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# PARENTAL CONTROL OF PUBLIC SCHOOL CURRICULUM \*

The second grade class had just finished reading *Jack and the Beanstalk*. The teacher glanced down at her guide and then questioned the students: "Do you think Jack is wrong to take the giant's bag of gold, then hen and harp? Does he have a right to take these?"<sup>1</sup> In this way, the traditional story about the hen that lays golden eggs is transformed into a discussion of morality, killing, and stealing—a discussion that many parents feel has no place in the public schools.<sup>2</sup> In a number of school districts across the country groups of parents, asserting a right to determine what their children should be taught, are protesting the use of certain textbooks and materials in the public school curriculum.<sup>3</sup> While it is generally undisputed that parents have a fundamental interest in the education of their children,<sup>4</sup> their attempts to wield a greater degree of control within the school system have caused great furor in the educational community.

Illustrative of the intensity that can accompany a dispute over curriculum control is the recent conflict experienced in Kanawha County, West Virginia. This controversy arose over a recommendation by the English textbook selection committee to the Kanawha County Board of Education that a series of textbooks be purchased for the upcoming year.<sup>5</sup> The normally routine procedure of adopting the committee's recommendations<sup>6</sup>

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\* This article is a student work prepared by Kenneth A. Schulman, a member of the ST. JOHN'S LAW REVIEW and the St. Thomas More Institute for Legal Research.

<sup>1</sup> Mathews, *A Peek Into Those Criticized Textbooks*, Washington Star-News, Dec. 2, 1974, at B1, col. 1, at B4, col. 2 [hereinafter cited as Mathews].

<sup>2</sup> *Id.* at B4.

<sup>3</sup> The term "curriculum" is intended to include any course of study, book, film, activity, or topic that comprises a part of the public school system. Protests over public school curriculum content have recently occurred in such places as Charleston, W. Va., Prince Georges County, Md., Boise, Idaho, St. Paul, Minn., Austin, Tex., and Baton Rouge, La. See N.Y. Times, July 25, 1975, at 47, col. 7.

<sup>4</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); Mott & Edelstein, *Church, State, and Education—The Supreme Court and its Critics*, 2 J. LAW & ED. 535 (1973).

<sup>5</sup> Teacher Rights Division, National Education Association, *A Textbook Study in Cultural Conflict 1-2* (D.C. Feb. 1975) [hereinafter cited as *A Textbook Study*]. For an excellent discussion of the content of some of the recommended books, see Mathews, *supra* note 1.

<sup>6</sup> *A Textbook Study*, *supra* note 5, at 16.

erupted into a stormy and often violent confrontation between parents and the school board.<sup>7</sup> Many parents denounced the recommended books as "anti-God, anti-family, and anti-America."<sup>8</sup> Materials were also alleged to invade the privacy of the children by raising personal and moral questions.<sup>9</sup> When verbal protests and petitions were found to be ineffective,<sup>10</sup> some parents resorted to a school boycott<sup>11</sup> and, on occasion, to full-scale violence.<sup>12</sup>

Despite compromise proposals by the school board,<sup>13</sup> the violence continued and the school superintendent and three board members were arrested for "contributing to the delinquency of minors by permitting use of

<sup>7</sup> School buses were struck by gunfire and schools and bridges were bombed in attempts by some parents to enforce boycotts of classes in which the disputed books were to be used. *See, e.g.*, N.Y. Times, Apr. 18, 1975, at 31, col. 5; *id.* Apr. 15, 1975, at 21, col. 4; Associated Press, Charleston, W. Va., Dec. 2, 1974, 17:40; United Press International, Charleston, W. Va., Nov. 14, 1974, 10:36.

<sup>8</sup> United Press International, Charleston, W. Va., Nov. 15, 1974, 11:34.

<sup>9</sup> A Textbook Study, *supra* note 5, at 29. John Mathews, a reporter who has read extensively the Communicating series textbooks published by D.C. Heath Co., one of the more controversial textbook series challenged by Kanawha County parents, has commented that, "[p]erhaps the most important departure . . . is the stress [the textbook series] puts on the 'affective' aspect of education: a child's feelings, emotions, opinions, the ability to deal with issues of principle." Mathews, *supra* note 1, at B4.

Many of the challenged materials used by Kanawha County teachers were designed to guide class discussions on topics such as the students' personal fears and their feelings on the morality of cheating. Parents, in their criticism of the books, maintained that children should be told what is "right" and "wrong" rather than probed about how they feel. They viewed such probing as a form of sensitivity training, which they felt was less important for the schools to concentrate on than imparting basic skills to the children. *See id.*

<sup>10</sup> The textbook protesters obtained 12,000 signatures on a petition seeking the removal from Kanawha County schools of all books which "[d]emean, encourage skepticism, or foster disbelief in the institutions of the United States of America and in Western Civilization." A Textbook Study, *supra* note 5, at 18. Among the institutions to which the petition referred were:

The family unit [which] emerges from the marriage of man and woman;  
Belief in a Supernatural Being, or a power beyond ourselves, or a power beyond our comprehension;  
The political system set forth in the Constitution of the United States of America

*Id.*

<sup>11</sup> The boycotts, at their most effective stage, kept approximately a third of the Kanawha County students out of school. United Press International, Charleston, W. Va., Nov. 18, 1974, 11:40. It is difficult to determine, however, whether the absent students were protesting the use of the books or merely intimidated by threats of violence. *Id.*, Nov. 15, 1974, 11:43.

<sup>12</sup> *See* A Textbook Study, *supra* note 5, at 23; note 7 *supra*.

<sup>13</sup> The board voted to return to the schools all of the disputed books. Two of the textbook series, however, were placed on reserve in the library to be used only by students with parental consent. A Textbook Study, *supra* note 5, at 23. The board also voted that no student be required to use a book objectionable to the student or his parents on either moral or religious grounds and that no teacher be allowed to indoctrinate a student with moral values or religious beliefs objectionable to the student or his parents. *Id.*

un-American and un-Christian textbooks."<sup>14</sup> Thereafter, the board, in an attempt to quell the continued violence, adopted restrictive guidelines for future textbook selections which, if applied stringently, would narrowly limit the choice of textbooks.<sup>15</sup> The following year the guidelines were apparently ignored, however, when the board of education unanimously approved books recommended by the social science teachers' textbook committee. Thus, Kanawha County may be viewed as a politically unsuccessful attempt by parents to remove from the schools books they considered unsuitable for their children.<sup>16</sup>

The Kanawha County controversy is even more noteworthy because it also involved an unsuccessful legal challenge to the specific issue of textbook control. The parents of two school-aged children initiated that challenge by bringing an action to enjoin the board from using the controversial texts and educational materials in violation of their constitutionally protected rights to religious freedom and privacy.<sup>17</sup> Today, the issues raised by the Kanawha County controversy remain very much alive in view of similar struggles over curriculum control in other school districts across the country.<sup>18</sup> This article will examine the rights of parents to control the curriculum of the schools their children attend and the circumstances in which parental objections to the curriculum may be sustained by the courts.

#### PARENTS POSSESS LIMITED RIGHTS IN CONTROLLING THE EDUCATION OF THEIR CHILDREN

That the state<sup>19</sup> has a right to control the educational process of the

<sup>14</sup> *Id.* at 24. The action against the superintendent and the board members was ultimately dismissed. Telephone interview with Hazel Kroesser, Coalition of Quality Education, Jan. 22, 1976.

<sup>15</sup> The guidelines required that textbooks in use in Kanawha County: (1) recognize the significance of the home in American society; (2) not question students about their inner feelings; (3) not contain profanity; (4) not encourage racial hatred; (5) respect the rights of ethnic groups; (6) encourage loyalty to the United States and not imply that any other political system is superior; (7) reflect the true history of the United States; and, (8) stress the importance of traditional rules of grammar. A Textbook Study, *supra* note 5, at 33-34.

<sup>16</sup> The entire course of events in Kanawha County, however, appears to have had a chilling effect on many of the teachers, who have feared to be innovative or to use books which might not be met with public approval. Telephone interview with Hazel Kroesser, Coalition of Quality Education, Jan. 22, 1976.

<sup>17</sup> *Williams v. Board of Educ.*, 388 F. Supp. 93 (S.D.W. Va. 1975), *aff'd*, Civil No. 75-1455 (4th Cir., Dec. 3, 1975).

<sup>18</sup> See N.Y. Times, July 25, 1975, at 47, col. 7.

<sup>19</sup> In order to accommodate the diverse communities within a state, the power to determine curriculum is often delegated to local boards of education.

[D]eference to local control . . . is a recognition of the varying wants and needs of the Nation's diverse and varied communities, each with its unique character, standards and sense of social importance of a variety of values.

public schools is a well established principle of law<sup>20</sup> stemming from the interest of the state in the welfare of its citizens.<sup>21</sup> Nevertheless, the conflicting right of parents to direct their children's upbringing has, in certain situations, been recognized. In this regard, *Meyer v. Nebraska*<sup>22</sup> and *Pierce v. Society of Sisters*<sup>23</sup> are illustrative.

The *Meyer* case involved an appeal by a teacher who was convicted of violating a Nebraska statute which prohibited the teaching of any lan-

*Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974). For example, N.Y. EDUC. LAW § 2590-e (McKinney Supp. 1975) provides that community boards shall have all the powers that are vested in the board of education for the city district of the City of New York. *See also State v. Haworth*, 122 Ind. 462, 465, 23 N.E. 946, 947 (1890), where the court noted that "[i]t is for the law-making power to determine whether the authority [over school affairs] shall be exercised by a state board of education, or distributed to county, township, or city organizations throughout the state."

<sup>20</sup> *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (state has "undoubted right to prescribe the curriculum for its public schools"); *Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580, 586 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974) (state has power to determine curriculum); *State v. Jackson*, 71 N.H. 552, 554, 53 A. 1021, 1022 (1902) ("subject of education [is] one of public concern, to be cherished, regulated, and controlled by the state").

This right of the state to control curriculum, however, is not unlimited. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state statute prohibiting the teaching of evolution violates establishment clause of first amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compelling public school students to pledge allegiance to the flag is violative of first amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state cannot prohibit teaching of foreign languages to elementary school students), *discussed in notes 24-26 and accompanying text infra*.

Also impinging upon the state's right to control education is the teacher's right to academic freedom, which may not be stifled by the state. Teachers retain their first amendment rights in the classroom, giving them a certain degree of control over what is taught in the public schools. *See Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970); *Mailloux v. Kiley*, 323 F. Supp. 1387, 1390 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971); Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. REV. 1176 (1973). That the teacher's right to academic freedom may prevail over the rights of parents as well as over the interests of the state is illustrated by *Keefe v. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969), where the court, in considering the propriety of a teacher's use of a "dirty" word in the classroom, noted that the students' parents' "sensibilities are not the full measure of what is proper education." *See generally* 81 HARV. L. REV. 1045 (1968).

<sup>21</sup> *See Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972) (education necessary to enable citizens to participate intelligently in the political system); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (state may require education to protect youth's general interest); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (state has right to improve mental quality of its citizens); *Stephens v. Bongart*, 15 N.J. Misc. 80, 82, 189 A. 131, 132 (Juv. & Dom. Rel. Ct. 1937) (police power of state to provide for citizens' welfare extends to regulation of education); *State v. Bailey*, 157 Ind. 324, 329-30, 61 N.E. 730, 732 (1901) ("The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education."). *See generally* Note, *Freedom and Public Education: The Need for New Standards*, 50 NOTRE DAME LAW. 530 (1975).

<sup>22</sup> 262 U.S. 390 (1923).

<sup>23</sup> 268 U.S. 510 (1925). Both the *Meyer* and *Pierce* opinions were authored by Justice McReynolds.

guage, except English, to a student who had not successfully completed the eighth grade.<sup>24</sup> Invalidating the provision as violative of the teacher's right to due process, the Court noted that the teacher's "right thus to teach and the rights of parents to engage him so to instruct their children . . . are within the liberty of the [fourteenth] Amendment."<sup>25</sup> In effect, the parents' right to educate their children was recognized in connection with the teacher's right to engage in a useful occupation. Thus, the *Meyer* Court concluded that the statute was also an unconstitutional attempt to regulate a parent's right to control his child's education.<sup>26</sup> It stopped far short, however, of clarifying the precise dimensions of that right.

The parental rights alluded to in *Meyer* were reaffirmed in *Pierce v. Society of Sisters*.<sup>27</sup> The *Pierce* Court held unconstitutional a compulsory education law mandating *public* education for every child between the ages of 8 and 16. The law was found to constitute an unreasonable interference with what had been treated in *Meyer* as a parent's right to direct his child's education.<sup>28</sup> The Court asserted that, "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>29</sup> Thus, the *Meyer* and *Pierce* decisions, considered

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<sup>24</sup> 262 U.S. at 397. Also prohibited was the teaching of any subject in a language other than English. *Id.* The Nebraska Supreme Court had upheld the statute as a valid exercise of the State's police power. The reasoning of the court was that it was "foreign to the best interests" of America to allow the children of foreign-born residents to be taught the native language of their parents before the American way of life had been inculcated upon them. *Meyer v. State*, 107 Neb. 657, 662, 187 N.W. 100, 102 (1922).

<sup>25</sup> 262 U.S. at 400. Since the fourteenth amendment had not yet been construed as imposing upon the states the limitations of the first eight amendments, the Court had to rely on a very broad concept of due process, *i.e.* the teacher's right to teach the proscribed subject was found to be within the penumbras of due process. See *Epperson v. Arkansas*, 393 U.S. 97, 105-06 (1968). Today the teacher's right to academic freedom is based directly on the first amendment right to free speech. See note 20 *supra*.

<sup>26</sup> The *Meyer* Court expressly recognized that the Legislature [had] attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

262 U.S. at 401.

<sup>27</sup> 268 U.S. 510 (1925). *Pierce* involved a suit brought by Society of Sisters, an Oregon corporation engaged in the business of maintaining private schools and academies, for an order restraining enforcement of the compulsory public education law. The Supreme Court, in affirming the granting of the injunction by the district court, held that the unwarranted compulsion of public school attendance would destroy the business and property of the corporation. While, as the Court noted, it is generally true "that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage," *id.* at 535-36, it was found that "the injunctions here sought [were] not against the exercise of any *proper* power." *Id.* at 536 (emphasis in original).

<sup>28</sup> *Id.* at 534-35, citing *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>29</sup> 268 U.S. at 535.

together, clearly indicate that parents have some basic rights in the governing of their children's education.

Although both of these cases have been cited repeatedly as championing a parent's right to direct his child's upbringing,<sup>30</sup> in each case, as the respective Courts pointed out, the state's conflicting right to control the schools was not at issue.<sup>31</sup> It appears, therefore, that neither of these cases, notwithstanding their recognition of a parent's right to control his child's education, can be construed to confer upon the parent any broad rights to dictate curriculum materials.

It is well established that a parent cannot successfully avail himself of the use of the courts simply on the basis of a disagreement he may have with the curriculum as prescribed by the board of education or the state. The Supreme Court has clearly pointed out that, "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."<sup>32</sup> Where, however, a parent's constitutional rights have been transgressed by the actions of the state or local

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<sup>30</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (state cannot compel Amish parents to send their children to formal high school); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (marital privacy violated by statute prohibiting use of contraceptives); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (freedom of religion not violated by statute forbidding parents to permit children to sell in the streets or work in violation of the law); *Reed v. Van Hoven*, 237 F. Supp. 48, 51 (W.D. Mich. 1965) (prayer acceptable in public schools if organized pursuant to court-imposed regulations concerning time and place); *People v. Stanley*, 81 Colo. 276, 283, 255 P. 610, 613 (1927) (parents may absent children from reading of Bible in public schools); *In re John Children*, 61 Misc. 2d 347, 363, 306 N.Y.S.2d 797, 813 (Family Ct. Citywide Child Abuse Term 1969) (presumption that it is necessary to remove child from parent addicted to narcotics not violative of fourteenth amendment).

<sup>31</sup> The *Meyer* Court noted:

The power of the State to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned [by either party]. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports.

262 U.S. at 402. Similarly, in *Pierce*, the Court observed:

No question is raised [by either party] concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

268 U.S. at 534.

<sup>32</sup> *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (emphasis added) (statute prohibiting teaching or use of textbook that teaches theory of evolution held unconstitutional). See also *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972); *Samuel Benedict Memorial School v. Bradford*, 111 Ga. 801, 36 S.E. 920 (1900). As has been pointed out by the Fifth Circuit, in considering school regulations, "[i]t is not for [the court] to consider whether . . . rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities." *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966).

board in establishing the curriculum, the courts must attempt to achieve a proper balance between the state's rights and those of the parent.<sup>33</sup> It may be concluded, therefore, that parents will fail in their challenges if their criticisms do not reach constitutional proportions or the constitutional infringement is justified by a greater state interest.

#### PARENTAL COMPLAINTS NOT REACHING CONSTITUTIONAL PROPORTIONS

Often, a parent's challenge to school board policy is unsuccessful because the complaint is viewed merely as evidence of a distaste for the school's curriculum. For example, in *Rosenberg v. Board of Education*<sup>34</sup> a parent sought to remove from the library shelves both Shakespeare's *The Merchant of Venice* and Dickens' *Oliver Twist* for the sole reason that, in the parent's view, they engendered antisemitism.<sup>35</sup> The parent did not contend that the books were approved by the board because of any antireligious inclination,<sup>36</sup> nor was any constitutional issue raised. In view of the failure to establish either one of these factors, the court upheld the board's exercise of its discretion in carrying out its legal duty to select books.<sup>37</sup> That the parent was offended by the two books was not deemed to be a sufficient reason to suppress their use in the public schools. The court recognized:

If evaluation of any literary work is permitted to be based upon a requirement that each book be free from derogatory reference to any religion, race, country, nation or personality, endless litigation respecting many books would probably ensue, dependent upon sensibilities and views of the person suing.<sup>38</sup>

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<sup>33</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972). As the Supreme Court has indicated, 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 . . . .

*Id.* at 214; *accord*, *Davis v. Page*, 385 F. Supp. 395, 399 (D.N.H. 1974), *discussed in notes* 55-63 and accompanying text *infra*. See also *State v. Hoyt*, 84 N.H. 38, 41, 146 A. 170, 171 (1929), where the court recognized the conflicting rights of the parent and the state and concluded that "the rule of reasonable conduct upon the part of each towards the other is to be applied."

<sup>34</sup> 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. Kings County 1949).

<sup>35</sup> *Id.* at 542-43, 92 N.Y.S.2d at 345.

<sup>36</sup> It would have been difficult to contend that any antireligious sentiment was involved in *Rosenberg* since the board of education there required the teachers to explain to the students that the characters described in the two challenged materials were not typical of any nation or race. *Id.* at 543, 92 N.Y.S.2d at 345.

<sup>37</sup> *Id.* at 544, 92 N.Y.S.2d at 346.

<sup>38</sup> *Id.* at 543, 92 N.Y.S.2d at 346. The *Rosenberg* court does, however, suggest two situations in which the suppression of a book would be warranted: (1) where a book has been maliciously written for the purpose of encouraging hatred of a particular group; and, (2) where the administrators of the school have acted with malevolent intent in selecting a book. *Id.* at 543, 544, 92 N.Y.S.2d at 346. It is submitted that the first classification is misguided in that it



The exercise of a school board's discretion was also sustained in *Presidents Council v. Community School Board No. 25*.<sup>39</sup> That case involved a school board's decision to remove from the library the novel *Down These Mean Streets*, thereby making it available only to parents on a direct loan basis. The book, an account of life in Spanish Harlem, included passages describing sexual and drug-related experiences. It was apparently removed as a result of the claim of some parents that the obscenities and sexual references contained therein would have an "adverse moral and psychological effect" on the children.<sup>40</sup> Others,<sup>41</sup> however, felt that the book would have no such effect on their children and maintained that their first amendment rights had been violated by the book's removal. The court held that no constitutional rights were transgressed and that the wisdom of the board's decision was therefore not properly reviewable.<sup>42</sup> It noted that while dissension is a predictable result of many of the decisions made by the board in determining what books will be stocked in the library,<sup>43</sup> "[t]he ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions."<sup>44</sup>

The recent case arising out of the dispute in Kanawha County, *Williams v. Board of Education*,<sup>45</sup> even more poignantly illustrates the burden a parent has in establishing that a state has violated the Constitution in exercising its power to regulate the curriculum of public schools. The parents in *Williams* alleged that they were forced to send their children to private school at added expense because the textbooks used in the public schools undermined their religious beliefs<sup>46</sup> and intruded upon their

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ignores the possibility that a book may have educational value regardless of the author's intent since the study of propaganda as such can easily be seen as a legitimate educational concern. The necessity for judicial interference in the second situation is more apparent. Any school official intending to promote hatred of a religion through the means of book selection would doubtless appear to be in clear violation of the free exercise and establishment clauses of the first amendment. See *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

<sup>39</sup> 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972).

<sup>40</sup> 457 F.2d at 291.

<sup>41</sup> The suit challenging the board's action was brought by former and current presidents of various parent and parent-teacher associations, a librarian, several parents, three junior high school students, two teachers, and a junior high school principal. *Id.* at 290.

<sup>42</sup> *Id.* at 291.

<sup>43</sup> The community board of education in *Presidents Council* was given the statutory power to regulate the instruction of the students, including the right to select textbooks. See N.Y. EDUC. LAW § 2590-e(3) (McKinney 1970).

<sup>44</sup> 457 F.2d at 292. With respect to the issue of a teacher's academic freedom, the court observed that the board had not prohibited the use of the book in class by a teacher wishing to discuss it, but had only denied the novel a place in the library. *Id.*

<sup>45</sup> 388 F. Supp. 93 (S.D.W. Va. 1975), *aff'd*, Civil No. 75-1455 (4th Cir., Dec. 3, 1975).

<sup>46</sup> 388 F. Supp. at 94. Some parents in Kanawha County have argued that the humanistic approach to education evidenced in some of the textbooks violated the first amendment's

right to familial privacy.<sup>47</sup> More specifically, the parents maintained that the texts in question contained references to religion and morals which were offensive to the establishment and free exercise clauses of the first amendment and the right to privacy of the ninth and fourteenth amendments.<sup>48</sup> The court explicitly recognized that some of the materials were "offensive to [the parents'] beliefs, choices of language, and code of conduct."<sup>49</sup> It held, however, that the placing of books containing religious references in the public schools in no way constitutes an establishment of religion or an inhibition of the free exercise of religion.<sup>50</sup> The court also ruled that there had been no violation of the right to privacy.<sup>51</sup> Finding

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establishment clause by promoting the teaching of Secular Humanism. *See generally* A Textbook Study, *supra* note 5, at 49-51. Indeed, Secular Humanism has been recognized as a religion. *See* *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961); *Welsh v. United States*, 398 U.S. 333, 357 n.8 (1970) (concurring opinion). *See also* *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957) (dictum). It has been suggested, however, that humanistic education does not amount to the teaching of the religion of Secular Humanism and that there is no evidence that the challenged materials represent an attempt to instill in the students the doctrine of Secular Humanism. A Textbook Study, *supra* note 5, at 75-76.

<sup>47</sup> 388 F. Supp. at 94.

<sup>48</sup> *Id.* at 95.

<sup>49</sup> *Id.* at 96.

<sup>50</sup> *Id.* In *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), the Supreme Court held unconstitutional the daily reading of a prayer in the public schools. Nevertheless, the Court maintained that the study of the Bible and religion as part of a secular education could be implemented in accordance with the first amendment. *Id.* at 225. The test that *Schempp* outlines is one of determining the purpose for which a religious reference or material is used. If the purpose be to promote or inhibit a religious practice, there is a violation of the first amendment. *Id.* at 222. In a concurring opinion Justice Brennan properly pointed out that it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not.

*Id.* at 300. *See also* *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (Jackson, J., concurring) (our culture is so infused with religion that the educational system would be remiss if it ignored these religious influences); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975) (study of religion from literary and historical viewpoints is not violative of the first amendment).

The *Williams* case points out that even offensive references to religion may, in the right context, be permissible under the first amendment. 388 F. Supp. at 96. Such a result would appear to pass the purpose-oriented *Schempp* test, and is in accord with such cases as *Todd v. Rochester Community Schools*, 41 Mich. App. 320, 200 N.W.2d 90 (1972), where, since the court found that the antireligious views contained in Kurt Vonnegut's *Slaughterhouse-Five* were neither taught subjectively nor part of any effort to demean Christianity, *id.* at 329-30, 200 N.W. 2d at 94, an attempt by parents to enjoin the book's use in the schools because of its alleged violation of the establishment clause was unsuccessful.

<sup>51</sup> 388 F. Supp. at 96. In dismissing the complaint, the court noted that although not explicitly mentioned in the Constitution, the right to privacy has sometimes been recognized under the ninth and fourteenth amendments. *Id.* Cases in which there has been such recognition include

simply that the texts and materials were offensive, but the defendant's actions not in violation of the Constitution, the court instructed the parents that their relief lay in "administrative remedies through board of education proceedings or ultimately at the polls on election day."<sup>52</sup>

The introduction of sex-education courses in the public schools has created a new subject for dispute. Many parents are of the opinion that they should have the constitutional right to be the exclusive educators of their children in so sensitive an area. Among other constitutional objections, such an argument was raised by a group of parents in *Cornwell v. State Board of Education*.<sup>53</sup> The plaintiffs in *Cornwell* challenged the enforcement of a bylaw passed by the board of education making sex education for all children an integral part of the curriculum. In upholding the bylaw, the court ruled that the constitutional allegations were wholly insubstantial.<sup>54</sup>

The aforementioned decisions suggest that the state's power to regulate the curriculum of the public schools is not easily challenged. Clearly, attempts by parents to use the courts to redress their personal objections

*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (ninth amendment supports assertion that concept of liberty embraces marital privacy as a fundamental right), and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (fourteenth amendment guarantees privileges essential to pursuit of happiness). See also *Roe v. Wade*, 410 U.S. 113, 153 (1973), where the Supreme Court recognized both *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), discussed in notes 27-29 and accompanying text *supra*, and *Meyer v. Nebraska*, 262 U.S. 390 (1923), discussed in notes 24-26 and accompanying text *supra*, as granting a right to privacy in the rearing and education of children.

<sup>52</sup> 388 F. Supp. at 96.

<sup>53</sup> 314 F. Supp. 340 (D. Md. 1969) (mem.), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970). The plaintiffs also alleged that making sex education an integral part of the curriculum violated the first amendment and the equal protection and due process clauses of the fourteenth amendment. 314 F. Supp. at 341.

<sup>54</sup> 314 F. Supp. 340 (D. Md. 1969) (mem.), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970). The court noted that it knew of "no such constitutional right." *Id.* at 342. See also *Medeiros v. Kiyosaki*, 52 Hawaii 436, 478 P.2d 314 (1970) (course on sex education not violative of parents' constitutional rights where parents have right to have their children excused); *Hobolth v. Greenway*, 52 Mich. App. 682, 218 N.W.2d 98 (1974) (statute authorizing school districts to establish sex-education programs and permitting parents to excuse children from such programs not an unlawful delegation of legislative authority).

Not all parental challenges to sex-education classes, however, have proved so futile. In *Valent v. New Jersey State Bd. of Educ.*, 114 N.J. Super. 63, 274 A.2d 832 (1971), parents alleged that their children were being compelled to attend sex-education classes which were violative of their religious dogma. The court refused to grant summary judgment to the board of education pointing out that there were questions of fact to be determined concerning whether there were any possible alternatives to the present administration of the program and whether the state's interest in compelling children to attend outweighed the constitutional right to religious freedom. See generally Comment, *Sex Education: The Constitutional Limits of State Compulsion*, 43 S. CAL. L. REV. 548 (1970).

to curriculum content will be made in vain. This is true even where the materials at issue are sincerely objectionable to a complaining parent.

#### CONSTITUTIONAL OBJECTIONS: APPLICATION OF A BALANCING TEST

In some instances part of a school curriculum may be found to be not merely objectionable but actually violative of the parents' constitutional rights. Even here, parents will be unsuccessful in their challenge if the court determines that the state's interest in education is sufficient to overcome such an infringement of the parents' rights.

Parental complaints based on alleged violations of religious freedom are the most likely to reach constitutional proportions. In *Davis v. Page*<sup>55</sup> the parents complained that the use of audiovisual equipment<sup>56</sup> conflicted with the dogma of their Apostolic Lutheran faith.<sup>57</sup> Instead of attempting to enjoin the use of audiovisual equipment in the schools, the parents challenged only the school board's requirement that all children be physically present during the use of such equipment. The court recognized that compelling the children to be exposed to the equipment *did* diminish the parents' rights to direct the upbringing of their children.<sup>58</sup> It took the position, however, that since audiovisual equipment is such an integral part of the educational process, to entitle the children to leave the room

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<sup>55</sup> 385 F. Supp. 395 (D.N.H. 1974).

<sup>56</sup> "Audio-visual equipment," as defined by the court, means "any material designed to aid in the children's learning and teaching by making use of both hearing and sight. This includes, but is not limited to, overhead projectors, film strips, television, radio, 8 mm movies, and 16 mm movies." *Id.* at 399.

<sup>57</sup> The parents also maintained that it was against their religious beliefs to use televisions or radios; study humanist philosophy, evolution, or sexually related courses; partake in play acting, singing, or dancing to worldly music; or discuss openly family and personal matters. *Id.* at 397.

<sup>58</sup> *Id.* at 399-400. The *Davis* court recognized that although the action was brought on behalf of the children's rights, the parents were really asserting the freedom to shape their children's religious beliefs in accordance with their own. Nevertheless, the case treated the rights of parents and students as one, but the court admitted that the interests of each are not necessarily the same. *Id.* at 398. It appears that the rights of a student to be exposed to courses of study offensive to his parents have never been specifically granted. Justice Douglas, however, has pointed out that the courts should consider the views of the student before granting the parents the right to keep their children out of school or have them excused from certain activities. Dissenting in part in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which allowed Amish parents to keep their children out of school after the eighth grade, Justice Douglas noted:

If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the rights of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. *Id.* at 245-46 (footnote omitted).

each time the equipment is used would be to deny them an effective education.<sup>59</sup> Therefore, with respect to the use of audiovisual equipment, the court held that the state's interest in providing education for its citizens prevailed.

Where the equipment was used for entertainment purposes, however, the *Davis* court found the balance to be in favor of the parents' rights to have their children excused. In the opinion of the court, transgressing the parents' rights to control the religious upbringing of their children was simply not warranted by any state interest in providing entertainment in the schools.<sup>60</sup> The court was aware that the distinction between education and entertainment at the elementary level may be almost imperceptible<sup>61</sup> and that to allow certain students to be excused from various activities can lead to a stratification of the school structure.<sup>62</sup> Nevertheless, it held that the students would be allowed to leave the classroom when the audiovisual equipment was used for entertainment purposes.<sup>63</sup>

The state's interest in education, as asserted in *Davis*, grows partly out of the fact that the children involved must be prepared to face life in the mainstream of American society. The state has a recognized interest in providing each student with the essentials of good citizenship.<sup>64</sup> As the *Davis* court noted, the children will "one day seek employment in the public sector and they will find that a basic education is essential when seeking gainful employment."<sup>65</sup>

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<sup>59</sup> 385 F. Supp. at 401.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 405-06. Students remaining in the classroom during audiovisual activities were called "sinners" by those leaving the classroom. *Id.* at 406.

<sup>63</sup> *Id.* at 401. The *Davis* court's separation of the educational and entertainment aspects of the school curriculum seems to be disadvantageous to the students. The court's refusal to allow students to be excused when audiovisual equipment is used for educational purposes was obviously a recognition of the state's strong power where the child's welfare is concerned. See *Parr v. State*, 117 Ohio St. 23, 26, 157 N.E. 555, 556 (1927). Yet in allowing students to be dismissed when the equipment is used to entertain the children, the court failed to perceive the disruptive effect of such an excusal system upon the students' integration into the social scheme of the school. See *State v. Counort*, 69 Wash. 361, 124 P. 910 (1912). *Contra*, *State v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914). It is submitted that this greatly diminishes the impact of the first part of the court's holding.

<sup>64</sup> 385 F. Supp. at 400. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *People v. Stanley*, 81 Colo. 276, 255 P. 610 (1927); *State v. Hoyt*, 84 N.H. 38, 146 A. 170 (1929); *Parr v. State*, 117 Ohio St. 23, 157 N.E. 555 (1927). See also *Brown v. Board of Educ.*, 347 U.S. 483 (1954), where the Court noted:

[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.

*Id.* at 493.

<sup>65</sup> 385 F. Supp. at 400.

This strong state interest in compulsory education, however, was challenged by Amish parents who claimed that their children would be entering an isolated existence. In *Wisconsin v. Yoder*<sup>66</sup> the Supreme Court sustained the parents' right to remove their children from school after the eighth grade<sup>67</sup> despite the state's compulsory education law mandating that children attend school until the age of 16. It deemed the exposure of an Amish child to the competition and conformity of a public school classroom a barrier to the child's integration into the religious community of the Amish,<sup>68</sup> a community inseparable from the Amish daily lifestyle.<sup>69</sup> It was significant to the Court that the Amish had thrived as an independent community without becoming a burden to the state.<sup>70</sup> Thus, transgressing the parents' constitutional right to religious freedom via compulsory education could not, in the opinion of the Court, be justified by any compelling state interest.<sup>71</sup>

While *Yoder* does represent an extension of parental rights, the Court expressly pointed out that its holding should not be interpreted to alter the "fact that courts are not school boards or legislatures, and are ill-equipped to determine the necessity of discrete aspects of a State's program of compulsory education."<sup>72</sup> Rather, the parental rights granted in *Yoder*, stem only from the extraordinary showing which the Court required to outweigh the state's power to demand a compulsory education. It is submitted that the *Yoder* standard, if applied to a parent who seeks to enjoin the use of a book because it is allegedly violative of some constitutional right, will rarely, if ever, be met. This is due to the difficulty that a parent will have in establishing that the use of so-called morally offensive literature either establishes a religion or inhibits the free exercise of religion.<sup>73</sup> As the *Yoder* Court points out, "subjective evaluation and rejection of the contemporary secular values accepted by the majority" will not "rise to the demands of the Religion Clauses."<sup>74</sup>

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<sup>66</sup> 406 U.S. 205 (1972).

<sup>67</sup> *Id.* at 234. Amish parents viewed the first eight years of education as necessary to impart to their children the basics of reading the Bible, managing productive farms, and interacting, when necessary, with non-Amish people. *Id.* at 212.

<sup>68</sup> *Id.* at 211.

<sup>69</sup> *Id.* at 216.

<sup>70</sup> *Id.* at 225.

<sup>71</sup> For an excellent discussion of the *Yoder* case, interpreting it as eroding the state's power to compel education, see Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213 (1973).

<sup>72</sup> 406 U.S. at 235.

<sup>73</sup> See *Williams v. Board of Educ.*, 388 F. Supp. 93 (S.D.W. Va. 1975), *aff'd*, Civil No. 75-1455 (4th Cir., Dec. 3, 1975).

<sup>74</sup> 406 U.S. at 216. It is further submitted that courts may be hesitant to enforce parents' demands to remove books or allow students to be exempted from certain classes because, in applying the balancing test, such a judicial act itself may be considered as violative of the establishment clause. The *Yoder* Court addressed this concern and warned that "an exception

## CONCLUSION

The cases where parents have been most successful in showing that their constitutional rights have been violated by a part of the curriculum are generally cases involving the first amendment's establishment and free exercise clauses.<sup>75</sup> Even where these constitutional rights have been violated, parents have still been denied the right to control the education of their children where a court finds that the state's interest in directing education is superior.

The school boards' right to adopt courses and select textbooks is one that is not second guessed by the courts, even at the urging of a parent who is sincerely offended by the material to which his child is exposed at school. This result is mandated by the need for public schools which run efficiently and without parental interference with every act of discretion made by the school boards. Unless they resort to private schools or more effectively influence the public school boards on election day, the dissatisfied parents of Kanawha County and others similarly situated will find that the right to control the education of their child stops at the schoolhouse gate.

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from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . . ." *Id.* at 220-21. This potential danger may even be a factor in a court's initial determination that there exists no valid religious objection necessitating the application of a balancing test. See *Williams v. Board of Educ.*, 388 F. Supp. 93 (S.D.W. Va. 1975).  
<sup>75</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975); *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974).