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Parents, Religious Convictions, and Public School Curricula

Mark Strasser*

I. Introduction

More and more states are recognizing same-sex marriage and civil unions. Further, the Federal Defense of Marriage Act may no longer be the law of the land in the not-too-distant future. The growing acceptance of lesbian, gay, bisexual and transgender (LGBT) families represented by these developments may have a variety of implications, for example, some teachers and school boards may feel increased pressure to modify their public school curricula to keep abreast of some of these changes in public opinion and include references to LGBT families during the school day.

Commentators suggest that some with religious views opposing same-sex marriage will not welcome such changes in school curricula. While that may be so, faith-based opposition by religious parents would not alone justify the exclusion of such references during the school day. If a rule were adopted precluding school children from being exposed to anything that might be thought to undermine someone's religious beliefs and values, then schoolchildren would be exposed to very little.

Certainly, it is by no means easy to achieve a balance between developing curricula on the one hand and respecting the sincere religious and moral concerns of parents on the other, especially given the great variation in moral and religious belief in our country. Yet, if children are going to learn about and be prepared for the world in which they live, then they must be taught about individuals who may be unlike

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themselves. This article discusses the inclusion of LGBT families in public school curricula, focusing on two cases that illustrate some of the difficulties posed for schools seeking to educate the students in their care when parents assert that the curriculum is undercutting their sincerely held religious convictions.

II. SCHOOL CURRICULA AND CONTROVERSIAL MATERIALS

Over the past few decades, parents have challenged the kinds of curricula offered in the public schools, claiming that the introduction of certain topics contravenes their religious convictions. Sometimes, parents seek to have their children exempted from instruction or discussions involving certain issues, which may impose more of a burden on the schools than might initially be apparent. Two cases—Mozert v. Hawkins County Board of Education\(^2\) and Parker v. Hurley\(^3\)—illustrate some of the difficult issues that must be confronted when parents feel that their religious beliefs and values are threatened by the subject matters taught in the public school classroom.

A. Mozert

Mozert is a seminal case, pitting a school system against the right of parents to limit their children’s exposure to ideas not in accord with the parents’ religious beliefs and values. The Sixth Circuit examined whether “a public school requirement that all students in grades one through eight use a prescribed set of reading textbooks violated the constitutional rights of objecting parents and students.”\(^4\) The parents suggested that the books at issue contained material that undermined the world view that they wished their children to have.

While the parents did not frame the issue in quite this way, at least one of the problems posed was that the school system taught “critical reading,”\(^5\) which required students to develop “higher order cognitive skills that enable students to evaluate the material they read, to contrast the ideas presented, and to

\(^2\) 827 F.2d 1058 (6th Cir. 1987).
\(^3\) 511 F.3d 87 (1st Cir. 2008).
\(^4\) Mozert, 827 F.2d at 1059.
\(^5\) Id. at 1060.
understand complex characters that appear in reading material.” 6 The parents did not challenge whether “critical reading is an essential skill which . . . children must develop in order to succeed in other subjects and to function as effective participants in modern society,” 7 and instead focused on the particular textbook choices made by the school board. Nonetheless, the basic objection of at least some of the parents was that the exposure of the children to certain concepts and ways of looking at the world would itself undermine the religious outlook that the parents wished their children to have. 8

Vicki Frost was the mother of four children, three of whom were in the public schools in 1983. 9 Mrs. Frost found that several of the themes included in the assigned reading were troubling, such as the mental telepathy in one of the stories in a sixth grade reader. 10 Further, after spending nearly 200 hours reviewing the series of books assigned in the schools, she found numerous passages that were religiously offensive 11—for example, passages describing “Leonardo da Vinci as the human with a creative mind that came closest to the divine touch” 12 or advocating “the use of imagination as a vehicle for seeing things not discernible through our physical eyes.” 13 The Sixth Circuit noted that there was a theme that was common to the testimony of several of the objecting witnesses, namely, that the “materials objected to ‘could’ be interpreted in a manner repugnant to their religious beliefs.” 14 Rather than take a chance that the materials would be understood by their children in a way contrary to faith, the parents wanted to make sure that their children would not be exposed to these potentially divisive ideas.

One parent, Bob Mozert, testified that he found certain passages religiously offensive, because they dealt with “role

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6. Id.
7. Id.
8. See infra notes 21–27 and accompanying text.
9. Mozert, 827 F.2d at 1060.
10. Id.
11. Id. at 1061. See also Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680, 683 (7th Cir. 1994) (detailing some of the reading topics that the parents believed would undermine their religious beliefs).
12. Mozert, 827 F.2d at 1062.
13. Id.
14. Id.
reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes."\textsuperscript{15} He seemed worried that his children might be led to misunderstand the "proper" roles of the sexes,\textsuperscript{16} although the opinion did not specify the sexes of his children.\textsuperscript{17} It might be noted that religious convictions do not always mirror equal protection jurisprudence or public policy. For example, the Supreme Court has emphasized the importance of looking past "fixed notions concerning the roles and abilities of males and females,"\textsuperscript{18} precisely because of the importance of making legislative decisions based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."\textsuperscript{19} Nonetheless, some religious traditions suggest that women as a general matter should take on the traditional role of stay-at-home wife and mother.\textsuperscript{20}

Under cross examination, Mozert and Frost testified that they "objected to passages that expose their children to other forms of religion and to the feelings, attitudes and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that the plaintiffs' views are the correct ones."\textsuperscript{21} Basically, the parents wanted to reduce the chances that their children would be exposed to non-conforming beliefs and attitudes, although it seems likely that the children would have some exposure to different views just by virtue of being at a public school where there might be children from a variety of backgrounds, who might be living in any number of different family settings, and might have a broad range of views about a variety of matters.

\textsuperscript{15} Id.
\textsuperscript{16} Mozert was the father of a middle-school and an elementary school student. See id.
\textsuperscript{17} He and his wife were the guardians ad litem for Travis and Sundee, see id. at 1058, which presumably means that they had a boy and a girl.
\textsuperscript{18} Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).
\textsuperscript{19} Id. at 726.
\textsuperscript{20} See Linda C. McClain, The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality, 69 FORDHAM L. REV. 1617, 1643–44 (2001) ("Religious fundamentalism appears to have a significant effect on the preference for this kind of patriarchal family, and conservative Christian views about women’s proper domestic roles as wife and mother appear to exert a significant effect on women’s labor force participation, such that ‘fundamentalist women are significantly more likely to choose the home as their career in their early life course.’").
\textsuperscript{21} Mozert, 827 F.2d at 1062.
The parents were not claiming that their children had been forced to affirm ideas contrary to faith. Had the children been forced to do that, their constitutional rights would have been violated. As the United States Supreme Court made clear long ago, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Rather, what was at issue here was the parents' objection to the introduction of other people's feelings, beliefs, and attitudes without an accompanying suggestion that those views not coinciding with the parents' views were incorrect.

Mrs. Frost did not argue that it would be unacceptable to expose her children to other religions and philosophies at all. Rather, she said that "if the practices of other religions were described in detail, or if the philosophy was 'profound' in that it expressed a world view that deeply undermined her religious beliefs, then her children would have to be instructed to [the] error [of the other philosophy]." However, the opportunities for a profound disagreement were great, because Mrs. Frost's own worldview provided a basis from which all situations and beliefs should be judged, which presumably meant that any situation that might be discussed in the classroom would potentially come in conflict with the view that she sincerely held. Indeed, Mrs. Frost suggested that there were certain topics, for example feminism, that simply could not be broached without violating her beliefs.

22. *Id.* at 1063-64 ("The plaintiffs did not produce a single student or teacher to testify that any student was ever required to affirm his or her belief or disbelief in any idea or practice mentioned in the various stories and passages contained in the Holt series.").
25. *Id.*
26. *Id.* ("The plaintiffs view every human situation and decision, whether related to personal belief and conduct or to public policy and programs, from a theological or religious perspective.").
27. *Id.* ("She identified such themes as evolution, false supernaturalism, feminism, telepathy and magic as matters that could not be presented in any way without offending her beliefs.").
As a separate matter, there was testimony that there was too little discussion of Judeo-Christian concepts in the class.\textsuperscript{28} However, as the Sixth Circuit pointed out, changing the balance of discussion might well have caused individuals of other faiths to complain.\textsuperscript{29} The court might have made a further point. Even if there had been more discussion of "these two dominant religions in the United States,"\textsuperscript{30} the plaintiff might well have objected anyway, because the additional discussion of these religions might have involved positions to which she did not want her children exposed. For example, it would not be surprising if she did not approve of increased discussion of a religion that does not recognize the divinity of Jesus Christ. Presumably, she also would not agree with views that certain other Christians hold.\textsuperscript{31} Indeed, the Sixth Circuit noted that there was "evidence that other members of their churches, and even their pastors, do not agree with their position in this case."\textsuperscript{32}

The point should not be misunderstood. There is no requirement for other members of one's faith to agree with one's religious views in order for one's views to count as religious. The United States Supreme Court has explained that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect,"\textsuperscript{33} especially because "it is not within the judicial function and judicial competence to inquire whether the petitioner or [others] more correctly perceived the commands of their common faith."\textsuperscript{34} Thus, the point here is not that Mrs. Frost and the other plaintiffs misunderstood their faith. Rather, it is merely to point out that so much would potentially contradict their views that it would be very difficult during the school day to avoid everything that was objectionable, especially if part of

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 1064–65 ("[P]laintiffs’ expert witness, Dr. Vitz, . . . found 'markedly little reference to religion, particularly Christianity, and also remarkably little to Judaism' in the Holt series. His solution would be to 'beef up' the references to these two dominant religions in the United States.").
\item \textsuperscript{29} \textit{Id.} at 1065.
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{32} \textit{Mozert}, 827 F.2d at 1061.
\item \textsuperscript{33} Thomas v. Review Bd. of Ind. Emp’t Sec. Div., 450 U.S. 707, 715–16 (1981).
\item \textsuperscript{34} \textit{Id.} at 716.
\end{itemize}
the program was designed to encourage critical reading, thinking, and discussion throughout the school day.\textsuperscript{35} Arguably, all the school was doing was exposing the children to different viewpoints,\textsuperscript{36} but even this might be objectionable to the parents unless the divergent views were labeled as incorrect.\textsuperscript{37}

One of the difficulties in understanding what was being contested in \textit{Mozert} was that there was some confusion about what the parents believed their children were being taught. The Sixth Circuit noted that "the plaintiffs appeared to assume that materials clearly presented as poetry, fiction and even 'make-believe' in the Holt series were presented as facts, which the students were required to believe,"\textsuperscript{38} although there was absolutely nothing in the record to support that these materials were presented that way.\textsuperscript{39} One cannot tell whether the parents would still have objected if they had understood that the children were not being required, for example, to affirm the truth of the make-believe materials. That said, however, when a parent objects to in-depth discussions of alternative belief systems and world views,\textsuperscript{40} it does not seem plausible to believe that her only worry is that her children might be forced to make affirmations contrary to faith. After all, the teacher could be careful to expose the children to several incompatible visions of the world, such that it would be impossible for the children to affirm all of the material presented. One infers that Mrs. Frost, for example, would not have been satisfied had her children been exposed to such a smorgasbord of ideas; on the

\footnotesize{\textsuperscript{35} Mozert, 827 F.2d at 1072 (Kennedy, J., concurring) ("This is particularly true in grades one through four where reading is taught throughout the school day, rather than in a particular period. Appellants would be unable to utilize effectively the critical reading teaching method and accommodate appellants' religious beliefs.").}

\footnotesize{\textsuperscript{36} Id. at 1069 ("The only conduct compelled by the defendants was reading and discussing the material in the Holt series, and hearing other students' interpretations of those materials. This is the exposure to which the plaintiffs objected.").}

\footnotesize{\textsuperscript{37} See id. at 1062.}

\footnotesize{\textsuperscript{38} Id. at 1064. Cf. Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680, 688 (7th Cir. 1994) ("In addition, this 'religion' that is allegedly being established seems for all the world like a collection of exercises in 'make-believe' designed to develop and encourage the use of imagination and reading skills in children that are the staple of traditional public elementary school education.").}

\footnotesize{\textsuperscript{39} Mozert, 827 F.2d at 1064.}

\footnotesize{\textsuperscript{40} See supra note 25 and accompanying text.}
contrary, it was the very variety of approaches that made her worry.41

One understanding of Mrs. Frost's concern was that the exposure of her children to the different world views and to the importance of critical thinking would themselves undermine the approach that she was teaching her children to use. She might say, for example, that in future when her children would be confronted with something novel or contrary to what they had been taught, she would not want them to try to analyze the issue from a variety of perspectives or even use critical thinking to reach some resolution. Instead, she would want them to understand that all answers come from the correct understanding of the Bible.

If understood in this way, Mrs. Frost's contention would be reminiscent of the claims set forth in Wisconsin v. Yoder42 that the schooling would undermine the children's correct understanding of the world. That case involved a Wisconsin statute requiring students to attend public or private school until age sixteen.43 The Yoders did not want their children to go to school beyond the eighth grade,44 because they believed that high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.45

The United States Supreme Court upheld the right of the Yoders to withdraw their children from further formal schooling once those children had finished the eighth grade.46 Yet, the issue in Mozert was not whether the children could be home-schooled or receive instruction in another setting where
the parents' views were more likely to be supported but, instead, whether the students could attend the school but nonetheless be exempted from any discussions that might undermine the plaintiffs' religious beliefs and values.

The Sixth Circuit suggested that "governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise." The court drew a distinction between "those governmental actions that actually interfere with the exercise of religion and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion." If exposure to different ideas were enough to constitute interference with religious exercise, then many discussions of current events would almost necessarily interfere with someone's religious exercise.

The Sixth Circuit held that the "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 or engage or refrain from engaging in a practice prohibited or required by their religion." The court did not examine whether forcing the students to engage in critical thinking and analysis might itself contradict the religious views of the parents, since it was "not clear that the plaintiffs object to all critical reading." The court noted that Mrs. Frost had merely said that "she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer." However, it was not as if those areas of life to which Biblical teachings were applicable were limited in number. On the contrary, "to the plaintiffs

47. See Mozert, 827 F.2d at 1060 ("Most of the plaintiff students were ultimately taught at home, or attended religious schools, or transferred to public schools outside Hawkins County.").
48. See id. at 1061.
49. Id. at 1068 (citing Grove v. Mead Sch. Dist. No. 351, 753 F.2d 1528, 1543 (9th Cir. 1985) (Canby, J., concurring)).
50. Id. at 1068 (citing Grove, 753 F.2d at 1543 (Canby, J., concurring)).
51. Id. (noting that where the "free exercise clause violates whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible.").
52. Id. at 1070.
53. Id. at 1069 (emphasis added).
54. Id.
there is but one acceptable view—the Biblical view, as they interpret the Bible. Furthermore, the plaintiffs view every human situation and decision, whether related to personal belief and conduct or to public policy and programs, from a theological or religious perspective.” 55

Although “witnesses testified that reading the Holt series ‘could’ or ‘might’ lead the students to come to conclusions that were contrary to teachings of their and their parents’ religious beliefs,” 56 the Sixth Circuit was not persuaded that this mere possibility was “sufficient to establish an unconstitutional burden.” 57 Yet, the court would likely not have been convinced that an unconstitutional burden had been imposed even had a stronger case been made that the curriculum was attitude-changing.

Suppose, for example, that evidence were offered that students listening to discussions at school began to reject some of the views of their parents. As long as the students were deciding for themselves what to believe rather than were being forced against their wills to accept some proposition, the state would not have violated constitutional guarantees simply by exposing the students to views that they ultimately found persuasive. 58 Yet, if the important factor is whether the student is deciding for herself what to believe, then the real issue is not the relative degree of likelihood that the student will reach unwelcome conclusions, which is what one might have inferred from the court’s highlighting that the student “could” or “might” make certain judgments. Rather, the focus is on whether the state is exposing the students to a variety of ideas and then letting the students reach their own conclusions rather than imposing certain beliefs on the students or coercing the students into adopting or affirming certain views.

The Sixth Circuit did not address the substance of the policy at issue. 59 Further, the court did not say that it would have been impermissible to reach some compromise that would

55. Id. at 1064.

56. Id. at 1070.

57. Id.

58. See id. at 1068.

59. Id. at 1073 (Boggs, J., concurring) (“we make no judgment on the educational, political or social soundness of the school board’s decision to adopt this particular set of books and this general curricular approach”).
have been more satisfactory to the parents.\textsuperscript{60} Rather, the court simply tried to flesh out what must be shown to establish that the state is imposing too great of a burden on the religious views of the parents and students.\textsuperscript{61} Exposing children in a public school setting to different worldviews and trying to develop critical thinking skills within those children does not constitute a violation of constitutional guarantees.

\textit{B. Parker}

A little over twenty years after \textit{Mozert} was decided, the First Circuit was asked to address the kinds of accommodations that a school must make for parents with religious objections to some of the curriculum's content. In \textit{Parker v. Hurley},\textsuperscript{62} parents sued the Lexington, Massachusetts school district because they wanted to be given the opportunity to exempt their children from religiously repugnant books.\textsuperscript{63} One set of parents, the Parkers, objected to a book given to first-graders that included a discussion of diverse families including families where both parents were of the same sex.\textsuperscript{64} The other set of parents, the Wirthlins, objected to a second grade teacher's reading to her class a book that depicted and celebrated a same-sex marriage.\textsuperscript{65} The parents did not challenge the use of these books as part of a "nondiscrimination curriculum in the public schools."\textsuperscript{66} Instead, they wanted prior notice about the materials that would be used in class and an exemption from any instruction that they believed might be contrary to faith, although they said that this would no longer be necessary once their children reached the seventh grade.\textsuperscript{67}

As an initial matter, it is helpful to examine some of the objectionable material. For example, Jacob, a kindergartener,

\begin{footnotesize}
\begin{enumerate}
\item \textit{Cf. id.} (noting that at "the classroom level, the pupils and teachers in these schools had in most cases reached a working accommodation").
\item \textit{Id.} (noting that the case "is about the constitutional limits on the powers of school boards to prescribe a curriculum").
\item \textit{Parker,} 514 F.3d 87 (1st Cir. 2008).
\item \textit{Id.} at 90.
\item \textit{Id.} ("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.").
\item \textit{Id.} ("The Wirthlins object to a second-grade teacher's reading to their son's class a book that depicts and celebrates a gay marriage.").
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
brought home a "Diversity Book Bag" that included depictions of different families including "single-parent families, an extended family, interracial families, animal families, a family without children, and . . . a family with two dads and a family with two moms."\(^6^9\)

The Diversity Book Bag was brought home in January 2005,\(^7^0\) which was over a year after the Supreme Judicial Court of Massachusetts had held that the state's same-sex marriage ban violated state constitutional guarantees.\(^7^1\) Yet, as the First Circuit noted, the book did not mention anything about same-sex marriage,\(^7^2\) so it was not as if Massachusetts's recognition of same-sex unions would somehow have been a necessary condition for a discussion of families involving parents of the same sex. Indeed, Massachusetts had recognized that two adults of the same sex could each be the legal parent of the same child a decade before Goodridge v. Department of Public Health was decided.\(^7^3\) Thus, the information that was presented in this Book Bag might have been presented even before Massachusetts had begun formal recognition of same-sex marriages.

Consider a state that does not afford legal recognition to same-sex unions and, further, does not permit two individuals of the same sex to become the legal parents of the same child. Would it make sense to have the Diversity Book Bag be part of the curriculum in such a state?

Elementary education serves a variety of goals,\(^7^4\) including promoting good citizenship\(^7^5\) and learning how to get along

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68. Id. at 92.
69. Id.
70. Id.
71. Id. ("On November 18, 2003, a divided Supreme Judicial Court of Massachusetts held, in Goodridge v. Dept of Pub. Health, 798 N.E.2d 941 (Mass. 2003), that the state constitution mandates the recognition of same-sex marriage.").
72. Id. at 92.
73. See Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) (holding that each member of a same-sex couple can be the legal parent of the same child).
75. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (states "are educating the young for citizenship").
better with others. But getting along well with others may well be facilitated when one learns that other children live in families unlike one's own, whether those families involve one parent, two parents of different races or religions, or two parents of the same sex. Further, it should be noted that even a state that does not permit second-parent adoptions within the jurisdiction would still have to recognize such a final adoption that had been validly performed in a sister state. This means that one child might have two legal parents of the same sex in any state of the union, for example, because the parents established their legal relationship with their child in one state but then moved to another. For example, Oklahoma does not allow two individuals of the same sex to adopt a child. However, two members of a same-sex couple who adopt a child in California and then move to Oklahoma would have their legal relationships with the child recognized, notwithstanding that such an adoption could not have been performed within the state.

Suppose that the law were different and that states were not required by the Full Faith and Credit Clause to recognize adoptions finalized in other states. Even so, that would not obviate the desirability of having schoolchildren realize that some of their classmates may live in family settings unlike their own. Nor would it obviate the desirability of having children in alternative family settings realize that they are not alone and that others live in nontraditional families.

The Diversity Book Bag was not offering a legal definition of family, as is evidenced by its referring to animal families.

76. Cf. John T. Berry, A Check-Up on the Health of the Legal Profession, 17 PROF. LAW. 1, 2 (2006) (discussing a judge who guessed that "the lawyers in this case did not attend kindergarten, as they never learned how to get along well with others").

77. See Finstuen v. Crutcher, 496 F.3d 1139, 1141 (10th Cir. 2007) ("We hold that final adoption orders by a state court of competent jurisdiction are judgments that must be given full faith and credit under the Constitution by every other state in the nation.").

78. See id. at 1149 ("[t]he statute, OKLA. STAT. ANN. tit. 10, § 7503-1.1 (West 2009), categorically denies unmarried couples eligibility to adopt a child."). Oklahoma does not allow same-sex couples to marry. See OKLA. STAT. ANN. tit. 43, § 3(A) (West 2009) ("Any unmarried person who is at least eighteen (18) years of age and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex.").

79. See Finstuen, 496 F.3d at 1156 ("We hold today that final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause.").
But in that event, inclusion of these families in a book does not imply that the state affords such families legal recognition. Nor does it imply that the state is offering an endorsement of these families. Rather, inclusion merely involves an acknowledgment that such families exist. If one of the goals of the schools is to teach children that there are many types of family settings, then children should be presented with a wide assortment of households, some but not others containing children and some but not others that are afforded formal legal recognition.

Many commentators bemoan the breakdown of the family, yet, presumably, inclusion of single-parent families within the families in the Diversity Book Bag should not be criticized as an endorsement of single-parent households. Rather, it should be understood as a representation of one kind of family. Further, refusing to recognize that alternative families exist would be to ignore an important demographic fact, even if these alternative living arrangements are not in accord with a particular religious ideal.


83. Some commentators seem to forget that the claimed right is an exemption from exposure to religiously objectionable lifestyles, which might include a whole host of arrangements involving individuals of the same sex or of different sexes. It thus simply will not do as an answer to point out that many of the alternative living arrangements involve different-sex couples, as if that justifies making a special exemption for LGBT families even though many families would be found religiously unacceptable. See Charles J. Russo, Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of Their Children, 32 U. DAYTON L. REV. 361, 366–67 (2007) (“This essay parries these objections by pointing out that as regrettable as developments with regard to marriage and alternative living
Consider a particular tradition that does not approve of divorce. It would be a disservice to all concerned to refuse to acknowledge that many households contain children living with a divorced parent, even if some religious traditions disapprove of divorce. Or, suppose that a particular religion disapproves of religious intermarriage. Would this mean that an elementary school teacher should consider carefully whether to mention the marriage of Chelsea Clinton and Marc Mezvinsky if that wedding were somehow relevant on a particular day? 84

Presumably, one of the reasons that these different types of families were included in the Diversity Book Bag was to reassure children who were living in nontraditional families. Consider a different book in the first grade curriculum, to which parents objected, *Molly's Family*, which was about a girl who was teased because she had two mothers. 85 Eventually, she learns to feel better about herself and her family once she appreciates that there are many different types of families. 86 But developing an appreciation that there are many types of families and that one should not feel ashamed for living in an unusual family might be helpful for any number of children. For example, children living in a very religiously conservative family might come to appreciate that they are not somehow wrong or bad for being raised in a setting that does not mirror the setting of many of their classmates.

Other plaintiffs objected to the reading of *King and King*, in which one prince falls in love with another. 87 The Wirthlins did not want that book read to their second grader, and wanted advance notice of what books would be covered so that they could have their child exempted when the material would contravene their religious beliefs. 88 It might be helpful to flesh

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84. See For Quiet Bride, Dress Speaks Volumes, WATERLOO REGION REC., Aug. 3, 2010, at D6, available at 2010 WLNR 15397005 ("The ceremony was conducted by a rabbi and a reverend as Chelsea Clinton is Methodist and Mezvinsky is Jewish.").

85. See Parker, 514 F.3d 87, 93 (1st Cir. 2008) ("When Jacob entered first grade that fall, his classroom's book collection included . . . Molly's Family, a picture book about a girl who is at first made to feel embarrassed by a classmate because she has both a mommy and a mama but then learns that families can come in many different varieties.").

86. Id.

87. Id.

88. Id. at 102.
out what it would mean for the state to be asserting something that contravenes one's religious beliefs. Presumably, it does not violate the Wirthlins' religious beliefs for the state to say that some jurisdictions or religious traditions recognize same-sex marriage, even if the Wirthlins' religious tradition does not. Suppose that a particular religion does not approve of interracial marriage or, perhaps, does not approve of religious intermarriage. Presumably, mentioning that such couples exist would not contravene those religious beliefs, even if the religion at issue would not recognize the marriages. Or, suppose that a particular religion believes in the importance of following the Biblical command to be fruitful and multiply. Presumably, it does not contravene religious beliefs to mention that there are childless couples or that some individuals voluntarily choose not to have children, even if the religion advocates having children.

A separate question involves whether legitimate pedagogical interests are served by mentioning diverse families more generally, or families involving same-sex parents in particular. The Parker court noted that the state has an interest in promoting tolerance, mentioning "the role of public education in the preparation of students for citizenship." Thus, the inclusion was designed to further legitimate state objectives, and there was no evidence that the discussion of this vast array of types of families was included as a subtle or not-so-subtle attempt to undermine the teachings of a particular religious group.

89. Jamal Greene, Comment, Divorcing Marriage from Procreation, 114 YALE L.J. 1989, 1995 (2005) ("Although many religions do not recognize same-sex marriage, many others do.").

90. See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983) ("Bob Jones University is not affiliated with any religious denomination, but is dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs. . . . The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage.").

91. Zvi H. Triger, The Gendered Racial Formation: Foreign Men, "Our" Women, and the Law, 30 WOMEN'S RTS. L. REP. 479, 479 (2009) (discussing the "ancient proscription against intermarriage, based on a broad range of prohibitions against mixing religion, race, status, nationality and so forth, is common to numerous societies and religions that have thrived at different times and in various places").

92. See Holmes Rolston III, Essay, Saving Creation: Faith Shaping Environmental Policy, 4 HARV. L. & POL'Y REV. 121, 147 (2010) ("In Genesis 1:22, God says, more simply: "Be fruitful and multiply.").

93. Parker, 514 F.3d at 95.

94. Id.
Merely because the state believes that valid interests are served by informing children about the different kinds of families living in the state or the country does not mean that parents will agree with that assessment. As the First Circuit noted, parents might choose not to send their children to public schools, instead opting to send their children to private schools or, as a different court noted, to do home-schooling. However, those parents deciding to send their children to the public schools do not have a constitutional right to direct schools in how to educate their own or others’ children. Nor do the parents have a constitutional right to decide that their children will attend public school part-time, for example, to receive instruction in only certain specified subjects, if such an option is not afforded as a general matter by the school.

Were parents to have a right to determine the content of the curriculum, many public schools would simply be unable to operate. Parents might disagree both about curricular content and about the amount of class time that should be spent on particular topics. In many cases, it would be impossible to satisfy the competing desires of interested parents. Further, even if it were possible to meet the different parental demands, designing the curriculum to meet the various desires articulated by the parents might yield a curriculum that could not be defended pedagogically.

To assess the merits of the plaintiffs’ claim, the First Circuit first sought to determine the kind of harm that the plaintiffs had suffered. As had been true in Mozert, there was...
no allegation of coercion in *Parker.*\(^{98}\) Nor was there any allegation, for example, that listening to the teacher read *King and King,* or any of the other books that the parents objected to being read, somehow violated Joseph Wirthlin’s religious duties.\(^{99}\) Further, it was not as if Joseph’s having been read to in school would somehow prevent his parents from instructing him in a way that was more in keeping with their beliefs.\(^{100}\) While the First Circuit was willing to accept the plaintiffs’ assertion that “the reading of *King and King* was precisely intended to influence the listening children toward tolerance of gay marriage,”\(^{101}\) the court rejected that the reading involved an “attempt to indoctrinate.”\(^{102}\) Indeed, the court suggested that requiring a student to read a book, without more, would generally not be enough to constitute religious coercion.\(^{103}\) Something more would be required to establish a constitutional violation, for example, forcing the student to affirm those ideas.\(^{104}\)

So, too, merely because two books were made available to Jacob Parker to which his parents had religious objections did not suffice to prove a free exercise violation. Indeed, Jacob was required neither to read the books nor have them read to him.\(^{105}\) Further, when one considers that the books did not “endorse gay marriage or homosexuality, or even address these topics explicitly, but merely describe[d] how other children might come from families that look different from one’s own,”\(^{106}\) it was difficult to see how this would involve a free exercise

\(^{98}\) *Parker,* 514 F.3d at 105 (“The parents do not allege coercion in the form of a direct interference with their religious beliefs, nor of compulsion in the form of punishment for their beliefs.”).

\(^{99}\) Id.

\(^{100}\) Id. (“[T]he mere fact that a child is exposed on occasion in public school to a concept offensive to a parent’s religious belief does not inhibit the parent from instructing the child differently.”). See also *Fields,* 427 F.3d at 1200 (“[T]here is no fundamental right of parents to be the exclusive provider of information regarding sexual matters to their children, either independent of their right to direct the upbringing and education of their children or encompassed by it. We also hold that parents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students.”).

\(^{101}\) *Parker,* 514 F.3d at 106.

\(^{102}\) Id.

\(^{103}\) Id.

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) Id.
violation. Thus, there was some question whether the plaintiffs had suffered a cognizable harm.

When the state describes the family settings that exist, it is acknowledging but not necessarily legitimizing those families.\textsuperscript{107} There is something rather unsettling in implicitly if not explicitly suggesting that various types of families should not even be mentioned unless they have the requisite religious approval. While individuals are free to believe according to their own lights,\textsuperscript{108} those beliefs should not determine who is even acknowledged to exist.

There is also something unsettling in suggesting that the contents of the curriculum should be determined by the taxpayers in the community or the parents of children in the schools, as if the subject matters should be chosen by a vote during a Parent Teacher Association meeting.\textsuperscript{109} If students are going to be able to thrive in this world, they are going to have to be able to work with people both like and unlike themselves. Pretending that whole segments of society do not exist will help no one, even if those segments of society are not popular locally.

Certainly, many of the parents who were challenging what was being taught in their children's school were not challenging the subject per se by saying that it simply should not be included in the curriculum,\textsuperscript{110} but were instead suggesting that they did not want their children exposed to the subjects.\textsuperscript{111} Yet, such a request is more difficult to grant than might first appear.\textsuperscript{112} Suppose, for example, that a child were

\textsuperscript{107} Some commentators do not seem to appreciate this. See Russo, supra note 83, at 371 (discussing "teaching that essentially legitimizes same-sex marriage by presenting it as one of an array of familial alternatives").

\textsuperscript{108} See Emp't Div. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.").

\textsuperscript{109} Cf. Russo, supra note 83, at 379 (suggesting that "educational leaders and boards should focus on input from their real stakeholders-parents and community members").

\textsuperscript{110} Parker, 514 F.3d at 102 ("Plaintiffs specifically disclaim any intent to seek control of the school's curriculum or to impose their will on others. They do not seek to change the choice of books available to others.").

\textsuperscript{111} Id.

\textsuperscript{112} Some commentators do not seem to appreciate some of the difficulties that might be entailed. See Eric A. DeGroff, Parental Rights and Public School Curricula: Revisiting Mozart after 20 Years, 38 J.L. & Educ. 83, 96 (2009) ("Parents should, therefore, be extended the right to exempt their children from curricular requirements
excused from reading about the different types of families that exist. Even so, during a different part of the day, one student might refer to readings or a discussion from an earlier part of the day or, perhaps, from the previous week. It might be quite difficult to prevent the religious child from being exposed to these "objectionable" ideas. Further, parents might object to a whole host of subjects that might yield understandings contrary to faith, which would both make it very difficult to anticipate when the topics would be raised. And, even if possible to anticipate, might mean that the children would be exempted from a significant percentage of class activities.113

While it might seem that exemptions would only affect the students who would be excused from certain activities, it is plausible to think that the effect would be more widespread. Consider a teacher who wants to discuss or refer to something in the afternoon that had been covered earlier in the day. Suppose that this teaching moment involved a sensitive subject matter for at least some of the students in the room. The teacher would have to decide whether to excuse the students for a few moments while making the reference or engaging in a limited discussion. It would be unsurprising if the teacher would decide simply not to discuss the issue rather than spend extra class time excusing particular students and then arranging to have them return to the class.

At least two difficulties are suggested by the scenario, in which the teacher forgoes saying or doing something that she believes would be pedagogically useful because she might otherwise have to take class time to excuse particular students. First, it might mean that the curriculum could in effect be controlled by those who want their children excused, which might mean that particular subject areas would be much less likely to be addressed in class.114 Second, it should not be thought that very few discrete areas would be subject to this

in the public schools, at least when their objections are prompted by religious or moral convictions.

113. See Emily J. Brown, Note, When Insiders Become Outsiders: Parental Objections to Public School Sex Education Programs, 59 DUKE L.J. 109, 111 (2009) (suggesting that Parker illustrates the practical problems posed when parents object "to the general worldview promulgated by a public school curriculum").

114. Ironically, some commentators complain that including the subject matter in the first place somehow involves use of a heckler's veto, see Russo, supra note 83, at 370, whereas it is much more plausible to suggest that refusing to discuss the material involves deference to such a veto.
reduced coverage as a brief consideration of some of these cases reveals.

Some parents have articulated religious objections to classic children's authors such as A.A. Milne, Dr. Seuss, and Maurice Sendak.\textsuperscript{115} But this might mean that \textit{Charlotte's Web}\textsuperscript{116} or \textit{Winnie the Pooh}\textsuperscript{117} would be materials that might be avoided either on the reading list or, perhaps, in later discussions. Would students be able to get an education even if these materials were not included? Yes. Would their educations be diminished if these and other works were excluded because some parents found the content religiously objectionable? Yes.

Some commentators imply that books like \textit{Diversity Book Bag}, \textit{Molly's Family}, and \textit{King and King} are being foisted on the schools by "a small number of activists attempting to change the nature and meaning of marriage."\textsuperscript{118} It is especially ironic that such a claim would be made in the context of an analysis of \textit{Parker}. The first two of those books did not even discuss marriage, so it is difficult to see how those books could fairly be characterized as seeking to foist this allegedly foreign concept on unsuspecting children. Even \textit{King v. King} was read in a state that already recognized same-sex marriage, so it could hardly be fairly described as attempting to subvert the state's definition or understanding of marriage.

Suppose, however, that we were talking about a state in which same-sex marriage was not recognized. Even so, it must be remembered that this was a fairy tale. Many things happen in fairy tales that not only will not occur locally but are physically impossible. Yet, same-sex marriage is recognized in various states and countries, even if it is not (yet) recognized in the particular state where a book is being read. It would be at best an unusual educational principle that precluded discussion of anything that was not legally recognized within a particular state.

Regrettably, some commentators seek to justify excluding certain books or subjects because those books present a picture of the world that the commentators reject, empirical evidence undermining the commentators' views notwithstanding.

\textsuperscript{115} See Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680, 688 (7th Cir. 1994).
\textsuperscript{117} A. A. Milne, \textit{Winnie the Pooh} (1926).
\textsuperscript{118} Russo, \textit{supra} note 83, at 370.
Consider the claim that "the co-parenting message of marriage is weakened when marriage is redefined to include relations among same-sex couples that are designed for sexual pleasure and lack the ability to co-parent."119 Yet, it is difficult to see how the co-parenting message is undermined by couples who not only do not lack the ability to co-parent, but are in fact co-parenting. Indeed, various studies suggest that same-sex couples are parenting quite well.120

Several of the plaintiffs in Goodridge were same-sex couples living with their minor children.121 To say that they could not co-parent is simply wrong. It seems safe to assume that some parents do not approve of the message sent in the Diversity Book Bag, not because of the message's falsity but because of its truth. LGBT families exist and are thriving, even if certain religious groups disapprove of them.

Certainly, commentators might note that members of a same-sex married couple cannot each be biologically related to the same child. But we have long ago rejected that marriage should only be for individuals who can have a child through their union, and numerous couples both of the same sex and of different sexes find themselves parenting children to whom they have no biological connection. If this is somehow destructive of the basic understanding of marriage, then marriage is in serious trouble.

It is at best ironic that commentators seem to believe same-sex married couples who are raising their children do more to sever the link between marriage and parenting than do heterosexual married couples who choose not to have children. The claim here of course is not that voluntarily childless couples should not be able to marry but merely that some of the arguments offered against same-sex couples seem much more persuasive when applied to other groups. But this suggests that even more groups are at risk of being marginalized by


120. See e.g., U.Va. Study: Adoptive Children of Lesbian and Gay Couples Developing Well, DAILY NEWS LEADER, July 26, 2010, available at 2010 WLNR 14917973 (discussing a study finding "that whether or not adoptive children were developing in positive ways was unrelated to the sexual orientation of their adoptive parents").

continuing efforts to restrict school discussions to those promoting a particular viewpoint.

III. CONCLUSION

How should a school's curriculum be affected by a state's deciding to recognize same-sex marriage? As a general matter, it should not make much difference. It is too late in the day to treat same-sex marriage as if it was a contradiction in terms. Whether or not same-sex marriage is recognized in one state should not affect whether the topic can be mentioned. Indeed, unless there can be general agreement that mentioning a topic, without more, cannot be construed as endorsing a particular view, children will be at risk of being given a woefully inadequate education because so many subjects would be objectionable as endorsements.

As Parker and Mozert illustrate, parents may have religious objections to subjects involving legally permissible or even recognized relationships or activities. Figuring out how to acknowledge the existence of LGBT families without burdening free exercise may involve difficult line-drawing in some cases. However, for the most part, whether a particular state recognizes same-sex relationships should not determine whether the existence of such relationships should be acknowledged, and the claim that it should, imposes a litmus test that would normally never be imposed. Children should be taught in age-appropriate ways about the world in which they live, and their exposure to the world should not be limited to those subjects that have been given a religious stamp of approval.

122. See Vanessa A. Lavel, Comment, The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies between Marriage and Adoption Cases, 55 UCLA L. Rev. 247, 271 (2007) ("When same-sex couples first began to petition for marriage licenses, for example, some state officials simply denied the possibility of same-sex marriage, describing it as a 'contradiction in terms.'").