

COMMENT

Homosexuality, the Public School Curriculum and the First Amendment: Issues of Religion and Speech

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“The foundation of every state is
the education of its youth.”
Diogenes Laertius¹

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I. INTRODUCTION

Education provides the means to create an informed citizenry, which is a necessary element of an effective democracy.² Education is defined as “the act or process of imparting or acquiring general knowledge, developing the powers of reasoning and judgment, and generally of preparing oneself or others intellectually for mature life.”³ The United States has routinely recognized the importance of providing state-sponsored universal access to education in a democracy.⁴ Ideally, not only are American children provided with basic substantive knowledge, they are also taught how to participate meaningfully in a

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1. DIOGENES LAERTIUS, LIVES AND OPINIONS OF EMINENT PHILOSOPHERS (C.D. Yonge trans., 1853).

2. See *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

3. Dictionary.com., Education, <http://dictionary.reference.com/browse/education> (last visited Mar. 21, 2009).

4. See Cornell Univ. Law Sch. Legal Info. Inst., Education Law: An Overview, <http://topics.law.cornell.edu/wex/education> (last visited Mar. 21, 2009).

democratic government.⁵ This must necessarily include teachings of “core American values such as fairness, equality, justice, respect for others, and the right to dissent.”⁶

Scholars in the field of education have argued the profound effect curricula have on children’s social development.⁷ It is not surprising that debates exist over what constitutes suitable curricula.⁸ Curricular battles in the public education system serve as a reflection of the hot topics in communities across the country, including race, sexuality, gender, and religion.⁹

Today, the legal ramifications of mandating or banning the topic of homosexuality in curricula is an issue facing school boards, legislatures, and courts alike.¹⁰ On one side of the debate, scholars argue that the inclusion of age-appropriate information on the topic of homosexuality will provide benefits,¹¹ such as an accurate reflection of the different types of individuals and families in our society, and that it will encourage children to develop their own opinions on the issue of homosexuality. Scholars also argue that this information will promote understanding and respect, which is “essential . . . for ensuring stability in our diverse society.”¹² The public education system is in a unique position to promote tolerance towards homosexuals and to prevent the acceptance of antigay harassment.¹³

There is also fierce opposition. In some areas of the United States, school districts have banned positive references to homosexuality, while others have entirely banned the topic from their curricula.¹⁴ Often, where

5. See Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1606 (1995).

6. Nat’l Coalition Against Censorship, *Censorship in Schools*, <http://www.ncac.org/education/schools/index.cfm> (last visited Mar. 21, 2009).

7. See JAMES ANTHONY WHITSON, *CONSTITUTION AND CURRICULUM* 54-61 (1991) (noting the vast array of scholars treating the subject and the variety of opinions).

8. See *id.*

9. See CHRISTOPHER EISGRUBER & LAWRENCE SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 181 (2007)

10. See generally *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); Andy Sher, *House Panel Kills Bill That Would Ban Teaching of Homosexuality in Schools*, CHATTANOOGA TIMES, Feb. 20, 2008, <http://www.timesfreepress.com/news/2008/feb/20/house-panel-kills-bill-would-ban-teaching-homosexu/>.

11. Tenney, *supra* note 5, at 1614.

12. See *id.*

13. See *id.* at 1607-08.

14. See Tenney, *supra* note 5, at 1604.

no formal policy has been implemented, schools simply attempt to ignore the existence of homosexuality.¹⁵

The precise role of homosexuality in public school curricula raises many federal constitutional issues. First, the due process rights of parents to control the upbringing and education of their children are in question.¹⁶ Second, because homosexuality is condemned by some religions,¹⁷ its acknowledgment in the classroom brings up the contentious relationship between religion and the schools, which is notoriously “one of the most disputed areas of Constitutional law in the United States.”¹⁸ Third, attempts to censor materials in the public school system based on content raise concerns of infringement of First Amendment freedom of speech and expression guarantees.¹⁹

Changing social conditions often motivate parents to request that schools limit students’ exposure to certain issues.²⁰ In the past, parents have objected to various topics contradicting their personal views, including references to sexual topics, violence, or role models they may feel are inappropriate.²¹ It is often a complex, if not impossible, task to distinguish between material that can be excluded for appropriate reasons, such as students’ ages, or because of violations of the separation between religion and the government and the impermissible elimination of material sought to be censored solely based on viewpoint.

Finally, in a country where millions of individual preferences exist, it would be unworkable to give veto power to each parent regarding specific topics in public school curricula, and would result in a narrow and mostly irrelevant knowledge base in our schools.²² Considering also that if students must be exposed to multiple sides of an issue in order to exercise the freedom to dissent that is so crucial to the principles of our

15. *See id.* Significant harm can result from schools ignoring the existence of homosexuality, including harassment and hostility to gay students or students with homosexual family members. Such harms can result in alienation and attempted suicide. *See id.* at 1609-14.

16. *See, e.g.,* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 518, 534-35 (1925) (holding that parents have some right to direct how their children are educated); *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

17. *See, e.g.,* *The Trashing of America*, <http://www.jeremiahproject.com/trashingamerica/homosexeducate.html> (last visited Mar. 21, 2009). Many Christian groups, for example, find tolerating homosexuality akin to tolerating criminal behavior like child abuse, pedophilia, rape, or murder. *See id.*

18. *Id.*

19. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 855-56 (1982).

20. *See Nat’l Coalition Against Censorship, supra* note 6.

21. *See id.*

22. *Id.*

democratic government, it is evident that the topic of homosexuality in public school curricula must be navigated carefully.

II. EDUCATION IN THE UNITED STATES

In the United States, states have primary responsibility for the maintenance and operation of the public schools.²³ The federal government can provide grants to states contingent upon implementation of certain educational programs and requirements, but the federal government has no direct control over state legislation regarding school curricula.²⁴ States have the plenary power to establish and regulate tuition-free public school systems that are equally accessible to all children.²⁵

State legislatures typically mandate general academic requirements and proceed to delegate powers to prescribe and shape those parts of curricula not mandated at the state level to a state board of education or a local school board.²⁶ A state legislature may exercise and delegate power over the school system subject only to state constitutional mandates.²⁷

In the early nineteenth century, educators were directed to teach basic skills from a strongly religious perspective and to choose curricula and texts reflecting these values.²⁸ After 1825, the influence of the government over the public schools became more significant than that of the church, and thus the emphasis shifted towards ideals of “patriotism, loyalty to government, and the protestant [work] ethic.”²⁹ This shift continued over the next century, and after World War I, most states enacted statutes requiring patriotic instruction in the classroom.³⁰ Many

23. See, e.g., *Rollins v. Wilson County Gov't*, 154 F.3d 626, 630 (6th Cir. 1998); *Choice-in-Education League v. L.A. Unified Sch. Dist.*, 17 Cal. App. 4th 415, 423 (2d Dist. 1993).

24. See ARVAL A. MORRIS, *THE CONSTITUTION AND AMERICAN PUBLIC EDUCATION* 95 (1989).

25. See, e.g., *Hull v. Albrecht*, 950 P.2d 1141, 1142 (Ariz. 1997); *Ex parte James*, 713 So. 2d 869, 882 (Ala. 1997).

26. See MORRIS, *supra* note 24, at 96. The delegation of school affairs to municipalities has been found constitutional, and legislatures reserve the power to retain control at any time. See *State ex rel. Clark v. Haworth*, 23 N.E. 946, 948 (Ind. 1890); *Carlberg v. Metcalf*, 234 N.W. 87, 91 (Neb. 1930).

27. See, e.g., *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 F.2d 806 (Ariz. 1994) (en banc); *Smith v. Board of Educ. of Oswego Cmty. High Sch. Dist.*, 89 N.E.2d 893 (Ill. 1950).

28. See DAVID L. KIRP & MARK G. YUDOF, *EDUCATIONAL POLICY AND THE LAW: CASES AND MATERIALS* 114 (1973).

29. *Id.*

30. See *id.* at 115.

states enacted additional laws prohibiting the use of certain textbooks if they presented any antinational or pro-foreign topics.³¹

Race relations, human sexuality, and other social, political, and economic issues and values have also historically been carefully regulated in the public schools.³² This is apparent from the regulation of classroom textbooks that, scholars note, play an especially crucial role in presenting information about community values to children.³³ For example, until the late 1960s, minorities were presented in cursory stereotyped roles (if they were included at all) in textbooks.³⁴ The depiction of minorities slowly changed due to social and political pressures, but the adoption of textbooks reflecting updated views was very slow until the 1970s.³⁵ Critics of this type of regulation of information suggest that the presentation of certain topics in a formulaic narrative is not ideal for educational purposes because it does not accurately portray governments or historic events.³⁶

Today, one role of the school board is to “define an educational philosophy that serves the needs of all its students and reflects community goals.”³⁷ Community goals can be formed by input from advisory boards, parents, and other community members, but actual curriculum development is created by professional educators who also must consider state-mandated requirements such as competency standards like standardized testing.³⁸ School boards must form curriculum without attempting to advance any particular “ideological, political, or religious viewpoint,” while simultaneously taking into consideration the espoused goals of the community.³⁹ The task of creating curricula based on community values while simultaneously maintaining ideological neutrality has resulted in a remarkable increase in disputes over textbooks, library books, student newspapers, and school productions portraying controversial ideas over the last thirty years.⁴⁰

31. *See id.*

32. *See id.*

33. *See* FREDERICK M. WIRT & MICHAEL W. KIRST, THE POLITICAL WEB OF AMERICAN SCHOOLS 29-31 (1972).

34. *See id.* at 30.

35. *See id.* at 31.

36. *See id.* at 32.

37. Nat’l Coalition Against Censorship, *supra* note 6.

38. *See id.*

39. *Id.*

40. *See id.*

III. THE FIRST AMENDMENT AND CURRICULA

The First Amendment to the United States Constitution reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁴¹ Under the Constitution, other than the individual rights of parents, the power of the government to dictate curricula is subject only to the limitations of freedom of speech, freedom from governmental expression of religious preference, and freedom from governmental prohibition of the free exercise of religion.⁴² Often, curricular matters necessitate a complex combination of these considerations.⁴³ It is noted, “To the extent that . . . principles [of equal liberty] apply differently to religious practices than to political or ideological ones, it is because of the different social meanings associated with those practices—not because religion is subject to an entirely different set of principles.”⁴⁴

In theory, the First Amendment prohibits the government from aiding or endorsing any particular religion.⁴⁵ The United States Supreme Court has interpreted this to mean that the separation between religion and state must be “complete and unequivocal.”⁴⁶

However, in practice, it has proven extremely difficult to excise religion completely from public school curricula in bright line fashion. Clearly, when a curricular matter involves direct religious exercise, such as school-led prayer, it is in conflict with the First Amendment.⁴⁷ However, constitutional issues also arise in situations where religion plays a more indirect role in curricula.⁴⁸

One instance where this can occur is the situation where a religion or religious topic is an explicit component of a school’s curriculum, but is not taught from a devotional perspective.⁴⁹ For example, teaching the

41. U.S. CONST. amend. I.

42. *See id.*

43. *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) (prohibiting statutory ban on evolution in the schools); Hopkins v. Hamden Bd. of Educ., 289 A.2d 914, 920 (1971) (holding that wholly secular sexuality education is not in violation of the First Amendment).

44. EISGRUBER & SAGER, *supra* note 9, at 179.

45. *See* MORRIS, *supra* note 24, at 171. “[R]eligions in America coexist with each other within a secular state, in large part, because government cannot aid one or all religions. The First Amendment’s complete ban on government aiding or endorsing religion is the American heritage.” *Id.* at 172.

46. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

47. *See* Lee v. Weisman, 505 U.S. 577, 599 (1992).

48. *See* EISGRUBER & SAGER, *supra* note 9, at 179-80.

49. *See id.* at 180-81.

Bible for a historical or literary purpose presents few constitutional problems if taught for a truly secular purpose.⁵⁰ Other examples are instances where curricular decisions are motivated by religion, regardless of their religious or secular substantive nature, and instances where entirely nonreligious curricular decisions are objectionable for religious reasons.⁵¹ Finding the latter two situations to be most relevant to the discussion of the issue of homosexuality in curricula, this Comment will focus on these two areas of religious controversy in curricula.

A. *Curricular Decisions Motivated by Religion*

Religion in curricula can be a concern when, regardless of the nature of the substantive material in question (religious or secular), the decision to include or exclude the material has been motivated by religious doctrine.⁵² This can occur, for example, where a choice is made to teach creationism (the religious belief that humans were created directly by God) in conjunction with the subject of human evolution.⁵³ In *Edwards v. Aguillard*, the Supreme Court examined the constitutionality of such a statutory mandate and concluded that, even assuming there was some scientifically legitimate support for the view of creationism, the statute had clearly been enacted solely to present creationism as a religious alternative theory to evolution and was therefore unconstitutional.⁵⁴

A religious motivation for curricular decisions can also create constitutional problems when the subject in question is secular. For example, a curriculum of abstinence-only sexual education enacted because of a religious belief—that it is a sin to engage in sexual intercourse before marriage—held by the school board or legislature would be on unsound constitutional footing.⁵⁵ This is distinct from the example of creationism because it is far easier to substitute a nonreligious rationale to an abstinence statute, such as the goal of lowering the rate of sexually transmitted diseases in students.⁵⁶ Alternatively, religiously motivated curricular decisions can occur when educators decide *not* to teach certain subjects, such as a school board or

50. *See id.*

51. *See id.* at 180.

52. *See id.*

53. *See id.* at 185-86.

54. 482 U.S. 578, 581 (1987). The Court also found instruction of the religious doctrine of creationism as would affiliate the government with a religious view, and thus violation of the First Amendment directly. *See id.* at 593.

55. *See* EISGRUBER & SAGER, *supra* note 9, at 180.

56. *See id.* at 188-89.

legislature deciding to ban the subject of human evolution, despite its scientific credibility, because it conflicts with board members' personal religious views.⁵⁷

The Supreme Court, in the 1968 decision *Epperson v. Arkansas*, decided that evolution could not be statutorily prohibited solely because it conflicted with the doctrine of a particular religion.⁵⁸ Although the challenged statute did not require the teaching of any specific religious doctrine, the Court found it had been enacted for the purpose of *preventing* the exposure of secular views because they conflicted with religious doctrine.⁵⁹ Scholars have noted that similarly to *Edwards*, the Court in *Epperson* invalidated a state statute on constitutional grounds because it was intended to promote the biblical story of creationism.⁶⁰

Using the intent behind a statute as a constitutional test has the negative policy implication of forcing religious citizens to suppress their convictions when seeking to influence public policy, while leaving nonreligious citizens free to invoke their most passionate beliefs and values.⁶¹ This implication can be avoided if alternative legal reasoning is used to analyze these types of issues. Scholars have noted the congruence between attempts to prohibit the subject of evolution and attempts to censor other material from the curriculum, such as books containing unpopular political or ideological material.⁶²

Legal precedents lend themselves easily to the censorship of viewpoint-oriented curriculum decisions banning the teaching of evolution. In a notable Supreme Court plurality opinion, the Court indicated that a local school board may not remove books from a school library because of disapproval of the ideas in the books, including ideas about religion.⁶³ In that opinion, the Court quoted from Supreme Court Justice Jackson's earlier decision in *West Virginia State Board of Education v. Barnette*, where he wrote, "No official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."⁶⁴

Cases like *Epperson* evade the religiously charged issue and replace it with an interpretation triggered by topical constraints on the school

57. See *id.* at 189.

58. See 393 U.S. 97, 107-08 (1968).

59. See EISGRUBER & SAGER, *supra* note 9, at 190.

60. See *id.* at 191-92.

61. See *id.* at 189.

62. See *id.* at 194.

63. See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870-71 (1982).

64. 319 U.S. 624, 642 (1943).

curriculum.⁶⁵ This places the prohibition of secular curricular material that may be objected to on religious grounds closer to situations like book banning than to issues like school prayer.⁶⁶ If the subject matter at issue is inherently nonreligious, using censorship standards in place of a religious intent test creates results more congruent with the goals of the public education system in a democracy: to provide students with access to information so that they become capable of self-governance.⁶⁷ Subtracting legislative intent as a factor in favor of a broader standard removes religion from the equation.

B. Religiously Motivated Objection to Secular Curriculum

Another type of religious controversy may occur regarding secular curriculum instruction that is subject to religiously motivated objections.⁶⁸ This issue arises when the decision to include religious material in the curriculum was not made for religious reasons, such as the decision to teach evolution because of its scientific value or sexuality education as a part of reproductive education.⁶⁹ In cases where curricular decisions are not religiously motivated and do not force students to pledge allegiance to any secular beliefs in place of personally held religious beliefs, courts struggle to find a religious infringement of First Amendment guarantees.⁷⁰

However, in *Pierce v. Society of Sisters*, the Supreme Court held that the authority of the state over curricula in public schools is limited by the constitutional rights of parents to guide the education and upbringing of their children.⁷¹ Consequently, a second issue in cases where parents object to secular material is whether this right includes the right of parents to exempt their children from particular lessons that they find interfere with their religious beliefs.⁷² In *Wisconsin v. Yoder*, the Supreme Court found that the due process rights of parents who did not wish their children to attend school after the age of fourteen outweighed the state interest in compulsory education past that age.⁷³ In *Yoder*, the

65. See EISGRUBER & SAGER, *supra* note 9, at 191-92.

66. See *id.* at 194.

67. See WHITSON, *supra* note 7, at 13.

68. See EISGRUBER & SAGER, *supra* note 9, at 180.

69. See *id.*

70. See *id.*

71. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 510 (1925).

72. See EISGRUBER & SAGER, *supra* note 9, at 181.

73. See 406 U.S. 205, 232-34 (1972).

parents, who were Amish, objected to compulsory education because they claimed it conflicted with their religious beliefs.⁷⁴ The Court wrote:

[C]ourts are not school boards or legislatures, and are ill-equipped to determine the “necessity” of discrete aspects of a State’s program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State’s legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements.⁷⁵

Parental autonomy in these circumstances must be balanced with the impossibility of a school system tailoring its curriculum to fit the desire of every parent.⁷⁶ Scholars suggest that, constitutionally, school officials and legislatures “should respect the spirit of the *Pierce* decision and make reasonable efforts to accommodate . . . parents with regard to the school curriculum . . . whether or not these concerns emanate from the parents’ *religious* commitments.”⁷⁷ While this may be true, it is unclear what method courts can employ to evaluate who should be allowed exemption from curriculum that the school board has required as compulsory for all students.

C. *Additional Freedom of Speech Implications*

As discussed above, when school boards ban certain topics or viewpoints from the curriculum for religious reasons, infringements on freedom of speech may occur. Another form of impermissible censorship can occur when no prior decision or policy prohibiting certain material in the classroom exists, but there is a parental or other objection to the decision of an educator or student to present certain material.⁷⁸

Where there is no policy or regulation banning a specific topic, and material is not considered to be a part of the authorized curriculum, the decision to block the material must only survive constitutional rational basis review.⁷⁹ For example, in *Hazelwood School District v. Kuhlmeier*, the Supreme Court held that because a school newspaper was considered part of the curriculum, it was acceptable for a high school principal to bar

74. *See id.* at 209.

75. *Id.* at 235.

76. *See* EISGRUBER & SAGER, *supra* note 9, at 184.

77. *Id.* at 185.

78. *See* MORRIS, *supra* note 24, at 97.

79. *See* *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 189 (5th Cir. 1995). However, a school board’s decision to remove material from a school library, where students can voluntarily view material, must withstand greater constitutional scrutiny. *See* *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 853 (1982) (finding environment of school library “especially appropriate for the recognition of [First Amendment] rights”).

certain articles.⁸⁰ The Court determined that the school's decision to prohibit the articles at issue did not violate students' First Amendment rights "so long as [the principal's] actions [were] reasonably related to legitimate pedagogical concerns."⁸¹ The Court determined that the prevention of publication of articles written about issues such as teen pregnancy and the effect of divorce on students was reasonably related to such educational concerns.⁸²

In coming to its decision in *Hazelwood*, the Court discussed *Tinker v. Des Moines Independent School District*, where the Court found that students did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and were thus allowed to wear armbands to protest the Vietnam War.⁸³ The *Tinker* Court found that a prohibition on student expression could not be sustained without a showing that the expression would "substantially interfere with the work of the school or impinge upon the rights of other students."⁸⁴ The *Hazelwood* Court, however, distinguished the form of expression found in a school newspaper because, inter alia, it was expression supervised by educators and designed to impart knowledge, and thus there was greater reason to give educators control over subject matter.⁸⁵

Within weeks of the *Hazelwood* decision, the case became the most cited precedent involving restriction on student expression within the school curriculum,⁸⁶ and as a result of the decision, school officials now have abundant discretion in limiting unauthorized student speech.⁸⁷ When limiting student speech, educators may now consider any factor reasonably related to educational concerns, including the emotional maturity of the intended audience.⁸⁸ A violation of student free speech rights occurs only when denial of access to certain materials has no educational purpose whatsoever and the decision has been made solely because of school officials' disapproval of the subject matter in question.⁸⁹

80. See 484 U.S. 260 (1988).

81. *Id.* at 273.

82. See *id.* at 276.

83. See *id.* at 280-81 (citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

84. *Tinker*, 393 U.S. at 509.

85. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260, 273 (1988).

86. WHITSON, *supra* note 7, at 10.

87. See *Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wis. 1995).

88. See *Hazelwood*, 484 U.S. at 271.

89. See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870-71 (1982) (plurality opinion).

However, in the context of censorship of educational materials *expressly* prohibited in the curriculum, the Court determined that students have the right to receive ideas.⁹⁰ The tension between this idea and the ruling in *Hazelwood* is apparent. Justice Blackmun perhaps reconciled the concepts when he wrote, in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*:

I do not suggest that the State has any affirmative obligation to provide students with information or ideas, something that may well be associated with a "right to receive" I suggest that certain forms of state discrimination *between* ideas are improper. In particular . . . the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.⁹¹

IV. HOMOSEXUALITY AND CURRICULA

Homosexuality as a curricular topic within the public education system is a current issue involving a unique application of constitutional legal precedent.⁹² The choice of a legislature or school board to include homosexuality as a curricular topic, providing there is no accompanying requirement that students support the practice, is not a direct violation of the Establishment or Free Exercise Clauses.⁹³ Opposition to information about homosexuality in the public classroom may implicate another sphere of legal analysis, however, if there is a religious rationale behind the opposition.⁹⁴ In examining a prohibition on a secular curricular topic, the first type of analysis a court could undertake would be to look for a religious intention on the part of the government in its decision to prohibit the topic.⁹⁵

A rule mandating the *inclusion* of the teaching of homosexuality would be subject to the argument that, like a statute compelling abstinence-only sexual education, the government's motivation in including the topic in the curriculum was religiously based. However, this argument would only withstand logic if homosexuality were presented from a religious perspective in the classroom. Were educators teaching students that homosexuality were a religious sin, it is clear this would violate the First Amendment. A statute mandating teaching tolerance or acknowledging the existence of homosexuality would *not*

90. See *id.* at 866-67 (plurality opinion).

91. *Id.* at 878-79 (Blackmun, J., concurring in part and concurring in the judgment).

92. See, e.g., *Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008).

93. See U.S. CONST. amend. I.

94. See EISGRUBER & SAGER, *supra* note 18, at 181.

95. See *id.* at 180.

necessarily be motivated by the religious intentions of the legislatures, as homosexuality itself is not inherently a religion or religious practice. In such a case, it is likely that intentions of diversity would have been the motivation of the legislature or school board.

If homosexuality were banned entirely from the curriculum with no secular rationale, the situation would be analogous to that found in *Epperson*, where the prohibition on the teaching of evolution simply because it conflicted with certain religious beliefs could not be upheld.⁹⁶ On the other hand, were an adequate secular motivation to be supplied, it might trigger First Amendment freedom of speech concerns.⁹⁷ An example of educators restricting access to topics for the sole reason that they disapproved of the topic is the exact government-imposed orthodoxy of opinion that Justice Jackson stated was a violation of the First Amendment guarantee to freedom of speech.⁹⁸

It is also possible for religious values held by individuals to conflict with curricula when secular instruction is subject to possible religiously motivated objection.⁹⁹ A recent United States Court of Appeals for the First Circuit case regarding the teaching of tolerance of homosexuality in the classroom addresses this exact issue.¹⁰⁰

The Commonwealth of Massachusetts statutorily mandates that the Massachusetts State Board of Education establish academic standards for core subjects.¹⁰¹ It further stipulates that the prescribed standards “be designed to avoid perpetuating gender, cultural, ethnic or racial stereotypes.”¹⁰² In conjunction with this statute, the State Board of Education set forth the specific requirements that elementary school students be able to describe different types of families, describe prejudice and discrimination, and that by grade five, “[s]tudents should be able to ‘[d]efine sexual orientation using the correct terminology (such as heterosexual, and gay and lesbian).’”¹⁰³ In Massachusetts, the actual selection of the exact books that become part of the curriculum is the

96. See 393 U.S. 97 (1968).

97. See, e.g., Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982).

98. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

99. See *EISGRUBER & SAGER*, *supra* note 9, at 180.

100. See *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008).

101. See MASS. GEN. LAWS ch. 69, § 1D (2000).

102. *Id.*

103. See *Parker*, 514 F.3d at 91 (quoting MASS. DEP’T OF EDUC., MASSACHUSETTS COMPREHENSIVE HEALTH CURRICULUM FRAMEWORK 34 (1999), <http://www.doe.mass.edu/frameworks/health/1999/1099.pdf>.)

responsibility of the school principal with the approval of the school board.¹⁰⁴

As a result of this mandate, in Lexington, Massachusetts, school officials began to integrate books into the curriculum containing age-appropriate material on the topic of homosexuality.¹⁰⁵ In 2006, two couples with children enrolled in the Lexington public school system brought suit in federal district court.¹⁰⁶ One couple complained when their kindergartener received a book about different types of families that included examples of a family with two fathers and a family with two mothers.¹⁰⁷ A second couple took issue when their second grader's teacher read aloud to the class the story of a prince who rejected several princesses before falling in love with another prince.¹⁰⁸ In *Parker v. Hurley*, the First Circuit found that public schools were not obligated to allow exemption from occasional exposure to the idea of tolerance towards homosexuality.¹⁰⁹

The curriculum statute and the decisions made by the school in *Parker v. Hurley* were not intended to promote any religious viewpoint.¹¹⁰ Similar to any decision to teach substantive material, such as math, science, or sexual education, the First Circuit found no religiously motivated implication in the decision to include the teaching of tolerance of homosexuality in the curriculum.¹¹¹ The First Circuit determined that the exposure of the plaintiffs' children to the issue of the existence of homosexuality did not infringe on the free exercise of anyone's religion.¹¹² The court wrote, "There is no free exercise right to be free from any reference in public elementary schools to the existence of families in which the parents are of different gender combinations."¹¹³ Absent a finding that the school required students to agree with or affirm potentially religious ideas, the court found no sufficient burden on their free exercise rights.¹¹⁴

104. See MASS. GEN. LAWS ch. 71, § 48 (2008).

105. See *Parker*, 514 F.3d at 92.

106. See *id.* at 93.

107. *Id.* at 92. As quoted by the court, the book concluded, "'Who's in a family?': 'the people who love you the most!'" *Id.* (quoting ROBERT SKUTCH & LAURA NIENHAUS, WHO'S IN A FAMILY? 29 (1997)).

108. See *id.* at 93. The two princes are married in the book, and the last page shows them kissing with a red heart over their mouths. See LINDA DE HAAN & STERN NIJLAND, KING & KING (2002).

109. See *Parker*, 514 F.3d at 106.

110. See *id.*

111. See *id.*

112. See *id.* at 107.

113. *Id.* at 106.

114. See *id.* at 106.

The court next considered whether exposure to the topic of homosexuality in the school infringed on the substantive due process right of parents to direct and control the upbringing of their children.¹¹⁵ The parents alleged that even though this right cannot practically allow each parent complete control over the state's power to direct the curriculum, parents should receive notice that the topic of homosexuality would be discussed, along with the right to exempt their children from related instruction.¹¹⁶

In *Parker*, the court could find no federal case that extended the due process right of parental autonomy to include the right to exempt children from exposure to certain books used in the classroom.¹¹⁷ The court also found that the refusal of the school to provide notice or allow parents to exempt their children from exposure to the material did not interfere with the ability of the parents to instruct their children as to their own religious beliefs.¹¹⁸ Nor did it restrict their ability to take the children out of the public education system entirely.¹¹⁹ As the Supreme Court noted in *Wisconsin v. Yoder*, courts are ill-equipped to determine discrete aspects of the curriculum and should thus act cautiously in evaluating exceptions from requirements that educators have determined to be educational.¹²⁰

Aside from situations where curricular materials teaching tolerance of homosexuality have been mandated by government actors, discussion of the topic of homosexuality is typically informally discouraged or forbidden in public schools.¹²¹ This has ramifications on the freedom of speech rights of educators as well as students.¹²²

Under *Hazelwood*, school action to circumscribe material that is considered part of the curriculum does not violate the freedom of speech rights of students in the public school system as long as the "actions are reasonably related to legitimate pedagogical concerns."¹²³ This standard was extended to educators in the United States Court of Appeals for the Fourth Circuit in *Boring v. Buncombe County Board of Education*, where a teacher was transferred to a different school within the district

115. See *id.* at 97.

116. See *id.* at 102.

117. See *id.*

118. See *id.* at 105.

119. See *id.*

120. See 406 U.S. 205, 235 (1972).

121. See Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579, 596 (1999).

122. See *id.* at 580.

123. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

after she directed a controversial student-led play dealing with lesbianism, teen pregnancy, and other topics.¹²⁴ The court decided that because the production of the play was part of the curriculum, the teacher possessed no individual freedom of speech or expression rights in this context.¹²⁵ The court found that, even assuming the teacher did have some freedom of expression, the school officials' decision to restrict depictions of sexuality was related to a legitimate educational purpose.¹²⁶ Under *Boring*, school officials seemingly have the discretion to prohibit the topic of homosexuality once the forum it is presented in is established as part of the curriculum.¹²⁷

Courts have upheld student speech rights in schools when speech is not part of curricular material.¹²⁸ The Supreme Court found that unless speech substantially interferes with the ability of the school to educate or infringes upon the rights of other students, it must be tolerated in the public schools.¹²⁹ In *Tinker*, the political expression of students wishing to wear black armbands in an ongoing protest against the Vietnam War was not considered to be disruptive to educators or students.¹³⁰

This constitutional framework has recently proved useful for student supporters of gay rights. In July of 2008, the Northern District of Florida found that a school board engaged in viewpoint discrimination when the principal attempted to ban student expression advocating tolerance and fair treatment of homosexuals.¹³¹ In this case, students were prohibited from wearing T-shirts with pro-gay-rights messages such as "I support gays," and from wearing rainbow clothing or rainbow stickers.¹³² The court determined that the pro-gay rights expressions did not and would not interfere with the ability of the school to educate, nor would they affect the rights of others, and consequently the ban on expression was not justified under *Tinker*.¹³³ The court noted that the students' expression did not cause other students to skip classes or ignore teachers, nor did students wearing the messages of tolerance force their views

124. See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 366-67 (4th Cir. 1998).

125. See *id.* at 369-70.

126. See *id.* at 370.

127. See *id.*

128. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969).

129. See *id.* at 509.

130. See *id.*

131. See *Gilman ex rel. Gilman v. S.B. for Holmes County*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

132. See *id.* at 1364.

133. See *id.* at 1375.

upon other students.¹³⁴ In fact, the court discussed the positive effects of the students' expression.¹³⁵ The court wrote:

Obviously, political speech involving a controversial topic such as homosexuality is likely to spur some debate, argument, and conflict. Indeed, the issue of equal rights for citizens who are homosexual is presently a topic of fervent discussion and debate within the courts, Congress, and the legislatures of the States The nation's high school students, some of whom are of voting age, should not be foreclosed from that national dialogue.¹³⁶

By framing the message of tolerance towards homosexuals in a political context, the court presents a notable and compelling argument that expression of this viewpoint is precisely the type of speech requiring First Amendment protection.

The role homosexuality should play in the classroom is a controversial issue for students as well as school boards and educators, with differing First Amendment considerations for each. Even for those who believe there is no obligation in the public school system to expose students to controversial ideas that conflict with personal beliefs, there is still the reality that students have speech rights themselves, and constitutionally, government cannot act to suppress those rights for the sole reason that those holding antithetical beliefs disagree.¹³⁷ Furthermore, in light of the current controversial political atmosphere surrounding homosexual rights, there is a practical argument to be made for encouraging age-appropriate discourse on the subject, whether through curricular materials or through the encouragement of student expression.

V. CONCLUSION

Although the topic of homosexuality in the school curriculum may often trigger thoughts of conflict with the religion clauses of the First Amendment, analysis under the framework of freedom of speech and censorship of school material may be more appropriate. As a secular topic, the constitutional implications of homosexuality in the curriculum are unique, even when compared with the closely analogous area of the evolution-versus-creationism debate.

134. *See id.* at 1373.

135. *See id.* at 1374.

136. *Id.*

137. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 879 (1982) (plurality opinion).

The decision in *Parker*, for example, found that the teaching of tolerance of homosexuality in schools did not violate parents' right to free exercise of their personal religious beliefs under the First Amendment.¹³⁸ As commentators have noted, this precedent applies in the First Circuit regardless of subject matter, and ensures that no parent has the independent authority to require notification, to veto, or to opt out of any part of a school curriculum.¹³⁹ In a *Boston Globe* editorial about the *Parker* case, Jeff Jacoby wrote:

But suppose instead that the facts had been reversed, with parents who passionately support same-sex marriage filing suit because the school kept emphasizing the traditional definition of wedlock—a definition democratically reaffirmed in many state constitutional amendments and statutes in recent years. As [Judge] Wolf applied the law, the result would have been the same: The complaint would have been dismissed, and the school would have prevailed.¹⁴⁰

It is true that this decision is a celebratory step in the movement for acceptance of homosexuals. The promotion of tolerance of homosexuality in public schools might possibly even be the *only* way homosexuals will ever truly attain equal rights under the law. The acknowledgment of the existence of homosexuals in our communities may encourage children to be socialized to accept and respect those who may be different from themselves. This is the first step towards eliminating prejudice and antihomosexual sentiment in our society.

But in effect, this decision is really a step for the freedom of expression and the freedom to receive information within the educational system for individuals on both sides of the debate. Restrictions on curricula based solely on viewpoint and unrelated to educational concerns cannot be tolerated in any context. Considering that our government and way of life are based on the freedom to dissent, it should be a goal of the public education system in the United States to teach students to form opinions on their own. Regardless of whether those values include the promotion of the definition of marriage as between a man and a woman or whether they promote tolerance of homosexuality, the only way students will be able to decide what they think for themselves is if no topic is restricted unless for a valid educational reason.

138. See *Parker v. Hurley*, 514 F.3d 87, 91 (1st Cir. 2008).

139. See Jeff Jacoby, *A Call for Separation of School and State*, BOSTON GLOBE, Mar. 4, 2007, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/03/04/a_call_for_separation_of_school_and_state/.

140. *Id.*

Parents who disagree with specific material taught in the school system have two alternatives. First, they have the right to remove their children from the public school system and educate them alternatively, whether through private education or home-schooling. If they have no choice but to keep their children in the public education system, for financial or other reasons, they must fight the battle through the political process.¹⁴¹ Parents have the opportunity to campaign and elect legislators and a school board that will implement a curriculum that is compatible, within constitutional limits, with their assessment of what is appropriate.

When it is taken into consideration that one reason our education system exists is to develop reasoning and judgment skills, it is apparent that the harm that could result from government-imposed orthodoxy “runs especially high.”¹⁴²

141. See *Parker*, 514 F.3d; Jacoby, *supra* note 139.

142. See EISGRUBER & SAGER, *supra* note 9, at 192.