MINN. STAT. ANN. §131.18 (1946).

<sup>27</sup> OKLA. STAT. ANN. tit. 70, §11-3 (1950).

<sup>28</sup> IDAHO GEN. LAWS ANN. §33-2707 (1948).

usual in that the state constitution contains a textbook provision—a negative one. “Neither the Legislature nor the State Board of Education shall have power to prescribe text books to be used in the common schools.”<sup>29</sup> About half of the states adopt textbooks on a statewide basis through the state board of education or a state textbook commission. There is considerable variation in details. For a given subject or a given grade the state may prescribe a single book or there may be a list of several from which local authorities have a choice. Often procedures differ for elementary and high school textbooks. A few state laws provide for printing textbooks by the state rather than buying them from commercial publishers, but only California has gone far in that direction. Several states have laws licensing publishers and requiring that prices charged within those states be no higher than prices in any other jurisdiction. Once a book has been adopted as a text, it cannot be changed for a specific number of years in some states, *e.g.*, five years in Illinois.<sup>30</sup>

Textbooks are provided free to students for at least some grades in over two-thirds of the states. About half of these states stipulate that the books be paid for by the state rather than local units.<sup>31</sup> A few statutes provide that textbooks be furnished on the same basis to all children regardless of whether or not they attend public schools.

Not uncommon is a type of provision like the following Texas statute: “All textbooks on physiology and hygiene purchased in the future for use in the public schools of this State shall include at least one chapter on the effects of alcohol and narcotics.”<sup>32</sup> The post World War II period has featured considerable legislative concern over possible “subversive” materials getting into the schools, and legislative investigating committees have given attention to the question in more than a dozen states. Texas went so far in 1953 as to require a loyalty oath of authors whose books would be used in the public schools.<sup>33</sup>

## II

### JUDICIAL INTERPRETATIONS

The right of the state generally to regulate the public school curriculum has been treated by the United States Supreme Court as follows:<sup>34</sup>

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. . . .

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State’s power to prescribe a curriculum for institutions which it supports.

<sup>29</sup> UTAH CONST. ART. II, §9.

<sup>30</sup> ILL. STAT. ANN. §123.1258 (rev. 1946).

<sup>31</sup> Keesecker, *Free Textbook Trends Across the Nation*, *School Life*, Dec. 1949, pp. 44-45.

<sup>32</sup> TEX. CIV. STAT. ANN. ART. 2911 (1951).

<sup>33</sup> TEX. REV. CIV. STAT. ART. 6252-7 (1954 Cum. Ann. Pocket Part).

<sup>34</sup> *Meyer v. Nebraska*, 262 U.S. 390, 401, 402 (1923).

In another case the Supreme Court spoke on this point again.<sup>35</sup>

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 certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The main issues, then, lie along the somewhat hazy border between the parent's rights regarding the education of his children and the state's power and responsibility for the education of its citizens. The power of the state may be looked at in two aspects—that exercised by the legislature itself, and that exercised by local boards of education under expressed or implied delegated authority.

#### A. Subject Matter

1. *Specific elements.* That the legislature can provide more than a rudimentary education is well established. In the words of one court upholding a requirement for teaching agriculture to boys and housekeeping to girls in the public schools, "The power of the legislature to impose a system of public school education upon local communities is not limited to common branches alone."<sup>36</sup> The right of the legislature to permit, or even require, the establishment of kindergartens has been upheld,<sup>37</sup> as has authorization for junior colleges.<sup>38</sup>

Undoubtedly the most widely publicized case in this area is the Scopes evolution case. A Tennessee law forbidding the teaching of evolution was challenged by a teacher, John Scopes, who deliberately violated it. The law was upheld as being within the state's power. (Scopes escaped through a technicality the penalty assessed by the lower court, and the court of review suggested that the Attorney General suspend further prosecution.) The opinion stated:<sup>39</sup>

If they [school authorities] believe that the teaching of the Science of Biology has been so hampered by . . . [the law in question] as to render such an effort no longer desirable, this course of study may be entirely omitted from the curriculum of our schools. If this be regarded as a misfortune, it must be charged to the legislature.

The United States Supreme Court had ruled a few years before, however, that a law prohibiting the teaching of a foreign language in grades lower than the ninth was beyond the state's power.<sup>40</sup>

No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.

<sup>35</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

<sup>36</sup> *Associated Schools v. School Dist. No. 83*, 122 Minn. 254, 258, 142 N.W. 325, 327 (1913).

<sup>37</sup> *In re Kindergarten Schools*, 18 Colo. 234, 32 Pac. 422 (1893); *Posey v. Board of Education*, 199 N.C. 306, 154 S.E. 393 (1930).

<sup>38</sup> *McHenry v. Ouachita Parish School Board*, 169 La. 646, 125 So. 841 (1929); *Zimmerman v. Board of Education*, 199 N.C. 259, 154 S.E. 397 (1930).

<sup>39</sup> *Scopes v. State of Tennessee*, 154 Tenn. 105, 120, 289 S.W. 363, 367 (1927).

<sup>40</sup> *Meyer v. Nebraska*, *supra* note 34, at 403.

The power of local boards of education to provide curricular activities not specifically enumerated in state statutes has been contested many times, with the results clearly indicating that this generally may be done. Indeed, in the last decade or two the doctrine has rarely been challenged. As stated in Indiana, "It can not be doubted, we think, that the Legislature has given the trustees of the public school corporations the discretionary power to direct, from time to time, what branches of learning, in addition to those specified in the statute, shall be taught in the public schools of their respective corporations."<sup>41</sup> In a leading case arising in California, the court, while approving instruction in dancing, said:<sup>42</sup>

The legislature . . . quite naturally and with eminent propriety, has committed to . . . [school] authorities the right and power to prescribe the courses of study to be followed in the various grades of the system. . . . To all such regulations, if they be reasonable or not violative of any of their fundamental rights, or those of their parents or guardians, the pupils are bound to conform. . . .

It is also a proposition upon which there cannot exist any ground for legitimate controversy that, superadded to the mental training afforded by the public schools and public universities, there should be maintained a system of physical education or training . . . as will develop bodily and organic vigor in the pupils as an essential aid to the full development of their mentalities. . . .

A Montana court, in upholding a local board in building and equipping an outdoor "gymnasium," pointed out that the real purpose of the public schools was to develop good citizenship, and added, "Mentality without physical well-being does not make for good citizenship—the good citizen, the man or woman who is of the greatest value to the state, is the one whose every faculty is developed and alert."<sup>43</sup> Similar reasoning appears in a decision of an Arizona court:<sup>44</sup>

It seems to us that, to hold things of this kind [competitive athletics] are less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens, physically, mentally, and morally, than the study of algebra and Latin, is an absurdity. Competitive athletic games, therefore, from every standpoint, may properly be included in a public school curriculum.

Many courts have stated the case more strongly, such as one in Kansas which emphasized the authority of school boards to provide for instruction in subjects other than those specifically required, while adding that "The various boards of education, in providing for and sponsoring the various activities mentioned, have exercised a discretion which the statutes and the law have vested in them, and with which we may not interfere unless a clear case of fraud or abuse is shown."<sup>45</sup> A 1950 case in Missouri re-emphasizes this doctrine as follows: ". . . the Board of Edu-

<sup>41</sup> *W. P. Myers Publishing Co. v. White River School Township*, 28 Ind. App. 91, 93, 62 N.E. 66, 67 (1901), quoting from *State ex rel. Andrew v. Webber*, 108 Ind. 31, 37, 8 N.E. 708, 712 (1886).

<sup>42</sup> *Hardwick v. Board of School Trustees of Fruitridge School Dist.*, 54 Cal. App. 696, 702, 205 Pac. 49, 51 (1921).

<sup>43</sup> *McNair v. School Dist. No. 1*, 87 Mont. 423, 428, 288 Pac. 188, 190 (1930).

<sup>44</sup> *Alexander v. Phillips*, 31 Ariz. 503, 513, 254 Pac. 1056, 1059 (1927).

<sup>45</sup> *State Tax Commission v. Board of Education of Holton*, 146 Kan. 722, 725-726, 73 P.2d 49, 52 (1937).

cation has complete discretion to determine what courses shall be given, continued or discontinued and this cannot be controlled or interfered with by any court."<sup>46</sup>

Cases in courts of record have upheld local boards of education in establishing without express legislative permission high schools, kindergartens, and junior colleges and in offering courses in grammar, composition, debating, agriculture, domestic science, modern languages, music, athletics, dancing, bookkeeping, and commercial subjects in general. A course in Bible study, however, was disallowed in Washington on grounds of sectarianism which was proscribed by the legal structure of the state. In that case the issue involved credit given for studying the Bible outside of school, with the school furnishing supervision to the extent of an outline, examination, and grading.<sup>47</sup>

"It is the administrative function of the school directors and superintendents to meet changing educational conditions through the creation of new courses, reassignment of teachers, and rearrangement of curriculum."<sup>48</sup> So spoke the Supreme Court of Pennsylvania in a case brought by a discharged teacher who was not qualified to teach in the new curriculum (commercial subjects) which had attracted students away from the traditional academic program in which the plaintiff had taught and which had caused a reduction in staff. The court reasoned further:

If we sustain appellant's contention, we not only "freeze" the discretion accorded to school boards in their control over the courses of study, but stagnate development in our educational policies. School boards will not risk the establishment of new departments or courses if they must continue to employ teachers made unnecessary through such development.

Just as a local school board may add courses, so may it drop them (*e.g.*, kindergarten for financial reasons<sup>49</sup>) unless a course is required by the state.<sup>50</sup>

The above discussion has focused on the power of governmental bodies relative to elements in the curriculum. Judicial opinion also has dealt with a parent's right not to have his child take a certain course. Two statements taken from early cases are pertinent.

No parent has the right to demand that the interests of the children of others shall be sacrificed for the interests of his child; and he cannot, consequently, insist that his child shall be placed or kept in particular classes, when by so doing others will be retarded in the advancement they would otherwise make; or that his child shall be taught studies not in the prescribed course of the school, or be allowed to use a text-book different from that decided to be used in the school, or that he shall be allowed to adopt methods of study that interfere with others in their studies. The rights of each are to be enjoyed and exercised only with reference to the equal rights of all others.<sup>51</sup>

<sup>46</sup> State *ex rel.* Brewton v. Board of Education of St. Louis, 361 Mo. 86, 91, 233 S.W.2d 697, 699-700 (1950).

<sup>47</sup> State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 173 Pac. 35 (1918).

<sup>48</sup> Jones v. Holes, 334 Pa. 538, 542, 541, 6 A.2d 102, 104 (1939).

<sup>49</sup> Ehret v. School Dist. of Kulpmont, 333 Pa. 518, 5 A.2d 188 (1939).

<sup>50</sup> Posey v. Board of Education, 199 N.C. 306, 154 S.E. 393 (1930); Jones v. Board of Trustees, 8 Cal.App.2d 146, 47 P.2d 804 (1935).

<sup>51</sup> Trustees of Schools v. People *ex rel.* Van Allen, 87 Ill. 303, 307 (1877).

The right of the parent . . . to determine what studies his child shall pursue is paramount to that of the trustees or teacher. . . . No pupil attending the school can be compelled to study any prescribed branch against the protest of the parent . . . so long as the failure of the . . . [pupil to do so] does not prejudice the equal rights of other students. . . .<sup>52</sup>

Inconsistencies appear in the decisions of courts on the point in question. In the latter case quoted above, the parent's refusal to have his child study grammar because "that said study was not taught in said school as he had been instructed when he went to school" was upheld. In contrast other courts in very similar cases have ruled against parents because of the insufficiency of the reasons given for desiring the pupils to be excused.<sup>53</sup> Religious scruples generally constitute sufficient reason to refrain from a prescribed activity. Such a reason was acceptable to the California court in the case concerning dancing discussed previously,<sup>54</sup> yet *obiter dicta* in that case held that such scruples were not grounds for failing to salute the flag.<sup>55</sup>

2. *Ideas, Attitudes, and Influences.* That the state can require "certain studies plainly essential to good citizenship" and can prevent the teaching in the public schools of things "manifestly inimical to the public welfare" is well established.<sup>56</sup> In this connection laws aimed at assuring the loyalty of teachers through oaths or otherwise have been upheld so long as constitutional safeguards for the individual are observed.<sup>57</sup> Subtle influences are as reprehensible as direct statements. "We are not so naïve as to accept as gospel the argument that a teacher who believes in the destruction of our form of government will not affect his students. It is not necessary to impart a thought by direct statement. The result may be accomplished by indirect, subtle, insinuations; by what is left unsaid as well as by what is said."<sup>58</sup> Courts also have validated the dismissal of teachers for exercising such influences as may derive from remarks derogatory of the government, as differentiated from those aimed at overthrow of the government.<sup>59</sup> Where the state requires the teaching of a patriotic attitude, the removal of a teacher who was a conscientious objector opposed to combat and non-combat service in the armed forces has been upheld.<sup>60</sup>

The barring of sectarian influences is within the realm of the state's power.<sup>61</sup> So is the banning of immoral influences, *e.g.*, teaching polygamy<sup>62</sup> and use of profane

<sup>52</sup> State *ex rel.* Sheibley v. School Dist. No. 1, 31 Neb. 552, 557, 48 N.W. 393, 395 (1891).

<sup>53</sup> State *ex rel.* Andrews v. Webber, 108 Ind. 31, 8 N.E. 708 (1886); Samuel Benedict Memorial School v. Bradford, 111 Ga. 801, 36 S.E. 920 (1900).

<sup>54</sup> Hardwick v. Board of School Trustees of Fruitridge School District, *supra* note 42.

<sup>55</sup> For a contrary and overruling point of view, see West Virginia State Board of Education v. Barnette, *supra* note 22.

<sup>56</sup> Pierce v. Society of Sisters, *supra* note 35.

<sup>57</sup> See REUTTER, THE SCHOOL ADMINISTRATOR AND SUBVERSIVE ACTIVITIES c. 5 (1951); and ELSDREE AND REUTTER, STAFF PERSONNEL IN THE PUBLIC SCHOOLS 326-329 (1954).

<sup>58</sup> L'Hommedieu v. Board of Regents, 276 App. Div. 494, 505, 95 N.Y.S.2d 443, 453 (3d Dep't 1950).

<sup>59</sup> REUTTER, THE SCHOOL ADMINISTRATOR AND SUBVERSIVE ACTIVITIES 52-54 (1951).

<sup>60</sup> State *ex rel.* Schweitzer v. Turner, 155 Fla. 270, 19 So.2d 832 (1944).

<sup>61</sup> Bolmeier, *What the Courts Say About Church and Public School Relationships*, in LEE O. GARBER, THE YEARBOOK OF SCHOOL LAW 1953, 91-104.

<sup>62</sup> Davis v. Beason, 133 U.S. 333 (1890).

language.<sup>63</sup> Teaching the attitude of thrift is within the power of the local board of education.<sup>64</sup>

3. *Adjuncts.* In an unusual action the United States Supreme Court in 1943 reversed one of its previous decisions and adopted the view that a compulsory flag salute violated Constitutional religious freedoms.<sup>65</sup> This action invalidated the holdings of several state courts and caused the rewriting of many pertinent state laws to permit children to be excused on religious grounds from "pledging allegiance to the flag."

Whether the Bible may be read without comment in opening exercises has not been adjudicated by the United States Supreme Court, and state courts are in disagreement on the point.<sup>66</sup> Recitation of the Lord's Prayer is in a similarly hazy legal status.

### B. Methods

1. *General.* The legislature, according to a Tennessee court, "must have an unrestricted right to prescribe methods, and the Courts cannot interfere with it, unless some scheme is devised which is contrary to other provisions of the Constitution. . . ."<sup>67</sup> Also an Arizona court has stated:<sup>68</sup>

While the purpose of the public school and its justification for existence is always the same, like all other human institutions, it changes from time to time in the methods by which that purpose may be carried out. . . .

If physical education be one of the special subjects permitted by law, it is a matter for the reasonable discretion of our school authorities as to how such subject should be taught. . . .

The above reasoning led the Arizona court not to bar competitive athletics and consequent expenditures for a stadium.

Parents are not the ones to decide methods, according to the Supreme Court of Iowa in a case where a parent wanted bookkeeping taught differently. The court refused to interfere because the school board's "selection of the books to be used, the methods employed, and the character of the instruction suitable for the pupils is an exercise of discretion [by the board]."<sup>69</sup> A Vermont case of almost a century ago held that "With this concession to the teacher of fixing the mode of teaching these [required] branches, it seems very obvious that English composition may fairly be regarded as an allowable mode of teaching many of these branches."<sup>70</sup> In a later case in Georgia the court ruled that "Whether a particular subject given . . . for composition or debate is suited to the age and advancement of the pupil is a question for determination by . . . [public school] authorities, and not by the courts."<sup>71</sup> In

<sup>63</sup> *Bump v. Union High School Dist. No. 3*, 144 Ore. 390, 24 P.2d 330 (1933).

<sup>64</sup> *Security National Bank v. Bagley*, 202 Iowa 701, 210 N.W. 947 (1926).

<sup>65</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>66</sup> Bolmeier, *supra* note 61, at 91-95.

<sup>67</sup> *Leeper v. State of Tennessee*, 103 Tenn. 500, 518, 53 S.W. 962, 965 (1899).

<sup>68</sup> *Alexander v. Phillips*, 31 Ariz. 503, 510, 513-514, 254 Pac. 1056, 1058, 1059 (1927).

<sup>69</sup> *Neilan v. Board of Directors of Independent School District of Sioux City*, 200 Iowa 860, 862, 205 N.W. 506, 507 (1925).

<sup>70</sup> *Guernsey v. Pitkin*, 32 Vt. 224, 228 (1859).

<sup>71</sup> *Samuel Benedict Memorial School v. Bradford*, 111 Ga. 801, 802, 36 S.E. 920 (1900).

Massachusetts a parent complained that a student in the class was assigned by the teacher to grade papers and that the student had on more than one occasion marked his child's paper erroneously with consequent injury to his child's health from anxiety and nervousness. There the court said that "the management and direction of pupils and studies" was out of its jurisdiction, but that "While constrained to this decision we cannot refrain from the expression of disapproval of the practice of setting a rival pupil in judgment upon the work of an eager and zealous competitor."<sup>72</sup>

An interesting commentary on the relationship of the board of education and the professional staff in regard to methods appears in a relatively recent decision of the Supreme Court of Appeals of West Virginia.<sup>73</sup>

The law does not contemplate that the members of a board of education shall supervise the professional work of teachers, principals, and superintendents. They are not teachers, and ordinarily, not qualified to be such. Generally they do not possess qualifications to pass upon methods of instruction and discipline. The law clearly contemplated that professionally trained teachers, principals and superintendents shall have exclusive control of these matters.

The power of a local school board to hire a special teacher for music rather than having the regular staff handle such instruction has been recognized in Kansas:<sup>74</sup>

Being vested with authority and discretion in the employment of teachers, the district board was at liberty to determine whether the interests of the pupils would be best subserved by the employment of more than one teacher, and the branches to be taught by each. The board was, of course, required to employ qualified teachers. . . .

2. *Texts and Materials.* One of the leading textbook cases is an 1890 one in Indiana where it was ruled that the legislature has<sup>75</sup>

the authority to prescribe the course of study, and the system of instruction that shall be pursued and adopted, as well as the books which shall be used. . . . Having this authority, the Legislature may not only prescribe regulations for using such books, but it may also declare how the books shall be obtained and distributed.

Another leading case in this area is from Tennessee, where the court in upholding the constitutionality of a uniform textbook law commented, "That the State may establish a uniform series of books to be taught in the schools which it provides and controls, seems to be a proposition as evident as that it may provide a uniform system of schools, which we take it, is not now an open question. . . ."<sup>76</sup>

The authority to furnish free textbooks lies with the legislature, not with the implied powers of local boards.<sup>77</sup> Most states have enacted laws on the subject of free

<sup>72</sup> *Wulff v. Inhabitants of Wakefield*, 221 Mass. 427, 429, 109 N.E. 358, 359 (1915).

<sup>73</sup> *State ex rel. Rogers v. Board of Education of Lewis County*, 125 W. Va. 579, 588, 25 S.E.2d 537, 542 (1943).

<sup>74</sup> *Epley v. Hall*, 97 Kan. 549, 552, 155 Pac. 1083, 1084 (1916).

<sup>75</sup> *State ex rel. Clark v. Haworth*, 122 Ind. 462, 468-469, 23 N.E. 946, 948 (1890).

<sup>76</sup> *Leeper v. State of Tennessee*, 103 Tenn. 500, 516-517, 53 S.W. 962, 965 (1899).

<sup>77</sup> *Board of Education v. Detroit*, 80 Mich. 548, 45 N.W. 585 (1890); *Segar v. Board of Education*, 317 Ill. 418, 148 N.E. 289 (1925).

textbooks and many of these treat other materials. In the absence of specific mention in Nebraska, however, it was held that "a chart or a map or a globe is as much a textbook as a reader or speller. . . ." <sup>78</sup> In regard to free textbook laws, the United States Supreme Court has sustained the right of a state to distribute the same textbooks on the same basis to children in private schools as are furnished children in public schools. <sup>79</sup>

Recently action was brought in New York City to force the board of education to cease using in high school English classes *The Merchant of Venice* and *Oliver Twist* because of the portrayal of Jews in these volumes. The court refused to bar the books and reasoned that <sup>80</sup>

Except where a book has been maliciously written for the apparent purpose of promoting and fomenting a bigoted and intolerant hatred against a particular racial or religious group, public interest in a free and democratic society does not warrant or encourage the suppression of any book at the whim of any unduly sensitive person or group of persons, merely because a character described in such book as belonging to a particular race or religion is portrayed in a derogatory or offensive manner. The necessity for the suppression of such a book must clearly depend upon the intent and motive which has actuated the author in making such a portrayal.

### C. Brief Summary

According to the Supreme Court of Colorado, <sup>81</sup>

The powers of the State, the children and their parents over their education may be briefly but accurately stated thus:

1. The state, for its own protection, may require children to be educated. . . .
2. Certain studies plainly essential to good citizenship must be taught. . . . And, as a corollary, such studies may be required of every child.
3. Liberty is more than freedom from imprisonment. . . . The right to conduct a private school; the right of parents to have their children taught where, when, how, what, and by whom they may judge best, are among the liberties guaranteed by section 1 of the Fourteenth Amendment of the United States Constitution. . . .
4. But these rights are subject to the qualifications 1 and 2, above, and that teachers and places must be reputable and the things taught not immoral or inimical to the public welfare. . . .
5. Conversely, the teaching of what is immoral or inimical to the public welfare may be forbidden by the state, even though taught as a moral and religious duty; e.g., polygamy. . . .

It necessarily follows that if parents can have their children taught what they please, they can refuse to have them taught what they think harmful, barring what must be taught; i.e., the essentials of good citizenship. What these are the board of education of each district, primarily, and the courts ultimately, must decide. So whether any study is immoral or inimical to the public welfare the board primarily and the courts ultimately must decide.

<sup>78</sup> *Affholder v. State*, 51 Neb. 91, 93, 70 N.W. 544, 545 (1897).

<sup>79</sup> *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930).

<sup>80</sup> *Rosenberg v. Board of Education of City of New York*, 196 Misc. 542, 543, 92 N.Y.S.2d 344, 346 (Sup. Ct. 1949).

<sup>81</sup> *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 280-281, 255 Pac. 610, 613 (1927).