

Brigham Young University Education and Law Journal

Volume 2011

Number 2 *Symposium: The Impact of Same-Sex
Marriage on Education*

Article 8

Fall 3-2-2011

Same-Sex Marriage, Education, and Parental Rights

Richard S. Myers

Follow this and additional works at: <https://digitalcommons.law.byu.edu/elj>



Part of the [Education Law Commons](#), and the [Family Law Commons](#)

Recommended Citation

Richard S. Myers, *Same-Sex Marriage, Education, and Parental Rights*, 2011 BYU Educ. & L.J. 303 (2011).
Available at: <https://digitalcommons.law.byu.edu/elj/vol2011/iss2/8>

.

This Symposium Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Education and Law Journal by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

SAME-SEX MARRIAGE, EDUCATION, AND PARENTAL RIGHTS

*Richard S. Myers**

I. INTRODUCTION¹

There have long been battles in the United States over education. Since the first half of the nineteenth century, we have experienced contentious battles over the proper relationship between the state and parents in controlling the education of children.² In recent years, this controversy has played out in the area of education relating to sexual morality.³ One of the principal emerging controversies today involves teaching about same-sex marriage.⁴

I am not sanguine about an easy solution. Fortunately, we do not have the sort of violent controversies we had in the first half of the nineteenth century,⁵ but the current debates are often fractious and typically result in the subordination of

* Professor of Law, Ave Maria School of Law. I am grateful to Professor Lynn Wardle for inviting me to participate in the Symposium and to the Symposium participants for a stimulating conference.

1. I have addressed some of these issues in prior writings. See, e.g., Richard S. Myers, *The Right to Conscience and the First Amendment*, 9 AVE MARIA L. REV. 123 (2010) [hereinafter, Myers, *Conscience*]; Richard S. Myers, *School Choice: The Constitutional Issues*, 8 CATH. SOC. SCI. REV. 167 (2003) [hereinafter Myers, *School Choice*]; Richard S. Myers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 U. DET. MERCY L. REV. 63 (1996) [hereinafter Myers, *Civic Virtue*]; Richard S. Myers, *A Comment on the Death of Lemon*, 43 CASE W. RES. L. REV. 903 (1993); Richard S. Myers, *Curriculum in the Public Schools: The Need for an Emphasis on Parental Control*, 24 VAL. U. L. REV. 431 (1990) [hereinafter Myers, *Parental Control*]. To avoid multiplying footnotes, I will not provide a citation in every case in which I have drawn from my prior work.

2. Myers, *Parental Control*, *supra* note 1, at 432.

3. See, e.g., Emily J. Brown, Note, *When Insiders Become Outsiders: Parental Objections to Public School Sex Education Programs*, 59 DUKE L. J. 109 (2009).

4. See generally Symposium, *The Impact of Same-Sex Marriage on Education*, 2011 BYU EDUC. & L.J. 126 (2011).

5. See JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 149 (1999).

parental and religious rights.⁶ This is troubling because my approach to these issues begins with the presumption that parents have the primary authority and responsibility to control the education of their children.⁷

A major reason for the current situation, which I regard as unsatisfactory, is due to some basic deficiencies in our approach to education. We tend to view state education as the baseline and that exceptions ought to be narrow (and perhaps only reserved for fringe groups such as the Amish) because exceptions threaten the public schools,⁸ which the Supreme Court has characterized as the symbol of our democracy.⁹ This approach fails to accord a proper respect for parental rights. The current approach is heavily weighted towards the exercise of state power. We need to recognize the inevitability of compulsion in the public schools.¹⁰ We also need to recognize that the near monopoly of public funding for the public schools interferes with the choices of those parents who would like to choose private schools or home education.¹¹

I will begin by exploring the legal issues presented when parents object to teaching relating to same-sex marriage in the public schools. Despite some court decisions that have accorded constitutional protection to parental rights in the context of education,¹² the case law makes it clear that parents have very little ability (at least as a matter of federal constitutional law) to object to the public school curriculum.¹³ Although this conclusion runs against my policy preferences, I think the current law is a proper interpretation of the relevant federal constitutional provisions.

The federal Constitution does not provide any significant protection for parental rights. I will explore this by examining

6. See Myers, *School Choice*, *supra* note 1, at 169.

7. See, e.g., Myers, *School Choice*, *supra* note 1, at 176.

8. See, e.g., *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003); *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995).

9. The Supreme Court has characterized the public schools as “at once the symbol of our democracy and the most pervasive means for promoting our common destiny.” *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (quoting *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948)).

10. See Myers, *School Choice*, *supra* note 1, at 168–69.

11. See Myers, *School Choice*, *supra* note 1, at 170–75.

12. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

13. See Myers, *School Choice*, *supra* note 1, at 169–70.

cases addressing free exercise and due process arguments. The principal focus of the paper will be parental rights to control their children's education. I will briefly discuss older cases,¹⁴ but the main focus will be on recent cases such as *Parker v. Hurley*.¹⁵ These recent cases give very little protection to parental rights. I will evaluate these developments from two perspectives. First, I will analyze these decisions as a matter of federal constitutional law. Second, I will discuss the problems that this law creates and will, in conclusion, suggest how the current, unsatisfactory situation can be improved.

Because of the deficiencies in the federal constitutional law, it is necessary to explore other ways to protect parent choices. One way to do this is to broaden the debate. We really need to think more broadly about whether parents or the state ought to have the principal control over education and we cannot do that by narrowly focusing on the curriculum in the public schools. We need to also think about educational funding. Perhaps the current controversies over the contentious issue of same-sex marriage will prompt an increased focus on these broader issues and will lead to an increased appreciation of parental rights, subsidiarity, and a genuine pluralism in education.

II. LEGAL BACKGROUND

The government was not very active in the area of education until the 1820s–1840s. The common school movement of that era was a conscious effort to mold children in the philosophy of those in charge of the educational system.¹⁶ There was a particular concern to bring those of minority faiths (and here the particular concern was about Catholics) into the societal mainstream. This was enormously controversial,¹⁷ but after about the middle of the nineteenth century we have had a more or less stable set of affairs. I do not want to suggest that there were not controversies. It is true, however, that the disputes were worked out without the influence of federal constitutional law. The public schools have been basically

14. *Pierce*, 268 U.S. 534; *Meyer*, 262 U.S. 390.

15. 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008).

16. See Myers, *School Choice*, *supra* note 1, at 167.

17. *Id.*

Protestant schools for most of their history.¹⁸ There were some controversies over religious activities in public schools and state courts sometimes protected the rights of religious dissenters.¹⁹ But the main remedy for those parents who were unhappy with the public schools was for the parents to exercise the option of avoiding the public schools altogether. That is why Catholic immigrants made such enormous sacrifices to establish the parochial school system.²⁰

The United States Constitution did not play much of a role in these debates until the Court incorporated the Religion Clauses in the middle of the twentieth century.²¹ The school prayer cases of the early 1960s accelerated the move to a secular—as opposed to a Protestant—government school system.²² Most of the cases have dealt with efforts to ensure that all traces of religion are banished from the public schools. I think that most of these cases were properly decided, in large part because there is a very real risk of coercion in the public school setting.²³

But to a significant degree, these cases (involving in recent years things such as the Pledge of Allegiance and moment of silence laws²⁴) are a distraction from the real issues presented by an increasingly secular school system. These cases do not deal with the most serious interferences with parental rights. These interferences occur when parents have objected to the

18. *Id.* See also John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297 (2001) (“For most of its history, public education in America had been unabashedly patriotic and unmistakably Protestant.”).

19. See VITERITI, *supra* note 5, at 150; Jeffries & Ryan, *supra* note 18, at 304.

20. See Myers, *School Choice*, *supra* note 1, at 167.

21. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

22. See *Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). See also Jeffries & Ryan, *supra* note 18, at 318–27; Myers, *School Choice*, *supra* note 1, at 167–68.

23. Myers, *School Choice*, *supra* note 1, at 168. The courts have sometimes gone too far. See *id.* (mentioning *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation prayer) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer at high school football games) as examples of cases that went too far in excluding religion from the public schools).

24. See, e.g., *Freedom From Religion Found. v. Hanover Sch. Dist.*, 2010 U.S. App. LEXIS 23487 (1st Cir. Nov. 12, 2010) (upholding the constitutionality of a New Hampshire statute that requires that public schools authorize a period during the day for students to voluntarily recite the Pledge of Allegiance); *Sherman v. Koch*, 623 F.3d 501 (7th Cir. 2010) (upholding the constitutionality of an Illinois statute that requires a mandatory period of silence in the public schools).

public schools either in whole or in part, and it is to these situations that I now turn.

Supreme Court decisions in the 1920s did protect the rights of parents to opt out of the public school system altogether and to retain some control over private education. In *Meyer v. Nebraska*,²⁵ the Court held unconstitutional a Nebraska statute that made it illegal to teach a subject in a language other than English in any school, private or public. The Court found that the statute violated the due process clause because it unreasonably interfered with the right of the teacher to pursue his occupation and the rights of parents to control the education of their children. The Court noted “[t]hat the State may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally and morally[,] . . . [but also noted that] the individual has certain fundamental rights which must be respected.”²⁶ Although it found a constitutional violation in *Meyer*, the Court did acknowledge “[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English. . . .”²⁷

In *Pierce v. Society of Sisters*,²⁸ the Court held unconstitutional an Oregon statute that required children between eight and sixteen to attend public schools. The Court found that the statute violated the due process clause because it “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”²⁹ Justice McReynolds stated:

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.³⁰

25. 262 U.S. 390 (1923).

26. *Id.* at 401.

27. *Id.* at 402.

28. 268 U.S. 510 (1925).

29. *Id.* at 534–35.

30. *Id.* at 535.

The Court, however, did not recognize an absolute due process right of parents to control the education of their children. The *Pierce* Court noted:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.³¹

In 1972, in *Wisconsin v. Yoder*,³² the Court held that Wisconsin's compulsory school-attendance law (which required children between seven and sixteen to attend school) was unconstitutional as applied to Amish parents who refused to send their children to public schools after they completed the eighth grade. The Court did rely on the parental rights recognized in *Meyer* and *Pierce*, but most of the Court's focus was on the free exercise claim presented by the Amish parents.³³ Although the Court's ruling is considered a high-water mark of protection for free exercise of religion,³⁴ the opinion was quite narrow.³⁵ The Court acknowledged the power of the state to enact compulsory school-attendance laws and to promulgate reasonable educational standards. The Court's ruling seemed limited to the Amish.

Despite these rulings, the modern cases involving parental rights in the area of education have generally been decided in favor of the power of the state. I will limit myself to a few of many examples.

In *Mozert v. Hawkins County Board of Education*,³⁶ the district court held that a public school requirement that all

31. *Id.* at 534.

32. 406 U.S. 205 (1972).

33. *See id.* at 213–14.

34. Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 501 (2009).

35. *See Myers, Conscience, supra* note 1, at 127. *See also* Parker v. Hurley, 514 F.3d 87, 100 (1st Cir. 2008) (“Tellingly, *Yoder* emphasized that its holding was essentially *sui generis*, as few sects could make a similar showing of a unique and demanding religious way of life that is fundamentally incompatible with *any* schooling system.”).

36. 647 F. Supp. 1194 (E.D. Tenn. 1986) (*Mozert I*), *rev'd*, 827 F.2d 1058 (6th Cir. 1987).

students in first through eighth grades use a prescribed set of reading textbooks violated the constitutional rights of the objecting parents and students. The court entered an injunction that required the schools to excuse objecting students from participating in reading classes where the textbooks were used and awarded the parents more than \$50,000 in damages. The plaintiffs had a variety of objections to the reading series. Specifically, the plaintiffs believed that the reading series taught “evolution, moral relativism, internationalism (rather than patriotism), witchcraft, and idolatry, and also ‘denigrated the differences between the sexes,’ and disparaged parental control of children.”³⁷ The district court clearly held that “the [parents] believe that they must not allow their children to be exposed to the content of the [reading] series,” and that “plaintiffs’ religious beliefs compel them to refrain from exposure to the [reading] series.”³⁸ Despite these clear holdings, the Sixth Circuit reversed, holding:

[T]he requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief to engage or refrain from engaging in a practice prohibited or required by their religion.³⁹

Even if the courts find that some aspect of the public school curriculum creates a burden, the courts are far too quick to accept the argument that the state’s interest is strong enough to outweigh the harm to the parents and the students. For example, that was the position taken by one of the concurring opinions in *Mozert*. The opinion agreed with evidence presented at trial that “mandatory participation in reading classes using the Holt series or some similar readers is essential to accomplish” the state’s objective of teaching students how to think critically about complex and controversial subjects and to develop their own ideas and make judgments about these

37. George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 866 (1988) (describing the *Mozert* plaintiffs’ allegations).

38. *Mozert I*, 647 F. Supp. at 1198, 1200.

39. *Mozert v. Hawkins Cnty. Bd. of Educ. (Mozert II)*, 827 F.2d 1058, 1070 (6th Cir. 1987).

subjects, “and that this interest could not be achieved any other way.”⁴⁰

In fact, some of the more extravagant statements in this opinion are difficult to square with the existence of private schools. If the state does have a compelling interest in mandatory participation in a program of this sort, it is difficult to imagine how the state could allow students to be educated in private schools or in the home. It is one thing to say that the state has an interest in an educated citizenry. It is quite another to say that the state has the primary educational responsibility, a responsibility that is superior to parental judgments about the kind of upbringing their children receive.

The other concurring opinion in *Mozert* found that mandatory participation in the reading series did constitute a burden and rejected the view that the state had a compelling interest in its reading program that could not be accomplished by any other means. Yet, in the end, this judge concluded that there had not been a free exercise violation because the plaintiffs had the constitutionally protected option of choosing a private school. As the judge put it, “the school board is entitled to say, ‘my way or the highway.’”⁴¹

The First Circuit’s 1995 decision in *Brown v. Hot, Sexy, and Safer Productions, Inc.* is to the same effect.⁴² In *Brown*, two minors and their parents brought suit after the children were compelled to attend a sexually explicit AIDS and sex education program conducted at their public high school.⁴³ The plaintiffs alleged that the program advocated and approved oral sex, homosexual sexual activity, and condom use during promiscuous premarital sex.⁴⁴ The district court dismissed the complaint and the First Circuit affirmed.⁴⁵ The court of appeals’ conclusion was based on the view that although parents generally have the right to control the education of their children, that right could not be construed to interfere with the government’s decisions about the curriculum.⁴⁶ The court stated:

40. *Id.* at 1071 (Kennedy, J., concurring).

41. *Id.* at 1074 (Boggs, J., concurring).

42. 68 F.3d 525 (1st Cir. 1995)

43. *Id.* at 529.

44. *Id.*

45. *Id.* at 530, 541.

46. *Id.* at 534.

If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents . . . do not encompass a broad-based right to restrict the flow of information in the public schools.⁴⁷

Nor, according to the court, did this program interfere with plaintiffs' free exercise of their religion.⁴⁸ The plaintiffs' claim for damages was properly dismissed because "the plaintiffs [did] not allege that the one-time compulsory attendance at the Program threatened their entire way of life."⁴⁹

The First Circuit's decision in *Parker v. Hurley* is more of the same.⁵⁰ In *Parker*, there were two groups of plaintiffs. The court described the plaintiffs' contentions in this fashion:

The Parkers object to their child being presented in kindergarten and first grade with two books that portray diverse families, including families in which both parents are of the same gender. The Wirthlins object to a second-grade teacher's reading to their son's class a book that depicts and celebrates a gay marriage.⁵¹

The plaintiffs did "not challenge the use of these books as part of a nondiscrimination curriculum in the public schools, but challenge the school district's refusal to provide them with prior notice and to allow for exemption from such instruction."⁵²

The *Parker* court rejected the parents' free exercise and due process claims. With respect to the free exercise claim, the court stated: "While we accept as true plaintiffs' assertion that their sincerely held religious beliefs were deeply offended, we find that they have not described a constitutional burden on their rights, or on those of their children."⁵³ The court distinguished *Yoder* because the *Parker* court did not think the

47. *Id.*

48. *Id.* at 539.

49. *Id.*

50. 514 F.3d 87 (1st Cir. 2008).

51. *Id.* at 90.

52. *Id.*

53. *Id.* at 99.

plaintiffs in *Parker* had alleged the same devastating impact on their religion.⁵⁴ According to the court, “[e]xposure to the materials in dispute here will not automatically and irreversibly prevent the parents from raising”⁵⁵ their children in their religious beliefs. With respect to the due process claim, the court acknowledged that Supreme Court cases such as *Meyer* and *Pierce* had supported parental rights. The court found, though, that this parental right did not extend to “direct[ing] how a public school teaches their child.”⁵⁶ The court concluded that the due process clause did “not give plaintiffs the degree of control over their children’s education that their requested relief seeks.”⁵⁷

The *Parker* court also considered and rejected a combined due process and free exercise claim.⁵⁸ The basis for this conclusion was that the plaintiffs had not presented an argument that there was any direct coercion.⁵⁹ In addition, the court also rejected the argument that the school was unconstitutionally indoctrinating the plaintiffs’ children.⁶⁰ The parents retained the opportunity to instruct their children differently.⁶¹ The “indoctrination” in *Parker* was relatively mild (the court here returned to the idea that there was no cognizable burden involved) and did not amount to “systemic indoctrination.”⁶² According to the court, “[t]he reading by a teacher of one book, or even three, and even if to a young and impressionable child, does not constitute ‘indoctrination.’”⁶³

As *Parker* demonstrates, the current situation is quite bleak, at least as a matter of federal constitutional law.⁶⁴ There

54. *Id.* at 99–100.

55. *Id.* at 100.

56. *Id.* at 101 (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005)).

57. *Id.* at 102–03.

58. *Id.* at 105.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 106.

63. *Id.* at 107.

64. There are other cases to the same effect. See, e.g., *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir.), *amended and reaffirmed*, 447 F.3d 1187 (9th Cir. 2005).

seems to be little prospect of the United States Supreme Court changing this situation.

III. ASSESSMENT

This section of the paper will evaluate the courts' treatment of the free exercise (part A. 1.) and substantive due process (part A. 2.) claims. In my view, the recent court decisions reflect a defensible reading of the relevant constitutional provisions and precedents. I will then (part B.) evaluate the current legal situation from a parental rights perspective. I will also discuss (part C.) some solutions to this situation.

A. *Legal Doctrine*

1. *Free Exercise*

Under current law, the free exercise claim of parents who object to the curriculum in the public schools is not strong. In general, the Free Exercise Clause of the First Amendment provides very little judicially enforceable protection against state laws that mandate conduct that might be viewed as interfering with religious liberty. If the state requirement is a "neutral law of general applicability,"⁶⁵ then (under current law) there is no realistic argument that the Constitution provides any basis to resist the mandate.

The leading case is *Employment Division v. Smith*.⁶⁶ *Smith* involved two individuals who were denied unemployment compensation because of work-related misconduct.⁶⁷ The workers were fired from their jobs with a drug rehabilitation organization due to their use of peyote, an illegal drug, even though they used peyote for religious purposes.⁶⁸ The United States Supreme Court, in an opinion by Justice Scalia, concluded that Oregon could "include religiously inspired peyote use within the reach of its general criminal prohibitions on use of that drug. . . ."⁶⁹ To allow an exemption from laws

65. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

66. *Id.*

67. *Id.* at 874.

68. *Id.*

69. *Id.*

prohibiting “socially harmful conduct”⁷⁰ would allow an individual with a religious objection to such laws “to become a law unto himself.”⁷¹

Under this approach, so long as the state mandate is a neutral law of general applicability, then there is no prospect of a court finding that someone with a religious objection to the mandate is exempted from the mandate.

One seeking an exemption from such a mandate would be limited to seeking an exemption from the legislature.⁷² Justice Scalia noted that “leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in.”⁷³ He concluded, though, “that unavoidable consequence of democratic government must be preferred to a system in which conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”⁷⁴

Under this view, the right of parents to opt-out of an objectionable portion of the curriculum would fail. *Smith* is a controversial ruling but I believe that it was correctly decided. The argument for a constitutionally compelled exemption ought to fail.

I think that, properly interpreted, the free exercise clause only prohibits laws that intentionally discriminate against religion, not laws that have the effect of interfering with the free exercise of religion.⁷⁵ This view of the free exercise clause is the one with the most support in the text and history of the Constitution⁷⁶ and with the current emphasis in constitutional law on the almost always decisive importance of legislative purpose.⁷⁷ It is also the view that has prevailed for most of the long history of judicial interpretation of the free exercise clause. The exception, of course, was the period between 1963 and 1990 (during the *Sherbert-Yoder* era) but it is important to

70. *Id.* at 885.

71. *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

72. *Id.* at 890.

73. *Id.*

74. *Id.*

75. See *Myers, Conscience*, *supra* note 1, at 134.

76. *Id.*

77. *Id.*

note that that relatively brief interlude did not provide significant protection for religious practice.⁷⁸

There is some room to argue that the basic approach in *Smith* (no exemption from a neutral law of general applicability) does not apply. If the public school curriculum was not truly a “neutral law of general applicability,” then *Smith*’s restrictive rule would not apply. But if the school imposed an across the board requirement that students participate in the curriculum, then *Smith* will control. There is also a potential argument that the parents with a religious objection to the public school curriculum can establish a so-called hybrid rights claim.⁷⁹ This argument, which has recently been described by a leading scholar in this area as of “limited practical significance,”⁸⁰ is unlikely to provide support for a claim when the free exercise or substantive due process claims would not succeed independently.

In theory, there might be an argument that the “my way or the highway” situation creates a burden on the free exercise of religion. Parents who want to exercise their constitutional right to send their children to a religious school are faced with the choice of foregoing a valuable public benefit (a free public education) or violating what for some may be a religious obligation to choose religious schooling. I think it is fair to view this as a penalty on the exercise of a constitutional right.⁸¹ There is very little prospect, however, that the federal courts will accept this argument. Recent Establishment Clause decisions make it possible for the government to provide assistance (such as vouchers) that enables certain parents to choose a private education, but, as decisions such as *Locke v. Davey* make clear,⁸² this is viewed as a matter of legislative grace and not as constitutional mandate. This failure is

78. A careful review of the cases reveals that under *Sherbert* and *Yoder* review was “strict in theory but feeble in fact.” Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (footnote omitted).

79. This was how the *Smith* Court distinguished *Yoder*. See *Smith*, 494 U.S. at 881–82. There is a vast literature on hybrid rights. See, e.g., Steven H. Aden & Lee J. Strang, *When a “Rule” Doesn’t Rule: The failure of the Oregon Employment Division v. Smith “Hybrid Rights Exception,”* 108 PENN. ST. L. REV. 573 (2003).

80. DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* 107 (2d ed. 2009).

81. See Myers, *School Choice*, *supra* note 1, at 175.

82. *Locke v. Davey*, 540 U.S. 712 (2004).

lamentable but I do not think there is any prospect of a court finding that the current situation is unconstitutional.

2. *Substantive Due Process*

The recent courts that have considered parental rights arguments in disputes about the curriculum in public schools have rejected the substantive due process arguments. Despite the general support for a parental right to control education, most courts have interpreted this general right not to extend to the particular choice of a parent to opt-out of a portion of the public school curriculum.⁸³

In my view, this conclusion is probably correct as a matter of due process. The whole idea of substantive due process ought to be rejected.⁸⁴ *Meyer* and *Pierce* were *Lochner*⁸⁵-era decisions that relied on the doctrine of substantive due process. Although there were religious aspects to these decisions, *Meyer* and *Pierce* were decided before the Court had incorporated the religion clauses and the decisions were clearly based on substantive due process. With the repudiation of *Lochner*, these decisions, to the extent that they depend solely on the due process argument, ought to have been abandoned as well.

Even if the whole doctrine of substantive due process ought not to be rejected, it is probably true that the substantive due process “right” involved ought not to extend to the parental choice involved. There is a significant debate about how to define the scope of the rights protected by the doctrine of substantive due process.⁸⁶ The narrow approach to this issue reflected in cases such as *Washington v. Glucksberg*⁸⁷ is the most defensible. Yet, this approach likely provides little support for a claim to opt-out of a portion of the public school curriculum. As the Ninth Circuit stated in *Fields v. Palmdale*

83. See, e.g., *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1189–90 (9th Cir. 2006).

84. See Richard S. Myers, *The End of Substantive Due Process?*, 45 WASH. & LEE L. REV. 557 (1988). But see Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009).

85. *Lochner v. New York*, 198 U.S. 45 (1905).

86. See generally Richard S. Myers, *Pope John Paul II, Freedom, and Constitutional Law*, 6 AVE MARIA L. REV. 61, 62–77 (2007) (discussing the debate about the differing understandings of substantive due process).

87. 521 U.S. 702 (1997).

School District,⁸⁸ the “*Meyer-Pierce* right . . . does not include the ‘right to restrict the flow of information in the public schools.’ . . . Indeed, parents ‘do not have a fundamental . . . right generally to direct *how* a public school teaches their child.”⁸⁹ In considering this argument, the courts examine whether the claimed right is deeply rooted in our nation’s history and tradition. Parents do, it is true, have some limited opportunity to opt-out of the public school curriculum (this is typically permitted by state statutes dealing with sex education⁹⁰) but I do not think this would support a more general right to opt-out.

There is some argument for a broader approach to substantive due process. The Court does not always limit the scope of the doctrine to specifically defined rights with deep historical rights.⁹¹ It is possible to generalize from the broad language in *Yoder* to support the parental right involved in these curriculum cases. In *Yoder*, the Court stated: “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”⁹² It is not too great a leap from this approach to the right claimed by the parents in cases such as *Parker*. For this argument to succeed, courts would have also have to take a different approach to the burden issue than the courts did in cases such as *Mozert*, *Brown*, and *Parker*. The courts do in certain contexts demonstrate more sensitivity to the burdens placed upon those asserting constitutional claims (e.g., in the Establishment Clause cases involving religious exercises in public schools or the display of religious symbols⁹³) and so there is some hope that this argument might prevail. I believe, however, that the clear direction of federal

88. 427 F.3d 1197 (9th Cir. 2005), *amended and reaffirmed*, 447 F.3d 1187 (9th Cir. 2005).

89. *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190 (9th Cir. 2006) (citations omitted).

90. See Kevin Rogers & Richard Fossey symposium piece.

91. See Myers, *supra* note 84, at 67–72.

92. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

93. See Myers, *Civic Virtue*, *supra* note 1, at 85; Myers, *Parental Control*, *supra* note 1, at 437.

courts of appeals decisions on this topic indicates that there is little likelihood of this broader argument prevailing.

B. *Evaluation*

The current legal situation with regard to parental control over education is troublesome. The current legal approach is heavily weighted towards state power. As one commentator noted in defending the *Mozert* case:

[T]he entire concept of compulsory education is based upon the assumption that there are times when the state rather than the parent may decide what perspectives the child confronts. Although society normally assumes that parents are best able to determine and do what is best for their child, compulsory education traditionally has been justified as a mechanism to expose children to ideas that will enable them to advance beyond the home and transcend the prejudices of the past. [According to this commentator,] [t]o compel education, especially education under state control or supervision, is to assert that the state—rather than parents—ultimately should decide what is best for children.⁹⁴

I think it is important to recognize this reality. There is inevitably a fair amount of compulsion in the public schools.⁹⁵ And, because of inequities in funding, many parents do not have a realistic option to avoid the public schools by sending their children to private schools or by exercising the choice to home school.⁹⁶

My perspective on these issues is informed by Catholic social thought, which takes a very different approach. The Church emphasizes the primary rights of parents, the importance of the doctrine of subsidiarity, and a sensitivity to

94. Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 298 (1989) (footnotes omitted). For a commentary on the hazards of this sort of strong emphasis on state control over education, see Michael A. Scaperlanda, *Producing Trousered Apes in Dwyer's Totalitarian State*, 7 TEX. REV. L. & POL. 173 (2002); Michael A. Scaperlanda, *Realism, Freedom, and the Integral Development of the Human Person: A Catholic View of Education*, 44 J. CATH. LEGAL STUD. 65 (2005).

95. Myers, *Civic Virtue*, *supra* note 1, at 83.

96. Myers, *School Choice*, *supra* note 1, at 173–76.

the impact of funding.⁹⁷ The Congregation for the Doctrine of the Faith summarized Church teaching in this fashion:

The task of educating belongs fundamentally and primarily to the family. The function of the State is subsidiary: its role is to guarantee, protect, promote and supplement. Whenever the State lays claim to an educational monopoly, it oversteps its rights and offends justice. It is parents who have the right to choose the school to which they send their children and the right to set up and support educational centres in accordance with their own beliefs. The State cannot without injustice merely tolerate so-called private schools. Such schools render a public service and therefore have a right to financial assistance.⁹⁸

The Church's approach to parental control of education supports a parental right to opt-out of a portion of the curriculum. The 1983 Charter of the Rights of the Family stated: "Parents have the right to ensure that their children are not compelled to attend classes which are not in agreement with their own moral and religious convictions."⁹⁹ The Church's social teaching properly regards the "my way or the highway" approach reflected in the constitutional law of the United States as an injustice. As the Compendium of the Social Doctrine of the Church summarizes this point:

Public authorities must see to it that "public subsidies are so allocated that parents are truly free to exercise this right without incurring unjust burdens. Parents should not have to sustain, directly or indirectly, extra charges which would deny or unjustly limit the exercise of this freedom." The refusal to provide public economic support to non-public schools that need assistance and that render a service to civil society is to be considered an injustice.¹⁰⁰

97. See generally Patrick McKinley Brennan, *Harmonizing Plural Societies: The Case of Lasallians, Families, Schools—and the Poor*, 45 J. CATH. LEGAL STUD. 131 (2006).

98. The Congregation for Doctrine of the Faith, *Instruction on Christian Freedom and Liberation #94* (1986), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html.

99. Charter of the Rights of the Family, art. 5(c) (1983), http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html. See also Pontifical Council for the Family, *The Family and Human Rights* (1999), http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html.

100. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church #241* (2004) (quoting *The Charter of the Rights of the Family*, art. 5(b)

There would of course be limits to the parental right. The Church's teaching does not regard rights as absolute.¹⁰¹ But the limits would need to be quite narrow. In *Yoder*, the Court mentioned that "the power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have potential for significant social burdens."¹⁰² Yet, the cases seem to be far more deferential to state power, at least when parents have not opted out of the public schools. I would take the view that the state ought to be able to intervene when there has been a serious showing that parental choices were causing harm.¹⁰³

C. Solutions

1. Rebuild culture

The problem presented for parents whose children attend public schools is that there will inevitably be clashes over basic issues. The best long-term solution is to rebuild the culture so that these clashes are minimized.¹⁰⁴ The situation in *Parker* is only presented because significant segments of the population believe it is a good idea to promote the legitimacy of same-sex marriage. Interestingly, the amici in *Parker* were worried about the exodus from the classrooms if the plaintiffs in *Parker* were granted relief.¹⁰⁵ Apparently that is due to their recognition that not everyone agrees with that moral position.

This particular problem (with parents objecting to the promotion of same sex marriage) would not arise if a traditional understanding of marriage were restored. But I am not optimistic about that strategy in the short run. Because of the increasing pluralism in our society, the strategy of trying to build up a proper understanding of morality is not likely to

(1983)), http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html.

101. See Richard S. Myers, *Current Legal Issues Regarding Rights of Conscience in Health Care*, 16 JOSEPHINUM J. THEOLOGY 394, 403–04 (2009) (noting the Catholic Church's understanding of the limits on the right of religious liberty).

102. *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972).

103. Myers, *School Choice*, *supra* note 1, at 176.

104. See generally Myers, *Conscience*, *supra* note 1, at 137–38; Myers, *supra* note 84, at 405.

105. *Parker v. Hurley*, 514 F.3d 87, 96 n.8 (2008) ("Amici, however, argue that such exemptions would significantly burden the schools because (1) there would be an exodus from classrooms if plaintiffs received the relief requested and that (2) this in turn would send a message that children of same-sex partners are inferior.").

succeed any time soon. Some of these problems are less likely to arise in certain communities. There are many parts of the country where support for same-sex marriage is not widespread. It is a good thing, I believe, that we still have a significant amount of decentralization with regard to schooling. But this does not deal with the problems for parents who are faced with the dilemmas faced by the parents in *Parker*. Their plight would be best solved by restoring a traditional understanding of marriage, although that is a long-term cultural strategy.

2. *Other remedies*

In the meantime, because the federal constitutional arguments are so weak, other remedies need to be pursued. It is often possible to obtain sub-constitutional exemptions. It is worth recalling that legislative protection for conscientious objection to government mandates is long-standing and, I think, far more secure.¹⁰⁶ I think that is true in many contexts and also in the particular issue under review—the area of parental rights. The federal constitutional objections to sex education are typically rejected but there are statutory protections for parental rights in most states.¹⁰⁷ We sometimes forget that decisions such as *Smith* have been reversed by legislation.¹⁰⁸ In general, religious claimants fare better outside the courts.¹⁰⁹ This is a second-best strategy, as I pointed out in a recent paper on health care rights of conscience,¹¹⁰ but such a strategy is necessary to protect religious freedom while the long-term cultural strategy is pursued.

106. Myers, *Conscience*, *supra* note 1, at 135.

107. See Rogers & Fossey symposium piece. See also Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 years*, 38 J.L. & EDUC. 83, 129–30 (2009) (noting that public schools often have opt-out provisions and that these seem to work without significant difficulty).

108. Myers, *Conscience*, *supra* note 1, at 135.

109. Myers, *Conscience*, *supra* note 1, at 135. The legal status of home schooling is a good example. Home schooling advocates did not have a lot of success in the courts. See *id.* at 135 n.81; Myers, *Parental Control*, *supra* note 1, at 435–36. However, as a result primarily of legislative changes, home schooling is now quite secure. Myers, *Conscience*, *supra* note 1, at 135 n.81.

110. Myers, *supra* note 84, at 407.

3. *More equitable funding*

Perhaps a better strategy is to pursue genuine pluralism with regard to education. This would require a more equitable funding system.¹¹¹ I am not optimistic about the success of this approach, either as a matter of constitutional law or as a prudential policy option. Perhaps the serious, increasing clashes about same-sex marriage will prompt some movement in favor of school choice.

IV. CONCLUSION

The current legal situation involving parental rights with regard to controlling the education of their children is quite bleak as a matter of federal constitutional law. The only real constitutional right of parents is to opt-out of the public school system altogether. Parents have very little right to opt-out of particular courses or classes, even when such curriculum offerings interfere with the religious freedom of parents and their children.

The solutions to this plight are not very promising. The existing legal doctrines do not offer much support and, in any event, I do not believe that either the Free Exercise or Due Process clauses, properly interpreted, should offer much support. The solutions I mentioned—rebuilding the culture, pursuing other remedies for conscience, and encouraging an emphasis on school choice with a focus on equitable funding—are more long-term. None of these seems to offer much of a prospect of immediate relief, although the legislative exemption strategy offers some prospect of success. Perhaps, though, the recent intense controversies about same-sex marriage will prompt an increasing focus on school choice.

111. Myers, *School Choice*, *supra* note 1, at 173–76.