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Let Them Speak: The Case for Parental Rights as Educative Speech

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TABLE OF CONTENTS

I. AUTHOR'S NOTE

On June 27, 2025, the United States Supreme Court released its opinion in *Mahmoud v. Taylor*. At that time, this Article had already been written and was undergoing final review by the editors of the Nebraska Law Review *Bulletin*. As such, this Article does not reflect the high Court's recent opinion. For the sake of completeness and relevancy, however, the author provides this short summary and commentary regarding the impact of the case on this Article.

Most basically, the Court in *Mahmoud* determined that the school board's use of the "unmistakably normative" LGBTQ+ storybooks and refusal to allow opt-outs substantially interfered with the parents' ability to direct the religious upbringing of their children. Accordingly, concluding that the parents were likely to succeed on the merits of their claim that the school board's policy placed an unconstitutional burden on the parents' religious exercise, the Court held that the parents were entitled to a preliminary injunction.

For purposes of this Article, there are three takeaways from this opinion that are worth mentioning. First, the Court clarified that the analysis in and holding from *Yoder* was still applicable to parental rights and free exercise cases, and that it was not limited only to the facts of that case. Second, the Court unequivocally held, as argued in this Article, that public education is, in fact, a public benefit which cannot be conditioned on the parents' willingness to have their religious exercise rights burdened. Further, the Court was unpersuaded that the availability of private schooling or homeschooling provided any answer to such a burden. Finally, as alluded to above, the Court rejected the contention that the storybooks constituted mere exposure to objectionable ideas, instead recognizing that the storybooks were specifically intended to inculcate a particular set of values regarding sex and gender and to denigrate contrary values.

Though still early, it is clear that *Mahmoud* will stand as an important opinion in the line of parental rights cases; this case will likely provide the necessary clarity and momentum which this Article notes was previously lacking in the Court's Free Exercise jurisprudence with regard to parental rights. However, because *Mahmoud* is a parental rights case grounded in the Free Exercise Clause, it did not address the questions and issues discussed in this Article, namely the inherent uncertainty of the Substantive Due Process Clause and the Free Exercise Clause's inability to address the parental rights of non-religious parents. Therefore, the analysis in this Article serves to fill that gap.

II. INTRODUCTION

In 2022, the Parental Rights Foundation surveyed 1,002 individuals and asked the following question: "In general, parents have the constitutional right to make decisions for their children without government interference unless there is proof of abuse or neglect. Do you agree or disagree with this view of parental rights?"[1] The results revealed that 83% of respondents agreed with this statement.[2] The results were consistent across political and racial lines.[3]

One might believe such results were the reflection of a society with a unified social and legal approach to parental rights. Oddly, however, attending a school board meeting or scrolling through a few news articles on the topic would quickly dissuade anyone from such a notion.[4] Although parental rights are not an enumerated right in the US Constitution, Supreme Court doctrine has long identified parental rights as one of the unenumerated rights as envisioned by the Ninth Amendment.[5] What this doctrine has not done, however, is

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[1] *Survey: Voters Overwhelmingly Support Parents' Rights*, PARENTAL RTS. FOUND. (May 31, 2022), https://parentalrightsfoundation.org/poll2022/.
[2] *Id.*
[3] *Id.* (finding that 91% of Trump voters and 83% of Biden voters agreed with the statement. Across racial lines, finding: Whites 85% agree, 53% strongly agree. Blacks 75% agree, 49% strongly agree. Asians 76% agree, 36% strongly agree. Hispanics 85% agree, 53% strongly agree.).
[4] *See infra* Part III.
[5] *See infra* Part IV.

adequately define or explain the scope of such rights.[6] This reality, rather than the mere existence of parental rights,[7] has created the societal turmoil which has become associated with and, frankly, engulfed the parental rights movement.

Because of the lack of clarity regarding the scope of parental rights, one of the areas of greatest concern and debate centers on the question of whether parental rights have any application within public schools. Though long brewing, this issue was yanked into the limelight by the unprecedented educational experiences of the Covid-19 pandemic.[8] For the first time, parents saw how and what their children were or were not being taught; for the first time, they were uniquely placed "in" the virtual classroom. During and after the pandemic, there was a rise in parental objections to curriculum choices (often as they relate to sexual education, critical race theory, and LGBTQ+ policies).[9] Such objections often received swift backlash from teachers, administrators, and other officials, positing that parental rights end at the schoolhouse door.[10] Such a position, however, is contrary to the trajectory of current Supreme Court doctrine, which has historically protected parental rights under both the Fourteenth Amendment Substantive Due Process clause and, occasionally, the Free Exercise Clause.[11] In fact, the United States Supreme Court has established parental rights as fundamental, meaning they are rights of the highest order.[12] Although Substantive Due Process and Free Exercise Clause jurisprudence could, and arguably does, support the application of parental rights to public schools, this Article will advance the position that parental rights merit even broader application and protection. [13] It is the author's position that

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[6] *Id.*
[7] This statement is a generality. The author understands and recognizes that there are those who may still advocate for the entire abolition of parental rights. However, such a view would be in the minority as evidenced by the above cited Parental Rights Foundation Survey.
[8] *See* Ozge Misirli & Funda Ergulec, *Emergency Remote Teaching During the COVID-19 Pandemic: Parents Experiences and Perspectives*, 26 EDUC. AND INFO. TECH. 6699, 6699 (2021).
[9] *See infra* Part III.
[10] *Id*.
[11] *See infra* Part IV, V.
[12] *Id*.
[13] *See infra* Part IV, V.

parental educational rights are best viewed as parental speech, which can be protected by the Free Speech Clause.[14] Even a quick reflection upon the nature of how people are educated (by the speech of parents and educators) shows this to be true.[15] Once one recognizes parental speech rights, it becomes abundantly clear that public schools cannot prohibit such speech.[16]

More specifically, Part II will provide a brief overview of the relevant legal history of parental rights in the United States.[17] Part III will highlight the timeliness of such a discussion based on the current unrest surrounding the implementation of parental rights.[18] This portion of the Article will discuss how lower courts have addressed the intersection of parental rights in public schools and how such cases have greatly narrowed the scope of these rights. Parts IV and V will explore the viability and potential deficiencies of housing parental rights in the Substantive Due Process and Free Exercise Clauses.[19] In championing broad protections for all parents regardless of their political or religious status, Part VI presents several, multifaceted arguments for treating parental rights as speech rights under the Free Speech Clause.[20] So as to not ignore the obviously lingering question, Part VII will briefly identify the author's thoughts on the policy implications of protecting parental rights as parental speech.[21]

A. What This Argument Is Not

In anticipation of the likely response and feedback to the author's positions in this article, it seems incumbent to address some of the suspected concerns beforehand. First, this article is in no way articulating an argument for the elimination of public schools. The author recognizes the societal difficulties this would cause and that many individuals are perfectly

[14] *See infra* Part VI.
[15] *See infra* Part VI.
[16] *Id.*
[17] *Infra* Part II.
[18] *Infra* Part III.
[19] *Infra* Part IV, V.
[20] *Infra* Part VI.
[21] *Infra* Part VII.

satisfied with the quality of education their children receive within the public schools. This is perfectly reasonable, and the author does not seek to dissuade any parents from their apparent satisfaction. However, the author also recognizes that some parents are dissatisfied with the public education system and their lack of control within it. This Article seeks to advance a path that protects the rights of parents in both camps.

Second, this is not a policy paper. The author does not intend to, nor will they attempt to, address all the *policy* implications which arise from the view advanced herein. There is, however, a short section at the end of this paper cursorily addressing some of the most glaring objections. The main purpose of this Article is, instead, to discuss the possible *legal* implications of protecting parental rights as speech.

Finally, to be clear, nothing in Supreme Court precedent has yet indicated that parental rights must extend to public school curricula. However, if parental rights and educational freedom are to be taken seriously, then the following arguments are not only persuasive, but also demanded.

III. A BRIEF HISTORY OF PARENTAL RIGHTS

Parental rights, in their totality, refer to a wide range of rights parents possess with regard to the care and upbringing of their children. These include, among others, the rights of parents to maintain physical and legal custody of their children, and the ability to make health

care[22] decisions for their children.[23] Although these are important aspects of parental rights,[24] this Article will focus only on parental rights as they relate to education. Accordingly, when the author uses the term "parental rights," only its educational application is being referenced.

The legal history of these educational parental rights in the United States is rather young. In fact, during the first century of this country's existence, no cases dealt explicitly with parental rights. During the second century, however, three cases were decided, forming the trifecta of parental rights cases. The first case of importance in the history of parental rights, *Meyer v. Nebraska*, did not arise until 1923.[25] That case put parental rights on the map.[26] In that case, the state of Nebraska[27] passed a statute which outlawed the teaching of any foreign languages before a child had passed the eighth grade.[28] The statute applied to all types of schools within the state, whether private, denominational, parochial, or public.[29] Such action was animated by the fears left lingering after World War I; The war had prompted a desire to ensure citizens, including foreigners, were educated only in English and taught American values.[30] A teacher at a small, Lutheran school violated the statute by

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[22] There is a line of cases emerging within public schools dealing only with the unwanted gender transition of a child. In these cases, the discussion is primarily based on whether such an issue is a medical or educational decision. *See* T.F. v. Kettle Moraine Sch. Dist., No. 2021-CV-1650, 2023 WL 6544917 (Cir. Ct. Wis. 2023) (finding a violation of parental rights because such a social transition *was* a medical issue. The court expressly denounced any notion of this being an educational decision.); *see also* Foote v. Town of Ludlow, No. 22-30041, 2022 WL 18356421, at *5 (D. Ma. 2022) (finding the transition was *not* a medical issue, because calling someone by a different name or different pronoun does not require any certain skill level and, therefore, the school district was merely according the children "the basic level of respect expected in a civil society generally.").

[23] Isaac B. Gibson, Comment, *The Portion of Goods that Falleth to Me: Parental Rights, Children's Rights, and Medical Decisions After Covid-19*, 60 FAM. CT. REV. 590, 593 (2022).

[24] These additional areas of parental rights have a wide variety of cases and scholarship which address them. *See, e.g.*, *id.*; Troxel v. Granville, 530 U.S. 57 (2000); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Cressida Auckland & Imogen Goold, *Parental Rights, Best Interests and Significant Harms: Who Should Have the Final Say Over a Child's Medical Care?*, 78 CAMBRIDGE L.J. 287 (2019).

[25] Meyer v. Nebraska, 262 U.S. 390 (1923).

[26] William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 180 (2001).

[27] In a companion case, *Bartels v. Iowa*, the Supreme Court decided the same issue for the states of Iowa and Ohio. These decisions were given based on, and in accordance with, the outcome utilized in *Meyer*. *See* Bartels v. Iowa, 262 U.S. 404, 409 (1923).

[28] *Meyer*, 262 U.S. at 397.

[29] *Id.*

[30] *Id.* at 402.

teaching a ten-year-old student how to read in the German language.[31] The Nebraska Supreme Court upheld the teacher's conviction, reasoning that "the enactment of such a statute c[ame] reasonably within the police power of the state."[32]

The Supreme Court, however, had no issue overruling the decision.[33] First, the Court acknowledged Nebraska's concerns and desire to produce a well-educated citizenry, saying, "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."[34] It even admitted that "the state may do much, go very far, indeed, to improve the quality of its citizens, physically, mentally and morally."[35] The opinion was quick to clarify, however, that the police power of the state is not absolute, as "the individual has certain fundamental rights which must be respected."[36] The "fundamental rights" to which the Court referred, are parental rights; they are the right of parents to "establish a home and bring up children," and the "power of parents to control the education of their own."[37] The Court recognized that these rights exist because of an underlying duty unique to parents, explaining that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."[38] These parental rights, the Court explained, exist within the Fourteenth Amendment Substantive Due Process Clause.[39] The very recognition of the existence of these rights and their fundamental nature directly called into question the State's ability to take any action which would restrict such rights. Instead, because the ability to make decisions relating to education, including the ability to decide whether to teach a child a foreign language, is a right and a duty belonging to the parent, the Court held that "the interference [from the statute

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[31] *Id.* at 396–97.
[32] *Id.* at 398.
[33] *Id.* at 403.
[34] *Id.* at 400.
[35] *Id*. at 401.
[36] *Id.* at 401.
[37] *Id*. at 399, 401.
[38] *Id.* at 400. (partly quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 438).
[39] *Id.* at 399.

was] plain enough and no adequate reason therefor in time of peace and domestic tranquility ha[d] been shown" to overcome the unconstitutionality of this interference. [40]

The next significant parental rights case was decided only two years later in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*.[41] There, Oregon passed a law requiring all parents with children between the ages of eight and sixteen to enroll them in a public school.[42] The suit was brought jointly by both a Catholic school and orphanage, along with a boys military prep school. Both institutions would have been forced to close because of the statute.[43]

The Supreme Court followed the precedent from *Meyer* and found "it entirely plain that the Act of 1922 unreasonably interfer[ed] with the liberty of parents and guardians to direct the upbringing and education of children."[44] The opinion confirmed that parental rights encompass both parental rights and duties, and that both are protected by the Substantive Due Process Claus.[45] Building on and, indeed, going further than *Meyer*, the opinion utilized very strong rights language. The Court could not find (nor did the facts state) any reason for Oregon to have thought such an action was within its competency.[46] The Court admonished:

> 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. 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.[47]

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[40] *Id.* at 402.
[41] Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).
[42] *Id.* at 530–31.
[43] *Id.*
[44] *Id.* at 534–35.
[45] *Id.* at 535.
[46] *Id.* at 534–35 (stating "there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education" and that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.").
[47] *Id.* at 535.

In so saying, the Court explained that providing educational alternatives to public schools is "a kind of undertaking not inherently harmful, but long regarded as useful and meritorious."[48] Accordingly, the Court held that restricting parental liberty to select such alternatives was "arbitrary, unreasonable, and unlawful."[49]

Following *Pierce*, the Supreme Court was silent for a number of years on the issue of parental educational rights. It was not until 1972 that the Court decided *Wisconsin v. Yoder*, the final case in the parental rights trifecta of cases.[50] There, the Court held that Amish parents could not be forced to send their children to public school past the eighth grade, because doing so violated their religious beliefs.[51] Based on their religious convictions, the Amish withdraw their children from formal educational training after eighth grade, instead favoring vocational training at home and within their communities.[52] Thus, it is important to realize that, unlike *Meyer* and *Pierce*, in the factual situation presented to the Court in *Yoder*, the Amish children would not have been educated in either a public or private school, but rather, they would be educated at home.[53] This placed the Amish parents in violation of Wisconsin's compulsory attendance laws, which required attendance until age sixteen.[54]

Also unlike *Meyer* and *Pierce*, in *Yoder*, the basis for the claim rested on the Free Exercise Clause. Accordingly, the Court focused a great deal of its reasoning on that clause, although the Substantive Due Process Clause conception of parental rights still provided the foundation for the Court's ultimate conclusion.[55] In this sense, the

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[48] *Id.* at 534.
[49] *Id*. at 536.
[50] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[51] *Id.* at 234, 230–31, 241. The decision was based on the parental religious convictions, not the rights of the children. The majority was very emphatic about this distinction. In fact, it served as the cause of Justice Douglas' dissent. *Id.* at 241.
[52] *Id.* at 211–13.
[53] *Id.* at 207.
[54] *Id.* at 207–08.
[55] *Id*. at 214. The Supreme Court did not begin to incorporate the First Amendment against the States until 1925, the same year Pierce was decided. *See* Gitlow v. New York, 268 U.S. 652 (1925); *Yoder*, 406 U.S. at 215–19.

Free Exercise claim was unique. It echoed strains from *Meyer* and *Pierce's* view of parental rights, but it was couched in terms of the Free Exercise of religion.[56] Thus, the religious belief violated, and sought to be vindicated, was the ability and right of parents to direct the religious upbringing of their children under the First Amendment.[57]

Analyzing this combination claim through the lens of strict scrutiny, the Court first acknowledged the sincerity of the Amish religious belief that children should be educated at home after eighth grade.[58] Based on that acknowledgement, the Court concluded that Wisconsin's compulsory education law, being discriminatory in application, hindered this religious conviction because it required the Amish to do something "undeniably at odds with fundamental tenets" of their religion.[59] Looking next for a compelling state interest, the Court found Wisconsin's identified interest in creating self-sufficient citizens capable of effective participation in society unpersuasive, considering Amish communities' extremely productive, hardworking, and self-reliant nature, even without secondary education.[60]

At this point, the Court acknowledged the principles from *Pierce* and *Meyer*: the principle that parents have both the right and the duty to control their children's education, and the principle that the child is not the mere creature of the State.[61] These foundational principles allowed the Court to take the next logical step of concluding that parents must also then have the right to direct their children's religious and moral upbringing.[62] The Court concluded that if it permitted the State to "save" the children from the parents by requiring the additional two years of schooling, it would essentially be tantamount to allowing the State

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[56] *Yoder*, 406 U.S. at 214–34.
[57] *Id*.
[58] *Id*. at 208.
[59] *Id*. at 218.
[60] *Id.* at 222–26.
[61] *Id.* at 232.
[62] *Id*.

to determine, or at least influence, the religious future and moral upbringing of the child, which the Court recognized is far outside the purview of the State.[63] In so holding, Chief Justice Berger's majority opinion frequently quoted from *Pierce*, calling it the "charter of the rights of parents."[64] Specifically, the Court stated,

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children . . . This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[65]

In further explaining its analysis, the Court commented that it was the combination[66] of a Free Exercise claim with a claim based on parental rights which lent this case its strength.[67]

Today, homeschooling is legal in all fifty states and stands as an easily recognized parental right. [68] It is important to note, however, that *Yoder* represented only one of the earliest steps in a series of cases, legislation, and advocacy, which eventually created the homeschool right known today.[69] As such, this case did not arise in a vacuum, nor was it the exclusive reason that homeschooling has become an accepted part of the parental rights schema. Nonetheless, for simplification, that right will be represented in this Article by the *Yoder* case.

A. The Relevance of these Cases for the Purposes of this Article

For the purposes of this Article, it is helpful to think of each of the above three cases as answering a discrete question in the grand scheme of parental rights. Broadly speaking, the

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[63] *Id*.
[64] *Id.* at 233.
[65] *Id.* at 232.
[66] This was foreshadowing the idea of "hybrid rights" later enunciated in another U.S. Supreme Court case. *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990).
[67] *Yoder,* 406 U.S. at 233.
[68] *State Homeschooling Laws*, HOMESCHOOL.COM, https://www.homeschool.com/articles/state-homeschooling-laws/ (last visited Nov. 10, 2023).
[69] *Yoder*, 406 U.S. at 224, 232. *See also* J. Gary Knowles et al., *From Pedagogy to Ideology: Origins and Phases of Home Education in the United States, 1970–1990*, 100 AM. J. OF EDUC. 195, 211 (1992) (providing a detailed account of the history of homeschooling in the United States).

question addressed in *Meyer* was "Do parental rights exist at all?"[70] The answer given by the Court was, of course, a resounding yes.[71] Similarly, then, the question addressed in *Pierce* was, "Do these parental rights include the ability to choose between a public and a private school?"[72] As explained above, the answer was also yes.[73] *Yoder* took the question a step further and asked, "If these parental rights include the ability to choose between a public and a private school, can I also choose to educate my child at home?"[74] The Court, again, answered yes.[75]

Each of these cases, and the important questions they answered, laid a new stone in the foundation for parental rights. Now entering the conscious of society, however, lurks a new, unanswered question, presenting an extremely pressing, divisive, and important inquiry. Neither the Supreme Court nor any type of federal legislation[76] has thus far answered this two-fold query, which asks whether parental rights extend into public schools and, if so, to what extent.[77]

IV. PRIOR ATTEMPTS TO ANSWER THIS PRESSING QUESTION

To be sure, this question has before occupied the fancies of law professors and made for interesting classroom hypotheticals, but now, for perhaps the first time, parents and families are beginning to ask this question on a more personal and particularized level.

As this question of parental rights in public schools has entered the lower courts, however, it has not been met with the same easy acceptance that parental rights received in

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[70] Mary-Michelle Upson Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction*, 50 S. CAL. L. REV. 871, 898 (1977).
[71] Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
[72] Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 987 (1996).
[73] Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 535 (1925).
[74] *See* Knowles, *supra* note 69.
[75] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).
[76] Parents Bill of Rights Act, H.R. 5, 118th Cong. (2023) (the House passed the Parental Bill of Rights in early 2023, but it has since languished in committee in the Senate).
[77] *See* Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of their Children*, 32 U. DAYTON L. REV. 361, 371 (2007); Kimberly Wehle, *He, She, They: The Pronoun Debate Will Likely Land at the Supreme Court*, POLITICO (Oct. 1, 2023, 7:00 AM), https://www.politico.com/news/magazine/2023/10/01/pronouns-schools-supreme-court-00118832.

Meyer, *Pierce,* and *Yoder*. Instead, these cases seem to show that despite their early success, parental rights jurisprudence hit, and continues to hit, a roadblock in the realm of public education. Courts have been all too willing to designate the public classroom as a sphere untouchable by parental rights. Frankly, the language utilized by the courts in these cases is startling and displays unabashed efforts to squelch parental control despite the above-mentioned Supreme Court precedent.

For example, in *Fields v. Palmdale School District*, a survey, touted as a questionnaire intended to aid in "establish[ing] a community baseline measure of children's exposure to early trauma," was given to first, third, and fifth grade students in an elementary school in California.[78] The consent form sent home did not reveal the fact that these children would be asked multiple questions about sexual feelings and sexual issues.[79] Some of the questions asked students to rank the frequency of activities such as "touching my private parts too much," thinking about having sex," and "thinking about touching other people's private parts."[80] In filing their lawsuit, the parents argued that the school district had deprived the parents of their fundamental right "to control the upbringing of their children by introducing them to matters of and relating to sex."[81] The lower court dismissed the parents' claims.[82]

Affirming the dismissal, the Ninth Circuit on appeal phrased the issue as "whether the parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children."[83] Citing *Glucksberg*,[84] the court found no such right,

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[78] Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1219 (C.D. Cal. 2003) [hereinafter *Fields I*].
[79] *Id.* at 1219.
[80] *Id*.
[81] *Id*. at 1221, 1223.
[82] *Id*. at 1224.
[83] Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1203 (9th Cir. 2005) [hereinafter *Fields II*].
[84] Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that assisted suicide was not a fundamental right under the due process clause. In so holding, the Court also enunciated a test for evaluating whether a right was fundamental).

either direct or implied, rooted in the nation's history and tradition.[85] The court reasoned that any application of parental rights in public schools would "restrict the flow of information in the public schools," which would "impose . . . a burden on state educational systems."[86] The Ninth Circuit attempted to distinguish *Meyer* and *Pierce* on the grounds that they dealt with the state's restriction of parental choices for a child's education, whereas the present case dealt with parental attempts to prevent the school from teaching certain things to their children.[87] The majority opinion claimed that it was actually contrary to the mission of public schools to "accommodate the personal, moral or religious concerns of every parent."[88] The court went so far as to say the parents have no constitutional right "to 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."[89] The United States Supreme Court denied certiorari.[90]

Two years later, the First Circuit dealt with a similar issue in *Parker v. Hurley*.[91] In that case, as part of the school's implementation of a diversity, equity, and inclusion program, children in kindergarten through second grade were introduced to books which included images and stories celebrating same-sex couples and their union.[92] Several parents objected to the use of these books based on their Judeo-Christian religious convictions.[93] There, Massachusetts had a state statute which required that parents be given notice and an opportunity to opt out of any material involving sexual education, but, in this case, the school refused both to provide notice and to grant the parents' requests to opt out of the readings, reasoning that such children's books "do not primarily involve human sexual education or

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[85] *Fields II*, 427 F.3d at 1203–04.
[86] *Id.* at 1205.
[87] *Id*.
[88] *Id.* at 1206.
[89] *Id.*
[90] Fields v. Palmdale Sch. Dist., 549 U.S. 1089 (2006) [hereinafter *Fields III*] (denying certiorari).
[91] Parker v. Hurley, 514 F.3d 87 (2008).
[92] *Id.* at 90–93.
[93] *Id.*at 92.

human sexuality issues."[94] Ignoring the parents' assertion of a Free Exercise violation, the district court found there was not a "constitutionally significant burden" on the parents or children and reasoned that "the state's interest in preventing discrimination . . . justified the policy."[95]

The First Circuit Court of Appeals agreed. It reasoned that there was no direct interference with religious beliefs, no punishment for religious beliefs, no denial of benefits, no compulsion to violate a religious duty or religious belief, and thus, there was no claim of direct coercion upon which the parents could stand.[96] In other words, the First Circuit found that, unlike *Yoder*, it could see no reason why requiring children to read books depicting, and at times promoting, homosexuality hindered the parents' ability to pass their religious beliefs to their children in the same way that compulsory education had for the Amish.[97] The parents argued that although the state may have a secular interest in promoting tolerance, the parents had an equally sincere interest in exempting their children from teachings which violated their religious beliefs.[98] The parents sought not to dictate the school curriculum, but simply to have tolerance shown to their religious beliefs by allowing their child to be exempted from those offensive portions.[99] The First Circuit handily rejected this proposition. It echoed the sentiment from *Fields* that the *Meyer* and *Pierce* right of parents to "direct the upbringing of children under their control" did not include any right to object to what their child was taught in a public school.[100] Interestingly, the court specifically acknowledged that young children are impressionable and more susceptible to subtle coercion.[101] It further acknowledged that the book assigned to the second-grade children was "precisely intended to influence the

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[94] *Id.*at 90.
[95] *Id.* at 94–95.
[96] *Id.* at 105.
[97] *Id*. at 100.
[98] *Id.* at 102.
[99] *Id.*
[100] *Id.*; *Pierce*, 268 U.S. at 534–35.
[101] *Parker*, 514 F.3d at 100.

listening children toward tolerance of gay marriage."[102] Nonetheless, the court did not take these acknowledgements to their logical conclusion and, instead, held "there is no viable claim of 'indoctrination' here."[103]

The next case, *Foote v. Town of Ludlow,* pushed the limits beyond a school not fully informing parents, or refusing to get consent from parents, to specifically going against the parents' expressed desires.[104] In *Foote*, two children, from the same family, ages eleven and twelve, started struggling with same-sex attraction after being assigned a project which encouraged students to discuss their gender identity and pronouns.[105] After this assignment, the students began using different names and pronouns.[106] The parents sought outside help and asked the school not to discuss this matter further with their children.[107] Because of a school policy of deferring only to student preferences on the sharing of information with parents, the school ignored the parents' request, and the school counselor and staff advised that the new names and pronouns be used.[108] School staff met regularly with the children and discussed their gender identities and mental health issues.[109]

Once the parents discovered this, they filed suit alleging a violation of their parental rights.[110] Citing back to *Parker*, the District Court stated that when parents opt to send their children to public schools, they "do not have a constitutional right to direct *how* a public school teaches their child."[111] Despite acknowledged flaws in the school district policy, the court concluded the decision to withhold information from the parents did not rise to a level

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[102] *Id.* at 106.
[103] *Id.*
[104] Foote v. Town of Ludlow, No. CV 22-30041-MGM, 2022 WL 18356421, at *1 (D. Mass. 2022).
[105] *Id.* at *2.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at *3.

of behavior that would "shock the conscience," as required by their substantive due process jurisprudence.[112] Based on these findings, the court dismissed the case.[113]

The First Circuit affirmed the dismissal.[114] In doing so, the court interpreted *Meyer*, *Pierce,* and *Yoder* as being a set of cases dealing only with situations in which the state attempted to proscribe the teaching of a particular topic to a child.[115] This case, according to the First Circuit, was substantially different, since it dealt with parents who sought to proscribe the school from speaking to their children about the children's mental health and gender identity, which the court said the parents had no basis for demanding.[116] Therefore, the court concluded that, "[b]ecause public schools need not offer students an educational experience tailored to the preferences of their parents, . . . the Due Process Clause gives the Parents no right to veto the curricular and administrative decisions identified in the complaint."[117] A request for certiorari is underway.[118]

The case of *Mahmoud v. Taylor*,[119] once again, brought the issue of parental rights to the forefront when an elementary school in Maryland no longer allowed families to opt out of the reading of storybooks discussing LGBTQ+ themes.[120] The parents who filed the lawsuit were of diverse faith backgrounds, but all objected that discontinuing the opt-out policy violated both their Free Exercise and substantive due process rights, because it restricted their ability to dictate the religious upbringing of their children by forcing them to expose their

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[112] *Id.* at *6–8.
[113] *Id.* at *9.
[114] Foote v. Ludlow Sch. Comm., 128 F.4th 336 (1st Cir. 2025).
[115] *Id*. at 352.
[116] *Id*.
[117] *Id*.
[118] *See Docket No. 24A848*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24a848.html (last visited June 1, 2025).
[119] This case was originally captioned as Mahmoud v. McKnight, and appears as such in the lower court opinions.
[120] Mahmoud v. McKnight, 688 F. Supp. 3d 265, 271 (D. Md. 2023) [hereinafter *Mahmoud I*].

children to beliefs that directly contradict their religious values.[121] As such, the parents advanced a hybrid-rights case similar to *Yoder*. The parents sought injunctive relief.[122]

The district court, however, disregarded both claims. As to the free exercise claim, the court declined to find that removing the opt-out provision had burdened the parents' religious freedom or coerced them into affirming views contrary to their own, since they still had opportunities outside of school hours to teach their children as they wished. [123] The court similarly declined to say that forcing children to listen to the LGBTQ+ storybooks would rise to the level of indoctrination, finding that compelled presence or exposure to teaching that violated the parents' religious beliefs did not create a sufficient burden to even place the claim within the scope of the Free Exercise Clause.[124] As such, it only applied rational basis review, a standard under which the parents made no allegations that they would succeed. [125]

The court similarly applied rational basis review to the parents' substantive due process claims, finding that there was no fundamental right implicated in the case.[126] Although the court conceded that there is a fundamental right to generally "control the education of their own," it refused to find a fundamental right to control the exposure of that child to teachings within a school.[127] In doing so, the court also declined to find any merit to the hybrid-rights framework, thereby cabining *Yoder* and any application it might have had in the case.[128] Accordingly, the district court found no likelihood of success on the merits of

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[121] *Id.*
[122] *Id*.
[123] *Id*. at 295–302. (Although not the topic of this paper, it is worth noting that the court also quickly dismissed any notion that the children's free exercise rights had been violated by "exposure to religiously offensive ideas [which] make[] the parents' efforts less likely to succeed.").
[124] *Id*. at 292–95.
[125] *Id*.
[126] *Id*. at 304.
[127] *Id*. at 302–06.
[128] *Id*.

either claim, so the request for a preliminary injunction was denied. [129] The parents appealed.[130]

In its recently issued opinion, the Fourth Circuit agreed, writing an opinion with reasoning that mirrored that of the district court.[131] Relevant to the discussion later in this Article, the court found no issue with the fact that objecting parents could only remove their children from this type of undesirable curriculum by paying to send their child to private school or by homeschooling them.[132] The case was successfully appealed to the Supreme Court, and oral argument was heard on April 22, 2025.[133]

V. PARENTAL RIGHTS ARE LIKELY SECURE AS A FUNDAMENTAL RIGHT UNDER GLUCKSBERG, BUT THIS PROTECTION IS INSUFFICIENT

The outcomes of these circuit court cases are concerning. In *Meyer*, *Pierce*, and *Yoder*, the Substantive Due Process Clause seemed to provide adequate protection for parental rights. The language from these more recent circuit opinions, however, shows a trend toward an excessively narrow interpretation of parental rights that favors institutional control over parental control of a child's education. In light of these developments, it is worth analyzing whether the Substantive Due Process Clause has the longevity and legal wherewithal to provide the necessary, more robust protections that parental rights require in this day and age. As will be explained in greater detail below, it is the Author's opinion that although the Clause is arguably sufficient to achieve this purpose, there are better options available.

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[129] *Id*. at 307.
[130] Mahmoud v. McKnight, 102 F.4th 191, 194 (4th Cir. 2024) [hereinafter *Mahmoud II*].
[131] *Id*.
[132] *Id*. at 214–16.
[133] Mahmoud v. Taylor, SCOTUSBLOG, https://www.scotusblog.com/cases/case-files/mahmoud-v-taylor/ (last visited May 30, 2025).

A. The Strengths of the Clause.

Although parental rights are not explicitly enumerated in the Constitution, this is not fatal to their case. The Court has recognized parental rights as being a right of elevated importance— a fundamental right. [134] A fundamental right is one that may not be explicitly listed in the Constitution, but which is so foundational to ordered liberty that it is recognized without being specifically enumerated.[135] For example, in *Troxel v. Granville*,[136] the plurality opinion by Justice O'Connor called parental rights, "perhaps the oldest of the fundamental liberty interests recognized by this Court."[137] Even the dissent in that case admitted, "[o]ur cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children."[138] The same was recognized in *Santosky v. Kramer*.[139]

This status affords parental rights an extra layer of protection under the Substantive Due Process Clause.[140] If a right is deemed fundamental, any challenge to it typically has to pass strict scrutiny, giving it a higher level of security when such a challenge does arise.[141] Further, as has already been mentioned several times in this Article, the Court in *Meyer*, *Pierce,* and *Yoder* explicitly acknowledged the existence of parental rights under its substantive due process jurisprudence, meaning that, at the very least, a baseline for parental rights is secure as a matter of precedent.[142]

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[134] Hugh C. Phillips, Note, *Liberating Liberty: How the Glucksberg Test Can Solve the Supreme Court's Confusing Jurisprudence on Parental Rights*, 16 LIBERTY U. L. REV. 345, 349 (2022).
[135] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237–38 (2022) (finding that there was no constitutional right to an abortion).
[136] Troxel v. Granville, 530 U.S. 57 (2000) (plurality affirmed the mother had the parental right to refuse visitation rights to paternal grandparents).
[137] *Id.* at 65.
[138] *Id.* at 87.
[139] Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child").
[140] See *supra* Part II.
[141] Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., Dissenting) ("nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'). While it is generally accepted that fundamental rights receive strict scrutiny, *Troxel v. Granville* provides an outlier. There, the Court recognized the fundamental nature of parental rights, but nonetheless, did not apply strict scrutiny. *See* Troxel v. Granville, 530 U.S. 57, 80 (2000).
[142] *See supra* Part II.

Having said that, after the Court decided *Dobbs v. Jackson Women's Health Organization*,[143] there was a flurry of panic as individuals speculated that the entirety of the Court's substantive due process doctrine might be overturned.[144] There need not have been such panic, however, because the majority opinion specifically renounced this possibility,[145] and, in fact, laid out the *Glucksberg*[146] Test as the means through which fundamental substantive due process rights should be analyzed in the future.[147] This test has two components: a substantive due process right seeking protection must be (1) "deeply rooted in this nation's history and tradition and [(2)] implicit in the concept of ordered liberty." [148]

Although an in-depth *Glucksberg* analysis is beyond the scope of this Article, other scholars have engaged with the topic beautifully. [149] Their analyses have shown that even if the Court were to evaluate the entirety of its substantive due process jurisprudence, as some fear, parental rights, as they are currently understood, would still be safe as a fundamental right, because they pass the *Glucksberg* test.[150] On the first component of the test, even the briefest of analyses shows that the conception of parental rights is woven throughout the natural and common law and is firmly rooted in this nation's history and tradition.[151] Second, with regard to the liberty interest, it has been noted that "[i]t is difficult to imagine anything more destructive of liberty than a government with the authority to override parental choices

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[143] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
[144] *See Roe v. Wade is Gone—What Now?*, NYU LAW (July 6, 2022), https://www.law.nyu.edu/news/-supreme-court-roe-wade-dobbs; Maddy Cittadino, *Dobbs v. Jackson: The Overturning of Roe v. Wade and its Implications on Substantive Due Process,* SYRACUSE L. REV. (June 30, 2022), https://lawreview.syr.edu/dobbs-v-jackson-the-overturning-of-roe-v-wade-and-its-implications-on-substantive-due-process/.
[145] *Dobbs*, 597 U.S. at 290 ("we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").
[146] Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that assisted suicide was not a fundamental rights under the due process clause. In so holding, the Court also enunciated a test for evaluating whether a right is fundamental.).
[147] *Dobbs*, 597 U.S. at 231.
[148] *Id*.
[149] *See generally* Phillips, *supra* note 134; Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozert after 20 years*, 38 J. L. & EDUC. 83 (2009).
[150] Phillips, *supra* note 134, at 373–75.
[151] Phillips, supra note 134, at 368–73; DeGroff, *supra* note 149, at 108–24.

concerning the development and values of the next generation—particularly religious or moral values."[152]

B. The Weaknesses of the Clause

However, within the second prong of the *Glucksberg* Test, the Court has specified that, not only must the liberty interest at issue be implicit in the concept of ordered liberty, but also that it must be sufficiently particularized such that it is capable of "a careful description."[153] This is potentially problematic, because the conception of parental rights, as they are currently described, may not be sufficiently particularized for the Court to feel comfortable extending them to the public school context.[154] As Professor Eric DeGroff has stated regarding parental rights, "all that is certain is that the Fourteenth Amendment's Due Process Clause provides parents a right with an unspecified level of protection to play a primary, but not fully defined, role in directing their children's education."[155] This uncertainty of scope was also recognized in *Meyer*.[156] For the purposes of this inquiry, then, the Court, conceivably, could affirm the fundamental nature of parental rights while denying their extension to public schools. This is precisely the problem seen above in the lower courts that has led to the inconsistent enforcement of fundamental rights.[157]

Further, regardless of whether parental rights pass the *Glucksberg* test, they may always be shrouded by an air of illegitimacy simply by the nature of their association with the Substantive Due Process Clause, which could put the doctrine at a higher risk of being

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[152] DeGroff, *supra* note 149, at 126.
[153] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).
[154] DeGroff, *supra* note 149, at 102–05, 128; Elliot M. Davis, *Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 29 HARV. J. L. & PUB. POL'Y 1133, 1133–34 (2006) ("this amorphous parental right has never been clearly defined by the Supreme Court. This lack of guidance has proven especially troublesome in the context of public schools where parents have attempted to shield their children from school mandates ranging from dress codes to sex education.").
[155] DeGroff, *supra* note 149, at 105.
[156] Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("this court has not attempted to define with exactness the liberty thus guaranteed").
[157] *See supra* Part III.

overruled or substantially changed.[158] Frankly speaking, the Substantive Due Process Clause is a legal fiction arising from the Fourteenth Amendment, and, as such, it has been called an instrument for "freewheeling judicial policymaking" and labeled as "fatally flawed."[159] One scholar stated, "substantive due process is a contradiction in terms—sort of like green pastel redness."[160] Thus, a more stable home for parental rights may be needed to protect them from changing political whims.[161]

VI. SOME PARENTAL RIGHTS CAN BE PROTECTED THROUGH THE FREE EXERCISE CLAUSE, BUT THIS PROTECTION IS ALSO INSUFFICIENT

Given the potential difficulties with enforcing parental rights under the Substantive Due Process Clause, it is important to remember that, although parental rights were first conceived in the Substantive Due Process Clause, they "are not inherently linked to substantive due process."[162] With a growing body of First Amendment precedent, attorneys have been increasingly making free exercise arguments in parental rights cases. Part of the promise of parental rights in *Pierce* and *Yoder* was that parents could control the moral and religious education of their child.[163] Because of the public school's commitment to secular education, which is often based "on a spurious, even prejudiced vision of the Establishment

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[158] Gilles, *supra* note 72, at 1009 ("Theoretically appealing as the principles declared in Pierce and Meyer are, the fact remains that substantive due process is a particularly controversial way to give them constitutional status.").

[159] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022); Christopher R. Green, *Twelve Problems with Substantive Due Process*, 16 GEORGETOWN J. L. & PUB. POL'Y 397, 400 (2017).

[160] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (Harv. U. Press, 1980).

[161] City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., Dissenting) ("The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called 'substantive due process') is in my view judicial usurpation."); Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) ("Without [a] core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.'" (alterations in original) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977)).

[162] Gilles, *supra* note 72, at 1009.

[163] It wasn't until *Yoder* that the specific language of directing a child's religious upbringing was used, but the Court in *Yoder* cites back to *Pierce* as the precedent for that language. *See* Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972).

Clause," educational policies may, at times, clash with parents' religious beliefs.[164] The Free Exercise Clause gives parents a means to challenge these interferences apart from the changing political whims which often plague the Substantive Due Process Clause.

As mentioned above, *Yoder* is the prime example of this.[165] The Court clearly recognized that parents have a right to direct the religious upbringing of their children, saying,

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.[166]

Again, had it not been for the free exercise component of *Yoder*, many have speculated that the case would have come down the opposite way.[167]

However, this hybrid approach has received mixed results. The strategy was successful in *Tatel v. Mt. Lebanon School District*.[168] There, the district court for the Western District of Pennsylvania granted declaratory relief to parents after finding that their free exercise rights had been violated by a school's refusal to provide notice or opt-out policies after the parents objected to their first-grade students being read books with transgender subject matter.[169]

On the other hand, in *Mozert v. Hawkins County Board of Education*, the appellants similarly alleged a free exercise violation when the school refused to allow their children to

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[164] Philip A. Hamburger, *Education is Speech: Parental Free Speech in Education*, 101 TEX. L. REV. 415, 439 (2022); Michael E. Lechliter, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2234 ("[O]ne must appreciate the tension that often develops between minority faiths and public education. Schools, which apply firm rules and regulations, will invariably come in conflict with religious practice.").

[165] *Supra* Part II (discussing the nature of *Yoder* as a free exercise case).

[166] *Yoder*, 406 U.S. at 214.

[167] *See* Gilles, *supra* note 72, at 1009; *Yoder*, 406 U.S. at 216 ("Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis.").

[168] Tatel v. Mt. Lebanon Sch. Dist., 752 F.Supp.3d 512 (W.D. Pa. 2024).

[169] *Id*. at 526, 580.

opt out of a reader series with ideas that violated the parents' fundamentalist Christian beliefs.[170] Perhaps not as shockingly as it should be, however, the court held that forced participation in, and exposure to, these readings did not constitute a violation, but instead was simply "exposure" to conflicting ideals.[171] Suggesting that a request for a religious exemption was too much to ask, the concurrence claimed, "[a] constitutional challenge to the content of instruction . . . is a challenge to the notion of a politically-controlled school system." [172]

As detailed above, the appellants in *Parker* and *Mahmoud* also articulated free exercise arguments.[173] The Free Exercise Clause reasoning was rejected in both cases.[174] The fact that these modern free exercise arguments have not been fully successful in defending parental rights does not mean, however, that the Free Exercise Clause is not able to protect such interests; it simply means that although "[t]he spirit of the First Amendment may be willing . . . its flesh is weak."[175] This process of strengthening the Free Exercise Clause and laying the framework for broader parental rights will take time, but the time to begin this process is now. In the meantime, however, parents deserve to have their rights protected through some other means.

There is, however, another, more obvious limitation to protecting parental rights under the Free Exercise Clause: the Clause is only useful if the assertion of parental rights

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[170] Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1060 (6th Cir. 1987).
[171] *Id.* at 1063–64.
[172] *Id.* at 1079 (Boggs, J., Concurring).
[173] Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008); Mahmoud v. McKnight, 688 F.Supp.3d 265, 271 (D. Md. 2023).
[174] *Supra* Part III. After the invention of "hybrid" rights in the lower courts have greatly struggled with the application of the Free Exercise Clause in such cases. *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990). Presenting this type of intertwining of parental rights with a free exercise claim may be posing part of the problem. *See* Heather M. Good, *The Forgotten Child of our Constitution: The Parental Free Exercise Right to Direct the Religious upbringing of Children*, 54 EMORY L. J. 641, 654 (2005).
[175] Richard F. Duncan, *Why School Choice is Necessary for Religious Liberty and Freedom of Belief*, 73 CASE W. RES. L. REV. 1055, 1077 (2023) (citing Mathew 26:41 saying, "[t]he spirit indeed is willing, but the flesh is weak.").

stems from a religious belief.[176] Directing protections of parental rights only to religious parents is wholly insufficient, because it would unnecessarily exclude those parents with philosophical or simply secularly-based value objections.[177]

VII. MAIN ARGUMENT

A. Parental Rights Should be Extended to the Free Speech Clause

1. Education is Speech, and Parents Have Parental Speech Rights

As identified above, although the Substantive Due Process Clause and the Free Exercise Clause provide legitimate legal means through which parents could vindicate their parental rights in public schools, both approaches come with substantial limitations, as well.[178] These deficiencies make it clear that another method of preserving parental rights is necessary, and the Free Speech Clause provides the perfect avenue for doing just that. Viewing parental rights as free speech rights can provide broad protections for all parents, devoid of the constitutional illegitimacy or religious caveats that plague the Substantive Due Process and Free Exercise Clauses.

This position was first advanced by Professor Stephen G. Gilles in 1996,[179] but not much has been written on the subject since then. The exception being Professor Philip Hamburger of Columbia Law School.[180] These two scholars have greatly informed the position discussed within this Article. At a time when our nation is facing an educational crisis and a great many parents and other interested parties are considering the power

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[176] Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.").
[177] Upson Hirschoff, *supra* note 70, at 903; Hamburger, *supra* note 164, at 463–64.
[178] *See supra* Part IV, V.
[179] Gilles, *supra* note 72.
[180] *Philip Hamburger*, COLUMBIA L. SCH., https://www.law.columbia.edu/faculty/philip-hamburger (last visited November 13, 2023).

dynamics in public schools,[181] this Article hopes to inform those discussions by drawing renewed attention to the ideas of these scholars.

First, it is important to note that the speech rights discussed herein are the same speech rights traditionally recognized as belonging to all individuals.[182] In this particular context, it is simply that those rights are applied to individuals who are parents.[183]

Second, the critical and fundamental point of this argument is that education is speech.[184] We have recognized this before. There is many a case on the free speech rights of students or teachers in public schools; these cases have addressed what students can wear,[185] what may be said at an assembly,[186] or displayed on a banner,[187] or who controls the speech from a school newspaper.[188] The difference, however, is that these cases "involve the periphery of our educational system rather than their core."[189] This core of the education system is, of course, its curriculum. Despite its centrality, however, we have left decisions regarding the actual substance of our public school curriculum to the Substantive Due Process Clause, rather than to the First Amendment like other educational speech topics.[190] This might have once been defensible prior to the incorporation of the First Amendment, but

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[181] The scary truth about how far behind American kids have fallen, Harvard Univ., Ctr. for Educ. Pol. Rsch. (Sept. 20, 2024), https://cepr.harvard.edu/news/scary-truth-about-how-far-behind-american-kids-have-fallen; Exec. Order No. 14242, 90 Fed. Reg. 13679 (March 20, 2025) (President Trump's Executive Order calling for the closure of the Department of Education, citing concerns regarding inefficiency, increased bureaucracy, and lack of measurable benefit); Welcome to the Era of Parents in the Driver's Seat: Parents Want an Education System with More Options and Flexibility, New National Survey Finds, Nat'l Parents Union (Jan. 7, 2025), https://nationalparentsunion.org/2025/01/07/welcome-to-the-era-of-parents-in-the-drivers-seat-parents-want-an-education-system-with-more-options-and-flexibility-new-national-survey-finds/.
[182] Hamburger, *supra* note 164, at 425.
[183] *Id*.
[184] *See generally* Hamburger, *supra* note 164.
[185] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
[186] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[187] Morse v. Frederick, 551 U.S. 393 (2007).
[188] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
[189] Gilles, *supra* note 63, at 1014.
[190] *Id.* at 1014; Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

any such continuance stands without reason; a fully developed body of First Amendment precedent stands ready for use.[191]

From the time a child is born, a parent's primary method of educating their child is through speech.[192] Whether that be by identifying shapes, colors, and animals, or reading a book, or giving a reprimand for fighting with other children, parents teach through their words.[193] Especially at the youngest ages, nearly every conversation is an opportunity for instruction. This parental speech is also indirect, however, as through the music, movies, pictures, and behaviors parents choose to present to their children.[194]

This reality does not change once a child is of school age. It goes nearly without saying that subjects like history, foreign language, English, and other social sciences, with their lectures, articles, presentations, and even the choice in assignments, are all based on speech.[195] Even math and the sciences can only be taught with speech.[196] Other activities such as experiments, playtime, and sports may even qualify as expressive conduct because of their "educational elements" and their tendency to be used to teach important lessons about a life skill.[197]

Third, not only is this parental education a form of speech, but it is constitutionally protected speech. It is often assumed that the core educational subjects (math, English, history, etc.) are objective and require no value judgments, meaning any parental speech interest would be inconsequential and that, therefore, it matters little who teaches those subjects.[198] Even if this were the case, it would be irrelevant to the constitutional status of parental educative speech, because the First Amendment protects not only the usual topics of

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[191] Gilles, *supra* note 72, at 1013.
[192] *Id.* at 1015.
[193] *Id*.
[194] *Id*.
[195] Hamburger, *supra* note 164, at 424.
[196] *Id*.
[197] *Id.*
[198] *Id*. at 442.

disagreement, but it also protects one's ability to disagree with the things no one thinks are up for debate.[199] However, Professor Phillip Hamburger has correctly highlighted that such arguments relating to "objectivity" are misguided.[200] At the very least, he notes that there can always be reasonable disagreement regarding pedagogy.[201] Further, it should by now be well understood that those teachings which are, at one moment, accepted as solidly representative of reality, can just as quickly be debunked by a new theory.[202] This is, of course, most prevalent in the sciences,[203] but, over time, there have also been changes in the way math, history, religion, or the lack thereof, are taught, as well. Take, for example, the substantial changes in the way addition and subtraction were taught after the introduction of the Common Core curriculum and standards.[204] Shifting views regarding the value of classical literature, or the appropriateness of teaching race relations in history provide further illustrations.[205] When these changes or disagreements do occur, they "are [often] deeply enmeshed in questions of religion, culture, and politics."[206] They involve serious choices, and when parents make these choices, they inherently reflect and communicate value judgments to their children. This is the essence of constitutionally protected speech.

a. The Principle of In Loco Parentis Frames the Discussion of School Authority

This calculous of value regarding parental educative speech changes little if the student is placed into public school rather than being homeschooled. At the time formal education begins, the parent merely selects an agent (a school) to teach their child on their

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[199] *Id*.
[200] *Id*.
[201] *Id*.
[202] *Id*. ("Scientific inquiry is thus an evolving process, and at the cutting edge, little is stable.")
[203] For instance, the scale of the intense biological debate regarding sex, sexuality, gender, and gender identity, is relatively recent. Consider also the educational shift from a creationist view of human origins to a Darwinian perspective.
[204] Hamburger, *supra* note 164, at 444.; Ashley Crowe, *New Math v. Old Math: What Parents Need to Know*, PRODIGY, https://www.prodigygame.com/main-en/blog/new-math-vs-old-math/.
[205] Courtney O'Brien, *Educators debate usefulness of classic literature in the classroom: 'A surrender on the part of teachers'*, FOX NEWS (May 25, 2022), https://www.foxnews.com/media/educators-classic-literature-classroom-surrender-teachers.
[206] Hamburger, *supra* note 164, at 444.

behalf.[207] The parental speech has not stopped, it has simply transitioned from direct, to indirect speech.[208] This is not a novel concept, either; it is accepted "that one may communicate through one's chosen agent without thereby forfeiting the protection of the First Amendment."[209]

The legal principle of *in loco parentis*[210] is also helpful for illustrating this point. The principle of *in loco parentis* was utilized in Common Law England.[211] William Blackstone described the concept in his famous Commentaries.[212] In describing the relationship between parent and child, he recognized a parent may:

> delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[213]

In loco parentis is, at its root, a sort of contractual principle.[214] The agreement is between the parent and the teacher.[215] The parent delegates the authority, as necessary and desired, to the teacher for the purposes of educating the student on the subjects the parent so wishes to have taught.[216]

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[207] Gilles, *supra* note 72, at 1016
[208] *Id.* at 1016.
[209] *Id.* at 1017; *See* Murphy v. Matheson, 742 F.2d 564, 568 (10th Cir. 1984) (Plaintiff smoke shops "of course have standing to assert that their personal commercial free speech rights have been infringed" by ban on advertisements of drug paraphernalia that "interfere[s] with their own advertising . . . by display or by radio."); Levine v. United States Dist. Ct., 764 F.2d 590 (9th Cir. 1985) (an attorney could not be prohibited from discussing a case with the media on behalf of his criminal defendant client, because to do so would violate both individuals' speech rights).
[210] It should also be noted that *in loco parentis* is substantially different from the idea of *parens patraie* which the Court has already rejected, and for which this paper does not advocate; *see* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) ("In the fact of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a parens patriae claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State."); Russo, *supra* note 77, at 375 (asserting the same).
[211] S. Ernie Walton, *The First Amendment, and Parental Rights—Can They Coexist in Public Schools?*, 55 TEX. TECH. L. REV. 461 (2023).
[212] 1 William Blackstone, Commentaries *285.
[213] *Id*.
[214] Walton, *supra* note 211, at 480.
[215] *Id*.
[216] *Id*.

This principle was passed to the American colonies and adopted into American legal thought.[217] Prior to the creation of the public schools in America, this was a very commonly utilized idea because of the prominence of private tutors in education.[218] Even after the creation of public schools, the courts applied *in loco parentis* to the public schools.[219] Due to modern changes in public schools, along with the enactment of the Fourteenth Amendment[220] there has, unfortunately, been some question as to the continued viability of the doctrine in public schools. This flux in thought was displayed by the various concurrences in *Morse v. Frederick*.[221] Justice Thomas, in arguing against any enlargement of the *Tinker* rules of student speech, noted that, through *in loco parentis*, it is the parents not the students who can voice objections to school policies. He explained:

> If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.[222]

Justice Alito, however, recognized that schools function as agents, but concluded that such agency is connected to the state rather than the parent, saying:

> When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority--including their authority to determine what their children may say and hear--to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State.[223]

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[217] *Id.* at 469–72 (providing an in-depth analysis of the history of *in loco parentis* in the early republic).
[218] *Id.*
[219] *Id. See* State v. Pendergrass, 19 N.C. 365, 365–66 (1837) ("The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power."). *See also*, Morrow v. Wood, 35 Wis. 59 (1874) (holding that a child could not be forced to attend class for and geography when the parent had explicitly stated not to and had therefore not delegated parental authority to the school for such instruction).
[220] Walton, *supra* note 211 at 482 (providing an analysis of how *in loco parentis* is compatible with the Fourteenth Amendment. Such a discussion is, of course useful, but well beyond the scope of this Article).
[221] Morse v. Frederick, 551 U.S. 393 (2007).
[222] *Id*. at 420 (Thomas, J., Concurring).
[223] *Id*. at 424 (Alito, J., Concurring).

It is Justice Alito's logic that is dangerous, however. It must be true that ultimate educational authority rests with the parents, and therefore, the use of the *in loco parentis* doctrine must continue, for without it, our basic conceptions of state authority will be disrupted.[224] Professor S. Ernie Walton of Regent University School of Law stated it this way: "If states do not exercise authority over children based on a delegation from the parents, then the state must have its own independent claim over children—distinct from that of the parents. This is not the law."[225] To suggest otherwise would be to accept something akin to Plato's view or a Spartan conception of mass state-directed upbringing, which the Court in *Meyer* specifically used as an example of the absurdity of denying parental rights.[226]

Unfortunately, however, despite the *in loco parentis* doctrine, this traditional relationship between teacher and parent has been distorted by state regulation of education.[227] As asserted in this Article, parental rights over education are fundamental and such regulation substantially interferes with these rights.[228]

b. Educational Speech has a Political Nature which Inherently Requires Value Judgements

One result of the regulated, governmental nature of public schools, the indirect parental educative speech discussed above becomes diluted. Building off the material previously mentioned, parents exercise value-based and value-filled judgments when teaching their children. Parents are also capable, through the doctrine of *in loco parents*, of

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[224] *See* Walton, *supra* note 211 at 499-500.
[225] *Id*. at 483.
[226] Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923) (explaining Plato's idea "[t]hat the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter." Explaining Sparta's approach the Court stated, "[i]n order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians." The Court rejected these approaches saying, "[a]lthough such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.")
[227] Gilles, *supra* note 72, at 1019.
[228] *Id.*

indirectly speaking through the school as an agent. There is a problem, however. Because educational choices do inherently require value judgments, when a public school selects its curriculum, its choices are no less value-laden.

Once in a public school, this indirect parental speech is mixed with government speech and becomes "[n]ot merely speech, [but] educat[ive] speech with a political mission."[229] The founders believed that such a republic as this one could not succeed without an educated citizenry.[230] In the case of some, such as Thomas Jefferson, it was believed that the state must provide this instruction.[231] Accordingly, the goal of this education has been "to prepare citizens to participate effectively and intelligently in our open political system."[232] In response to this purpose, the subject matter falling within the purview of public school instruction has become quite vast and continues to grow; schools have swallowed those tasks traditionally belonging to "families, churches, settlement houses, and other community agencies."[233] As such, it is common that schools should typically teach such things as "evolution, hygiene, health, social and racial relations, sex and sexuality, and so forth."[234] As one scholar already noted nearly sixty years ago, "the typical urban public school today is expected to perform the roles of social worker, parent, physician, minister, policeman, drug counselor, human relations counselor and employment agency."[235] This is a great deal of responsibility.

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[229] Hamburger, *supra* note 164, at 424.
[230] *Meyer*, 262 U.S. at 400 ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'"; Hamburger, *supra* note 164, at 424.
[231] Letter to George Washington from Thomas Jefferson (Jan. 4, 1786) (on file with the national archives) ("our liberty can never be safe but in the hands of the people themselves, and that too of the people with a certain degree of instruction. This it is the business of the state to effect, and on a general plan.").
[232] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).
[233] Diane Ravitch, *The Public School's Tasks, and How They Grew*, THE NEW YORK TIMES (Nov. 16, 1975) https://www.nytimes.com/1975/11/16/archives/the-public-schools-tasks-and-how-they-grew.html.
[234] Hamburger, *supra* not 164 at 424; Wisconsin v. Yoder, 406 U.S. at 221 (1972).
[235] Ravitch, *supra* note 233.

With such a vast array of topics under their direction, this teaching of a young populace inherently requires value judgements.[236] It would be naïve to say otherwise. Professor Sandy Levinson stated that public schools, "regularly articulate, clothed in the full symbolic and actual authority of the state, highly contestable—and completely unneutral—views on important political and cultural matters."[237] In an increasingly diverse (and polarized) society, with diverging definitions of what constitutes "the good life", it would be impossible to select a value-neutral[238] curricula.[239] What makes this situation unique, however, is that it is the government who is making these value judgments. In the past, the courts have permitted these types of value judgements by the government, because it is recognized as government speech.[240] The government can speak directly, as it does through its agencies, but it may also speak indirectly through funding of various programs, as well.[241] Government speech in the context of public schools could thus be considered both direct and indirect speech.[242]

Ordinarily, citizens cannot mount objections to government speech.[243] In this particular context of government speech in public schools, however, the argument fails for the following reasons.

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[236] Peter J. Jenkins, *Morality and Public School Speech: Balancing the Rights of Students, Parents, and Communities*, 2008 BYU L. REV. 593, 595 (2008).
[237] Sanford Levinson, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 79–80 (Duke Univ. Press 1998).
[238] The term "value-neutral" is being used more as a concept of neutrality rather than as an actual possibility in this sense. The author does not believe that a value-neutral curriculum is even possible. Because humans are finite, they cannot learn everything there is to learn about every topic. Therefore, whoever is selecting the curricula will have to make decisions about what to include and what to exclude. Even if the choice is between two uncontroversial topics of instruction, there is still a value judgment that must be made in selecting which of the two uncontroversial topics is most beneficial. Jenkins, *supra* note 236, at 593–96 (providing a deeper discussion of this idea).
[239] Duncan, *supra* note 175, at 1061; Hamburger, *supra* note 164, at 442.
[240] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (saying "when the State is the speaker, it may make content-based choices").
[241] *Id.*; Rust v. Sullivan, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest").
[242] Gilles, *supra* note 72, at 1027.
[243] Hamburger, *supra* note 164, at 426.

2. Today's Public Education System Places Direct Constraints and Abridgments on Parental Speech

These arguments can be formulated in several different ways in order to highlight the unconstitutionality of excluding parental rights from, or minimizing their involvement in, the public schools. The different elements add varying layers of complexity to the analysis. Accordingly, in a sort of "mix and match" fashion, the following arguments connect varying aspects of the public education system to bring several constitutional defects into focus.

a. Prohibitions on Subject Matter are View-Point Discrimination Which Interfere with Parental Speech

In making value judgments regarding curriculum in the public schools, these schools have, at times, designated certain subjects as being impermissible to teach.[244] The easiest example of this is what occurred in *Meyer*.[245] Recall in that case, the Nebraska legislature prohibited all instruction in any foreign language, for all types of schools across the state.[246] A more modern example is that "the public school curriculum is required to be strictly secular. Thus, secular ideas and viewpoints on history, government, justice, sexuality, gender identity, and many other topics can be endorsed in the public schools, [but] religious ideas and viewpoints . . . cannot be endorsed."[247] Even putting religion aside, the government can still choose to endorse some secular viewpoints over others.[248]

Although none of the examples creates a total ban, (since parents could theoretically teach their children at home) the prohibition still creates a partial ban on such instruction.[249]

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[244] Gilles, *supra* note 72, at 1019.
[245] Meyer v. Nebraska, 262 U.S. 390, 397 (1923) (foreign language speakers were viewed as "inimical to our own safety" because the teaching of foreign language would "naturally inculcate in [children] the ideas and sentiments foreign to the best interests of this country." It becomes immediately clear, then, that foreign languages were not prohibited specifically because of their *content* as a foreign language, but because of the *viewpoints* they were expected to inculcate). Although *Meyer* provides a convenient example, one could imagine many other instances of information which may not be taught, such as evolution, critical race theory, racism, Columbus' discovery of the Americas, etc.
[246] *Meyer*, 262 U.S. at 397 (1923).
[247] Duncan, *supra* note 175, at 1068.
[248] *Id.*
[249] Gilles, *supra* note 72, at 1019.

The partiality or totality of the prohibition does not matter, however, because both are presumptively unconstitutional as viewpoint[250] discrimination.[251] Such prohibitions are used solely because the government seeks to restrict the learning of a certain viewpoint.[252]

Prohibitions such as these effectively limit the ability of parents to have their child educated in a subject they may find important or desirable.[253] Although, in the instance of a partial ban, parents could, hypothetically, teach their child the material at home, this may not be realistic because of constraints on time and resources.[254] Thus, such a limitation on parental speech based on viewpoint cannot be taken lightly.

b. Refusing to Allow Parental Input on Public School Subject Matter Creates Compulsory Educative Speech

Not only is it problematic to *prohibit* certain parental speech, but it is perhaps even more problematic to also *compel* parental speech.[255] Yet, by mandating schooling through compulsory education laws, and not allowing parents to adjust such curricular requirements for their child, public schools have effectively done just that; they have compelled parents to adopt the government's speech in place of their own.[256] In the case of parents who disagree with this government speech, whether it be for religious, secular, or other reasons, unless they can remove their child from the school, they may be compelled to "say" things they would

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[250] *Id.* at 1020 (discussing the idea that even if a different type of prohibition were found not to be based on viewpoint discrimination, it would, at the very least, be content-based which still requires that the prohibition be narrowly tailored to advance a compelling government interest).

[251] *Id.*; Duncan, *supra* note 175, at 1066 ("it is more accurate to view the government school . . . as coercive content-based and viewpoint-based discrimination regarding government support for private speech of fundamental importance: the educative speech of impressionable children").

[252] Gilles, supra note 72, at 1020; Duncan, *supra* note 175, at 1066

[253] Gilles, *supra* note 72, at 1020; Runyon v. McCrary, 427 U.S. 160, 176 (1976) (explaining that parents have a right to choose certain educational topics for their children, the Court stated, "it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions." The Court qualified that the institution itself could not discriminate against racial minorities in, say, admissions, but that the curriculum itself could teach that racial segregation is beneficial).

[254] For example, one might imagine a single parent who works long hours in the evening and is unable to educate their child either on their own or by hiring a tutor. Alternatively, in the case of *Meyer*, one could imagine a parent wanting their child to learn a foreign language, but they do not speak a foreign language and therefore are unable to teach their child. Any number of other configurations could be conceived, as well.

[255] Gilles, *supra* note 72, at 1021.

[256] *Id.*; Hamburger, *supra* note 164, at 426.

not otherwise "say."[257] Rather than the parent acting as the gate through which all educational speech passes, the state requires itself to be the first and last arbiter of information. This clearly evidences a shift away from an *in loco parentis*-based educational system.

As enunciated in *Meyer*, *Pierce*, and *Yoder*, it is abundantly clear that parents should have the right to select whether to educate their children in a public school, private school, or through homeschooling.[258] This, in theory, allows a parent who disagrees with the government educative speech to opt out, so as not to have their child inculcated with ideas they find to be false or undesirable, and thus eliminating the risk of compelled speech.[259] This is not, however, the effect of the system in place. Because of compulsory education, and government funding for public schools, this parental decision regarding where to educate a child is not entirely voluntary.[260]

"The combination of state-mandated education and tuition-free state education means that parents are forced, by law, to pay to escape government education."[261] In other words, parents are forced to choose between paying to maintain their constitutional speech rights by withdrawing their child from public school and enrolling them in a private school, or relinquishing their speech rights in order to receive the free educational benefit.[262] This pressure will be even greater for low income families.[263] Because of compulsory education laws, if parents cannot afford to educate their child outside of the public schools, the "brutal bargain . . . is this: enroll your children in government schools or go to jail."[264] This situation

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[257] Gilles, *supra* note 72, at 1021; Hamburger, *supra* note 164, at 426.
[258] *Supra* Section II.A.
[259] Hamburger, *supra* note 164, at 428.
[260] *Id*.
[261] *Id*.
[262] *Id.*; Duncan, *supra* note 175, at 1066.
[263] Duncan, *supra* note 175, at 1066–67; Hamburger, *supra* note 164, at 429 ("Reinforcing this legal point is the grim social reality that all but the wealthiest are herded into state schools. Of course, even wealthy parents are penalized by having to pay to opt out of government speech—so the unconstitutionality is equal for the poor and the wealthy.")
[264] Duncan, *supra* note 175, at 1067.

of giving parents only a semi-voluntary "choice" over where to send their child, and whose educational speech to use, is a direct abridgement of parents' speech rights.[265]

Some parents, indeed, most parents, may be in full support of the viewpoint of the public schools and the government speech propagated therein, and therefore do not view it as compelled speech. This does not, however, minimize the offense to the dissenting parents' speech rights. In accordance with the argument above,[266] the severity of the compelled speech issue will depend on the viewpoint of the parent involved and their degree of disagreement with the public school curricula.[267]

> The ability of parents in the majority to communicate their values to their children is enhanced by the state's endorsement of their values, while that of parents in the minority is substantially undermined because they, unlike majority parents, are required by law to expose their children to beliefs they think untrue.[268]

The problem of compelled speech is not limited only to those who object to all aspects of public schools, however. This is a problem for parents even with objections only to particular sections of the curriculum.[269] Consider again, for a moment, the issue in *Mahmoud*. The Maryland school mandated that a variety of pride storybooks be integrated into their curriculum, and prohibited parents from opting out, and even prevented them from being notified of when the books would be read.[270] Such a configuration leaves parents with no way to counter this objectionable speech, and instead, forces them to operatively adopt it.[271]

Compelling parents to adopt educative speech they would not otherwise speak flies in the face of all that the Court explicitly stated in *303 Creative v. Elenis*. The Court in no

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[265] Hamburger, *supra* note 164, at 428–30.
[266] See *supra* subsection VI.A.2.a.
[267] Gilles, *supra* note 72, at 1021 ("the playing field has tilted sharply and on the basis of viewpoint"); Duncan, *supra* note 175, at 1067 ("Parents who prefer a secular public education for their children are fully funded; parents who prefer a traditional religious education for their children—or a secular education different in content and/or viewpoint from that offered in the public schools—are denied tens of thousands of dollars of public benefits for their children's education.").
[268] Gilles, *supra* note 72, at 1021.
[269] *Id*.
[270] Mahmoud v. McKnight, 688 F.Supp.3d 265 (D. Md. 2023).
[271] Gilles, *supra* note 72, at 1021.

uncertain terms denounced government compelled speech saying, "[n]o government . . . may affect a 'speaker's message' by 'forcing' her to 'accommodate' other views; no government may 'alter' the 'expressive content' of her message; and no government may 'interfere' with her 'desired message.'"[272] The Court's compelled speech doctrine has renounced compelled speech for decades, and behavior contrary to these precedents is presumptively unconstitutional.[273]

3. Combining Compelled Parental Speech with Government Funding for Public Education Creates an Unconstitutional Condition on the Public Benefit of Public Schools

This argument builds on both the previous ones[274] and will elaborate on many of the parts at play in order to provide a broader view of the unconstitutionality of the current education system's approach to parental rights.

Formal, public education in the United States is mandated in all fifty states through the imposition of compulsory attendance laws.[275] "Six hours a day, five days a week, nine months a year, only the public school's values may be communicated to one's child."[276] This public education is funded by the local, state, and federal governments.[277] Generally

[272] 303 Creative v. Elenis, 600 U.S. 570, 596 (2023) (holding that a website designer could not be compelled to speak creative messages through her website design that supported same-sex marriage, because it violated her religious beliefs).
[273] Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, 515 U.S. 557 (1995) ("the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (standing for the same proposition that the government cannot compel speech).
[274] See *supra* subsection VI.A.2.a–b.
[275] Hamburger, *supra* note 164, at 428; *Compulsory school attendance laws, minimum and maximum age limits for required free education, by state: 2017*, Nat'l Ctr. for Educ. Stat., https://nces.ed.gov/programs/statereform/tab5_1.asp (las accessed November 3, 2023).
[276] Gilles, *supra* note 72, at 1022.
[277] Peter G. Peterson, *How is K-12 Education Funded?*, PETER G. PETERSON FOUND. (Aug. 25, 2023), https://www.pgpf.org/budget-basics/how-is-k-12-education-funded; *The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html (last visited Nov. 19, 2023); Elizabeth Rembert, *Here's how Nebraska funds its public schools. It involves a lot of 'bells and whistles'*, NEBRASKA PUB. MEDIA (May 2, 2023), https://nebraskapublicmedia.org/en/news/news-articles/heres-how-nebraska-funds-its-public-schools-it-involves-a-lot-of-bells-and-whistles/.

speaking, the government does not fund any other types of educational institutions.[278] This has been the accepted formulation of things for decades with little to no question.[279]

In *Brown v. Board of Education*, the Court acknowledged that public education is a public benefit.[280] Traditionally, *Brown* is only known as the case which undid the "separate but equal doctrine," because it violated the Fourteenth Amendment.[281] As Professor Hamburger has so aptly highlighted, however, "more was going on."[282] At the time of this decision, the Supreme Court's jurisprudence had already clearly established that a public benefit could not be subject to a coercive, unconstitutional condition.[283] In *Brown* then, the Court was able to frame the situation in those terms, namely "state education as a state subsidy subject to [the] condition" that educational institutions be segregated. [284] Public education could not, the Court held, be subject to such to an unconstitutional condition.[285]

In much the same way as *Brown*, the government has made free, public education conditional.[286] It is conditioned, first, on the need for parents to send their children to public

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[278] It's possible that this is beginning to change. Recent Supreme Court cases seem to indicate that, at least when state governments choose to offer educational funding programs, it must make them available to all schools whether they are religious or secular. *See* Carson v. Makin, 142 S.Ct. 1987 (2022) (holding that Maine's tuition assistance program could not refuse to fund religious schools); *see also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017) (holding that the state violated the Free Exercise clause by denying a religious preschool access to an available educational grant for nonprofits, solely because of the schools religious nature); Agostini v. Felton, 521 U.S. 203 (1997) ("the Court has departed from Ball's rule that all government aid that directly aids the educational function of religious schools is invalid.").

[279] Even Professor Stephen Gilles, a leading scholar on parental rights, and one of the first (if not the first) to enunciate the idea of parental speech, missed the significance of this combination of influences. Gilles, *supra* note 72, at 1024 (he stated, "compulsory schooling laws will usually have little if any impact on parents' efforts to instill in their children their values or way of life.").

[280] Brown v. Board of Educ. of Topeka, Shawnee County, Kan., 347 U.S. 483, 493 (1954) ("[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."); Michael B. Katz, *Public Education as Welfare*, DISSENT (2010), https://www.dissentmagazine.org/article/public-education-as-welfare/#:~:text=Education%2C%20in%20fact%2C%20is%20the,history%20shapes%20institutions%20and%20policy (further explaining how public education fits into, and is part of the American welfare system).

[281] Hamburger, *supra* note 164, at 431.

[282] *Id*.

[283] *See, e.g.*, Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583 (1926). *See also* Perry v. Sindermann, 408 U.S. 593 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963) (both applying the doctrine in the First Amendment context).

[284] Brown v. Bd. of Educ. of Topeka, Shawnee Cnty. Kan., 347 U.S. 483, at 493 (1954).

[285] *Id*.

[286] Hamburger, *supra* note 164, at 430.

schools.[287] There is nothing overly notable about this. The unforgiveable aspect of the condition comes from the problems analyzed above; upon parental acceptance of the free education benefit, the parent must "acquiesce" to government speech displacing their own.[288] If a parent is unwilling to accept this condition, or simply does not want to utilize this benefit, they must pay a "fee" to be excluded from it.[289] This fee refers to paying private school tuition, or the costs associated with homeschooling.

This is not the usual way in which one thinks about selecting a school in America, but that is precisely what happens. As has already been established, the only other two options besides public school (broadly speaking) are private school or homeschooling, both of which require a significant monetary investment.[290] According to the Education Data Initiative, the average cost of a full private school education (K–4 years of postsecondary) in the United States is $307, 262.[291] A recent study on the cost of homeschooling showed that, on average, for one child in grades first through sixth, the annual cost is $1,295. [292] The average annual cost of such an education for one child in seventh through twelfth grade is $1,636.[293] Accordingly, a full education (first grade through 4 years of postsecondary) would average $17,586.[294] This number does not consider the fact that parents who choose to homeschool usually experience a loss of, or at least a decrease in, one parent's income unless they are paying for a tutor or some sort of baby sitter.[295] It also does not account for inflation. There is no way around this. Parents either must accept the government benefit, or they must pay one

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[287] *Id.* at 431.
[288] *Id*.
[289] Gilles, *supra* note 72, at 1025.
[290] Melanie Hanson, *Average Cost of Private School*, EDUC. DATA INITIATIVE (Aug. 29, 2024), https://educationdata.org/average-cost-of-private-school.
[291] *Id*.
[292] Steven Duvall, *The Cost of Homeschooling Today*, HOMESCHOOL LEGAL DEFENSE ASSOCIATION (Jan. 1, 2025), https://hslda.org/post/the-costs-of-homeschooling-today.
[293] *Id*.
[294] *Id*.
[295] Nayanika Guha, *How Much Does Homeschooling Cost?*, PARENTS (Aug. 23, 2023), https://www.parents.com/kids/education/home-schooling/homeschooling-costs/.

of these two fee arrangements.[296] Parents are effectively faced with a quid pro quo, a "Hobson's Choice."[297] This is a condition on a government benefit.[298]

In order to be an unconstitutional condition, it is not enough, however, for there to merely be a condition on the benefit; it must also be coercive. That too is present here. When the Court identifies an unconstitutional condition, it typically requires some showing of coercion.[299] In this case, the coercion is clearly financial, which the Court has recognized as a legitimate form of coercion.[300] One of the Court's most recent acknowledgments of this form of coercion was in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[301] There, the Court found that conditioning public funds for playground resurfacing on a preschool renouncing its religious underpinnings was unconstitutionally coercive.[302]

In the case of public school education, a short look at the figures mentioned above show the incredible coercive financial pressure placed on parents; parents must either accept the free education they disapprove of, or they must pay to educate their children in the manner they deem best. [303] It is worth pointing out that this coercion affects all parents regardless of wealth, because Supreme Court precedent recognizes that the First Amendment protects against "indirect coercion or penalties . . . not just outright prohibitions."[304] Therefore, even if a family has ample resources to pay the "fee" to educate their children

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[296] Duncan, *supra* note 175, at 1058; *see generally* Hamburger, *supra* note 164.
[297] Duncan, *supra* note 175, at 1058.
[298] Hamburger, *supra* note 164, at 430–32.
[299] *Id*. at 432.
[300] FCC v. League of Woman's Voters of Cal., 468 U.S. 364 (1984) (finding that the First Amendment right to free speech was violated and created a coercive environment when federal funds were conditioned upon not publishing any editorial opinion pieces).
[301] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).
[302] *Id.* at 451 ("Trinity Lutheran is not claiming any entitlement to a subsidy. It is asserting a right to participate in a government benefit program without having to disavow its religious character. The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.").
[303] Hamburger, *supra* note 164, at 433.
[304] *Trinity Lutheran*, 582 U.S at 450-51 (*citing* Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988)).

outside of a public school, there is still mild coercion sufficient to make the condition unconstitutional.[305]

These conditions and restrictions on parental speech are particularly sinister because the government is perfectly aware of, and, indeed, has long recognized the susceptibility of children in the public schools to coercive pressures.[306] This was of course the Court's reasoning for eliminating prayer and religious teachings from the public schools in the first place.[307] In *Edwards v. Aguillard*, for example, a case finding that the required teaching of creationism to be unconstitutional, the Court noted, "Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."[308]

Surely if young, impressionable children run the risk of being coerced into religious belief contrary to their parent's wishes, they can also be coerced into contrary beliefs relating to race and gender along with a myriad of other subjects and social issues.[309] In spite of the fact that public school messages can be particularly coercive to young children, conditions on parental speech through financial pressure greatly diminishes the ability of parents to counteract these contrary views in public school.[310] This should be concerning.

Nearly a century ago when Oregon tried to outlaw private education by mandating compulsory education at public schools, *Pierce* dealt with the same issues discussed in this

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[305] Hamburger, *supra* note 164, at 433.
[306] Lee v. Weisman, 505 U.S. 577 (1992) ("there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools . . . he concern may not be limited to the context of schools, but it is most pronounced there"); Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring) ("This court's decisions have recognized a distinction when government-sponsored religious exercise are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.")
[307] *See Weisman*, 505 U.S 577 and *Edwards*, 482 U.S. 578 and *Jaffree*, 472 U.S. 38.
[308] *Edwards*, 482 U.S. at 584.
[309] Hamburger, *supra* note 164, at 434 ("Imposing official political, racial, sexual, and antireligious speech on children can be equally coercive.").
[310] *Id.*

section.[311] There, the Court unequivocally stated, "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[312]As the above analysis shows the current system is having a very similar effect, albeit it through different means, but it must not be forgotten that "states cannot use other pressures to achieve the same unlawful end."[313]

4. There is no Compelling Interest which Justifies the Defeat of Parental Speech Rights

The only way the government could escape the unconstitutionality of its impositions on parental speech, is if it is necessitated by a compelling and narrowly tailored interest.[314] In the interest of time and brevity, this Article will address two of the most persuasive and frequently used interests advanced in this context: (1) the necessity and benefit of providing free government education, and (2) the accompanying need to standardize such education for efficiency purposes.[315]

As to the first interest, it has been argued that the government has an interest in having an educated polity in which citizens are prepared to fulfill their civic duties.[316] To ensure this is accomplished, the government has an interest in providing a means by which such education can occur. Accordingly, all fifty states have imposed on themselves the duty to provide free, public education to all children.[317] In this way, the states have effectively created for themselves an enumerated power akin to those seen under the Federal

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311 Pierce v. Soc'y of Sisters of Holy Names of Jesus and Mary, 268 U.S. 510 (1923); Hamburger, *supra* note 164, at 419.
312 *Pierce,* 268 U.S. at 535.
313 Hamburger, *supra* note 164, at 419.
314 Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1315 (2007).
315 For a much more complete analysis of potential compelling interests, and repudiations of them, *see* Hamburger, *supra* note 153, at 435–50.
316 *Id*.
317 Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM. OF THE STATES (2016).

Constitution.[318] This is all well and good, and this Article takes no issue with the ideal, and indeed necessity, of having an educated citizenry. It has been forgotten, however, that having created such a power does not automatically mean that constitutional rights are subordinate to this power[319] In fact, the general structural pattern of American constitutions[320] "elevat[es] rights over power."[321] Typically, in drafting governing documents the American people "[have given] power—legislative, executive, and judicial—to their governments and then guaranteed rights that restricted or withdrew portions of this power. Power thus was subject to enumerated rights rather than the other way round."[322] Applied in this context, the structural protection prevents parental rights, most notably parental speech rights, from becoming subordinate to a government power to educate. Accordingly, the mere assertion by governments that they must provide free education is insufficient to rise to the level of a compelling interest necessitating the imposition of an unconstitutional condition.[323] It also could not be said that such an interest is narrowly tailored. It is certainly not the case that an educated polity can only be achieved if parental rights are discarded.

As to the second objection, it is commonly asserted that the government, in providing this free education to all citizens, cannot allow for, or accommodate, any parental objections because principles of efficiency and fairness demand complete uniformity and systemization of its programs.[324] In other words, the basis for this objection is that it would be too burdensome for school districts to accommodate the individual speech rights of all potential

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[318] Hamburger, *supra* note 164, at 436.
[319] Phillip Hamburger, *The Inversion of Rights and Powers*, 63 BUFF. L. REV. 731, 733 (2015) (asserting that constitutional rights should triumph over governmental powers and comparing rights to "trumps.") [hereinafter *Inversion*].
[320] Referring both to state and federal constitutional structure.
[321] *See Hamburger*, *supra* note 319.
[322] *Inversion*, *supra* note 319 at 747 (giving the example of Article 1 Sections 8 and 9. Section 8 grants powers to Congress, while Section 9 makes *exceptions* to this power. These exceptions are effectively rights reserved to individuals); Hamburger, *supra* note 164, at 436.
[323] Hamburger, *supra* note 164, at 436.
[324] Upson Hirschoff, *supra* note 70, at 936.

parents with potentially differing objections.[325] The common chorus is: "if I make an exception for you, I'll have to make one for everybody, so no exceptions."[326] The problem with this logic, however, is that the Supreme Court has already rejected it. In *Holt v. Hobbs*, a prison argued that it could not permit religious exceptions to their no-beard-policy, because they feared the potentially numerous requests for religious exemptions would affect the safe and efficient operation of the prison.[327] Finding this argument to be yet another iteration of the no exceptions argument, the Court flatly rejected it calling it the "classic rejoinder of bureaucrats throughout history.[328] The Court's conclusion in *Holt* was based on its earlier holding in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, where it similarly rejected the government's uniformity-based compelling interest arguments because there was no evidence that granting the religious accommodation would compromise the government's ability to administer the program at issue.[329]

Second, the lived reality of this matter would suggest that schools are far more capable and creative than they are credited as being. [330] When faced with a situation in which a parent wishes to exercise their right to direct their child's education, schools can mix and match from a variety of measures to create a solution which fits the precise needs of the school, the parent, and the student. These could include anything from providing an alternative assignment, to making use of a separate online program, sending the child to the library for a study hall, or requiring the parent to homeschool the child for a class.

In the past, when schools have accommodated parental opt outs or other special requests, whether voluntarily or by court order, they have had no trouble doing so. [331] In fact,

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[325] *Id.*
[326] *See* Holt v. Hobbs, 574 U.S. 352, 368 (2015).
[327] *Id*. at 367–39.
[328] *Id*.
[329] Gonzales v. O Centro Espirita Beneficiente Uniao de Vegetal, 546 U.S. 418 (2006).
[330] *Take Back Our Schools: The Fight for Parental Rights*, Ricochet (Apr. 15, 2023), https://ricochet.com/podcast/take-back-our-schools/the-fight-for-parental-rights/.
[331] DeGroff, *supra* note 149, at 129.

schools already have extensive experience with such things as opt-outs and parental consent requirements. Schools across the country have, for many years, managed parental requests to opt children out of classes and programing on sexual education, animal dissection, standardized testing, and surveys, seemingly without being burdened by undo cost or disruption.[332] Public schools have also been tasked with creating and implementing Individual Education Plans (IEPs) for millions of students.[333] This impressive track record of accommodating opt outs and of creating more individually tailored educational experiences, undercuts any argument that the public schools have a compelling interest in complete uniformity. These facts also make it difficult to see how a court could find such an interest to be narrowly tailored.

VIII. A LOOK AT POLICY IMPLICATIONS

As mentioned at the outset, the primary goal of this Article is simply to address the legal viability of such an argument, rather than to exhaustively evaluate the policy implications. However, it would be remiss not to include a few thoughts as to how such a view could impact society.

The most notable impact would likely be a change in case outcomes. Had the above mentioned lower court cases[334] been decided on a parental free speech bases, it seems plausible that the outcomes would have been more favorable to parental rights.

With regard to actual implementation of this view, however, there are a couple possible approaches. First, Professor S. Ernie Walton proposes that the doctrine of *in loco*

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[332] *State Laws and Policies: Sex Education and HIV Education*, GUTTMACHER INSTITUTE, https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education (last updated May 5, 2025); *Opting Out*, DEFENDING EDUCATION https://defendinged.org/resources/opting-out/ (last visited May 29, 2025); *Humane Education Laws by State*, ANIMAL WELFARE INSTITUTE, https://awionline.org/content/humane-education-laws-state (last updated Aug. 13, 2023); Quanbeck et al., TWO PIECES OF A PUZZLE: THE 95% PARTICIPATION REQUIREMENT IN STATE PLANS AND STATES' OPT-OUT POLICIES, National Center on Educational Outcomes (June 21, 2024) (NCEO Report 443).

[333] *Students with Disabilities*, NATIONAL CENTER FOR EDUCATION STATISTICS, https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities (last updated May 2024).

[334] *Supra* Part III.

parentis and its concept of parental delegation can still provide a viable path forward.[335] The crux of his proposition is that because there is, hypothetically at least, still some level of voluntariness in electing to send a child to a public school, that this should continue to be viewed as a parental delegation of authority to the schools.[336] Professor Walton does, however, recognize that, because of modern attendance laws and curriculum restrictions, parents have a far more limited amount of freedom in directing their child's education.[337] In light of this contemporary state of public schools, Professor Walton construes the parental delegation very narrowly, and certainly not to include a delegation of authority on those subjects to which a parent specifically objects.[338] Under his view, although he does not use this precise terminology, the parental delegation should be understood through the lens of a sort of "history and tradition" test, such that the parental delegation would only be seen to encompass those subjects parents have traditionally and historically requested that schools teach their children, namely "the three R's and their natural outgrowths (geography, history, foreign languages, and sciences)."[339] Subjects not falling within this traditional definition constitute the "margins" of the child's education, and typically involve "matters of public concern."[340] These areas of study, Professor Walton posits, should fall exclusively within parental control and direction.[341] Professor Walton cabins even this discretion, however, through requirements that it be "reasonable," and not interfere with various school rules and requirements.[342]

The implementation of such a view would be a marked improvement from the current state of school-parent relationships in most states. However, although nice in theory, in

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335 Walton, *supra* note 211.
336 *Id*.
337 Gilles, *supra* note 72.
338 Walton, *supra* note 211, at 483–92 (citing Morrow v. Wood, 35 Wis. 59 (1874)).
339 *Id*. at 492.
340 *Id*.
341 *Id*. at 483–92.
342 *Id*. at 490.

application, such an idea may be difficult to implement and apply coherently. Additionally, this approach would not fully vindicate parental rights; it would function more as a Band-Aid rather than an actual salvation of parental rights.

A second, better approach exists. As discussed above, it is the author's view that public schools are capable of implementing opt outs and other creative measures to assist in returning control to parents.[343] It very well may be, however, that it would be too disruptive for parents to exert the full extent of their rights in the public schools. The solution, however, is not that parents must give up their rights. As America has done for centuries, we must find a way to "live together in our 'many-ness.'"[344] In this case our "many-ness" includes a vast number of visions for the best way to educate children. Professor Richard Duncan and other scholars have advanced the idea of states granting parents stipends for their children to use at a school of their choice.[345] The amount of the stipend would be the same amount it would normally cost to educate a child in the K-12 school district they would otherwise attend.[346] Parents would then be free to select the type of school they wished for their child to attend, whether that be a religious school, boarding school, homeschool or any other sort of educational institution.[347] If, however, a parent elected to send their child to a school which costs more than the amount of the stipend, this would need to be paid, out of pocket, by the parents. Notably, a recent survey done by the National Parents Union discovered that 71% of surveyed parents "support allowing parents to use state public education funding allocated for their child's education to send their child to any

[343] See discussion *supra* subsection VI.A.4.
[344] John D. Inazu, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 6 (U. Chi. Press 2016).
[345] Duncan, *supra* note 175; *School Choice*, AMERICAN FED'N FOR CHILDREN, https://www.schoolchoicefacts.org/?gclid=CjwKCAiA9dGqBhAqEiwAmRpTC4ZmQ1cMyzm88KETUz_uSfkqaDmQjVJnzBqLg-Ms3NKbEt516R3KqhoC-bsQAvD_BwE (last visited Nov. 16, 2023).
[346] Duncan, *supra* note 175, at 1066–1076.
[347] *Id*.

school they choose whether that is a public school, private school, religious school, or homeschool."[348]

It is the mission of the United States Department of Education, and indeed of public schooling generally, to provide "access to equal educational opportunity for every individual."[349] Based on the reasoning and analysis in this Article, however, the author would propose that it is actually this second idea which can provide the sort of free, "universal" educational opportunities the government seeks to provide, while still protecting parental rights. Indeed, what better, more efficient way to do so than by allowing each parent to select the best educational form and institution for that specific child. It is difficult to contemplate a more universal form for an education system capable of accommodating the many values, views, religions, and social preferences of this pluralistic nation.

IX. CONCLUSION

The "culture wars" of today seem omnipresent; they hang, like a fog, over much of public life creating tension to the point of stale-mate.[350] In many areas, dialogue has given way to metaphorical screaming matches, where individuals speak right past each other.[351] As with most societal issues, this impact is heavily felt in the public schools.[352] The discord between parents, public school educators and administrators is growing.[353] This was likely inevitable,

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[348] *Welcome to the Era of Parents in the Driver's Seat*, *supra* note 181.
[349] *Mission of the U.S. Department of Education*, U.S. DEPARTMENT OF EDUCATION, https://www.ed.gov/about/ed-overview/mission-of-the-us-department-of-education (last updated February 14, 2025).
[350] Zack Stanton, *How the 'Culture War' Could Break Democracy*, POLITICO (May 20, 2021, 5:30 PM), https://www.politico.com/news/magazine/2021/05/20/culture-war-politics-2021-democracy-analysis-489900.
[351] *Id.*
[352] Hannah Natanson, *Covid changed parents' view of schools—and ignited the education culture wars*, THE WASHINGTON POST (Mar. 18, 2023, 6:00 AM), https://www.washingtonpost.com/education/2023/03/18/pandemic-schools-parental-involvement/.
[353] *Id.*

but the odd phenomena of schooling during the Covid-19 pandemic placed public education under a microscope.[354]

Much of the discord stems from a disagreement as to who retains authority once children enter the schoolhouse gates—the parents or the state.[355] Supreme Court precedent makes clear that under the Substantive Due Process Clause, parents do, in fact, have the right, and duty, to direct the education and upbringing of their child. Unfortunately, the Court has only vaguely described the scope of this right, allowing lower courts to underenforce parental rights nearly to the point of extinction. This Article has advanced a far more protective approach to parental rights wherein they are recognized as parental speech, protected by the First Amendment. This view would not be subject to the same handicaps as protecting parental rights under the Substantive Due Process or Free Exercise Clause. Once the speech nature of education is highlighted, the unconstitutionality of excluding parents from their child's educational development in public schools becomes visible. This exclusion creates issues of viewpoint discrimination, compelled speech, and unconstitutional conditions, which cannot be defended by a compelling government interest.

Parents of all stripes are being denied their fundamental rights. We are only beginning to see the impact this could have on the family structure, free speech, and educational performance. Parents need the tools to reclaim these protected rights, and the Free Speech Clause provides the clearest way to do this.

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[354] Natanson, *supra* note 352; John Rogers & Joseph Kahne, *Educating for a Diverse Democracy: The Chilling Role of Political Conflict in Blue, Purple, and Red Communities*, UCLA IDEA PUBLICATIONS (2022) ("Almost half (45%) of principals reported that the amount of community level conflict during the 2021–2022 school year was "more" or "much more" than it had been prior to the pandemic. Three percent said there was less.").

[355] Ryan Bangert, *Parental Rights in the Age of Gender Ideology*, 27 TEX. REV. L. & POL. 715 (2023) (discussing the divergence of views between those who advocate for a parent-centric versus state-centric view of authority); Gilles, *supra* note 72, at 961–62.