Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?

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PARENTS AND THE PUBLIC SCHOOL CURRICULUM: IS THERE A RIGHT TO HAVE ONE'S CHILD EXCUSED FROM OBJECTIONABLE INSTRUCTION?

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TABLE OF CONTENTS

I. STATE INTERESTS, CURRICULUM REQUIREMENTS, AND CONFLICT WITH PARENTS' EDUCATIONAL GOALS ................................................................. 877
   A. SPECIFIC CURRICULUM REQUIREMENTS ....................... 879
   B. PARENTAL CONFLICTS WITH CURRICULUM REQUIREMENTS ... 883

II. COMMON LAW AND CONSTITUTIONAL PROTECTIONS OF PARENTAL LIBERTY TO DIRECT THE EDUCATION OF ONE'S CHILD ................................................ 885
   A. THE COMMON LAW RIGHT OF PARENTAL CONTROL ............. 886
      1. The Common Law .............................................. 886
      2. Current Validity of Common Law Precedents ............... 890
         a. Erosion by disuse ........................................ 890
         b. Greater teacher and administrator expertise ......... 892
         c. Abrogation by statutory enactment ..................... 893
   B. DUE PROCESS CLAUSE PROTECTION OF PARENTAL LIBERTY TO DIRECT THE EDUCATION OF ONE'S Child .................................................. 897
   C. FREE EXERCISE OF RELIGION CLAUSE PROTECTION OF PARENTAL LIBERTY TO DIRECT THE EDUCATION OF ONE'S CHILD ................................................... 901

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D. CONSTITUTIONAL ISSUES LEFT UNRESOLVED BY EXISTING PRECEDENTS .......................................................... 903

III. VALUE-BASED PARENTAL OBJECTIONS ........................................................... 904

A. RIGHT OF EXCUSAL FOR VALUE-BASED OBJECTIONS TO INSTRUCTION ........................................................................................................... 904

1. The "Captive Audience" and Indoctrination .............................................. 905
2. First Amendment Case Law ....................................................................... 910
3. The Inadequacy of a Right of Parental Excusal Limited to Conflicts with Religious Beliefs ......................................................... 914
4. The Inadequacy of the Private School Alternative ................................ 916

B. STATE INTERESTS LIMITING THE RIGHT OF EXCUSAL .......................... 918

1. The Rights of Children To Receive Instruction Contrary to Their Parents' Values .................................................................................................. 919
   a. The "psychological harm" argument .................................................. 919
   b. The "right to exposure to ideas" argument ....................................... 920
   c. The "student's age" argument .......................................................... 924
2. Balancing State Educational Goals and the Parental Right of Excusal ........................................................................................................... 926
   a. Relevant characterization of the state's interest ............................... 927
   b. The state interest in vocational training ........................................... 928
   c. The state interest in preparation for a satisfactory personal life .......... 928
   d. The state interest in preparation for citizenship ............................... 929
3. State Administrative Needs and the Interests of Other Children as a Limitation on the Right of Excusal ......................................................... 934
   a. The difficulty of ascertaining whether the objection is value-based or pedagogical ................................................................. 934
   b. State administrative interests in the efficiency of the schools .......... 936

IV. PEDAGOGICAL PARENTAL OBJECTIONS .................................................. 941

A. THE NATURE OF PEDAGOGICAL OBJECTIONS ........................................... 941

B. RIGHT OF EXCUSAL BASED ON THE DOCTRINE OF NONDELEGATION OF LEGISLATIVE POWERS ................................................................. 942

1. Curriculum Decisions at the State Level ................................................. 946
2. Curriculum Decisions at the Local Level ................................................. 947

C. STATE INTERESTS LIMITING A RIGHT OF EXCUSAL FOR SUBSTANTIVE PEDAGOGICAL OBJECTIONS ......................................................... 952

1. Claimed Societal Interests ....................................................................... 952
2. Balancing the State and Parental Interests ............................................. 952

V. THE RIGHT OF EXCUSAL, THE MAJORITARIAN POLITICAL PROCESS, AND FEDERALISM VALUES ................................................................. 955

CONCLUSION ...................................................................................................... 957
When parents\textsuperscript{1} in Kanawha County, West Virginia protested the use in the public schools\textsuperscript{2} of textbooks which they thought were "anti-American, anti-Christian, and obscene,"\textsuperscript{3} they brought to national attention a growing concern among parents that schools are teaching their children values that conflict with the values the parents seek to teach them.\textsuperscript{4} The parents who object are not only those holding "traditional" values. Parents have also protested the use of "conservative" pamphlets\textsuperscript{5} and textbooks which allegedly teach children sex bias, racism, and other stereotypes.\textsuperscript{6} Parents also

1. The term "parents" will be used throughout this Article to refer to any person who has responsibility for the upbringing of a child, \textit{e.g.}, natural mother or father, adoptive parent, or guardian. The common law assumed that the father alone made the family decisions with regard to the child; the singular "parent" will be used in discussion of those cases. The remainder of the Article, however, will use the term "parents" to denote the family unit to which the child belongs. It will be assumed that any disagreement among family members about the proper education for the child will be resolved within the family unit. (If the family unit does not resolve the disagreement, the parent whose views coincide with those of the school authorities would seem entitled to prevail.) The legal consequences of disagreement between the parents and the child are discussed in text accompanying notes 182-89 infra.

2. The term "schools," as used herein, refers only to elementary and secondary schools. The conclusions reached are not applicable to college and university schooling.

3. \textit{U.S. News & World Rep.}, Jan. 27, 1975, at 30 [hereinafter cited as \textit{U.S. News}]. The protest began in September 1974, over the use of "about a dozen required and supplemental English-grammar texts" and received nationwide attention because of its use of a school boycott which resulted in a 20% absenteeism rate, the picketing of the schools, mines, and other businesses, a sympathetic wildcat strike in the mines in Kanawha and other West Virginia counties, outbreaks of violence, and the temporary closing of the schools. The protesters believed the books taught rebellion, undermined parental authority and respect for the law, and "encourage[d] discussions of illegal and immoral actions that shouldn't be discussed or considered in school." \textit{What Was Silas Marner Doing with that Child?}, \textit{Wall St. J.}, Sept. 20, 1974, at 1, col. 1, at 18, cols. 1-2 [hereinafter cited as \textit{Wall St. J.}].

4. \textit{U.S. News}, supra note 3. U.S. Commissioner of Education T.H. Bell was quoted as saying: "What the present controversy comes down to, I believe, is a growing concern on the part of parents that they have lost control over their children's education and, therefore, their children's future." \textit{Id.} The protesting parents in Kanawha County were reported to "feel they have a responsibility to educate their children outside the schools in Christian morality. They want the schools to supplement, or at least not to undermine, this morality." \textit{Wall St. J.}, supra note 3, at 18, col. 1. Protests against textbooks or supplementary materials have occurred in communities throughout the country. \textit{U.S. News}, supra note 3; \textit{Wall St. J.}, supra note 3, at 1, col. 1.

5. One parent protested the availability in the schools of a politically conservative pamphlet, the \textit{Brian Bex Report}, when the school administration did not distribute materials "expressing opposing opinions." Daily Herald-Telephone (Bloomington, Indiana), July 9, 1976, at 1, col. 2. In 1973, the AFL-CIO complained that the business management viewpoint had been well presented in the schools, while the labor movement had been ignored or maligned. E. Jenkins, \textit{Unionists Study Classroom Role}, \textit{N.Y. Times}, Sept. 30, 1973, at 31, col. 1.

object to instructional methods which they consider ineffective.\textsuperscript{7} Controversy over the public school curriculum is certainly not new.\textsuperscript{8} The curriculum of a public school in a democratic system of government is necessarily a subject of political debate. These controversies dramatize the inherent tension between the interests of the state and the interests of the parents in shaping the child's development.\textsuperscript{9}

Public support for education through public schools and governmental regulation of private schools rests fundamentally on a societal interest in transmitting skills, information, ideas, attitudes, and values to children. Such transmission may be designed to preserve the past, maintain the present, or create a different future.\textsuperscript{10} Although the purposes schools could serve include achieving any societal goal that is thought to be attainable through formal education, it is useful to categorize the purposes that the curricula of the schools serve as follows: (1) to prepare youth for citizenship; (2) to prepare youth for a vocation; and (3) to prepare youth for a

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\textsuperscript{7} U.S. NEWS, supra note 3, at 30. One of the textbooks to which parents objected in Kanawha County, although not apparently on that basis, urged "the teacher not to teach proper grammar or spelling." B. Stein, Between the Textbook Lines, Wall St. J., Mar. 4, 1975, at 22, col. 4.

\textsuperscript{8} R.F. CAMPBELL, L. CUNNINGHAM, R. NYSTRAND & M. USDAN, THE ORGANIZATION AND CONTROL OF THE SCHOOLS 325 (3d ed. 1975) [hereinafter cited as CAMPBELL] (noting post-Civil War controversy that led to publication of different textbooks dealing with the war in the North and the South, and subsequent controversies over the curriculum).

\textsuperscript{9} This Article is concerned only with parents' objections to state-required instruction. Other manifestations of increasing parental interest in having greater control over the education of their children include proposals for voucher systems (i.e., direct grants of educational funds to parents), see, e.g., Center for the Study of Public Policy, Education Vouchers (1970); M. FRIEDMAN, CAPITALISM AND FREEDOM 85-98 (1962), demands for bilingual/bicultural education, see, e.g., Serna v. Portales Mun. Schools, 351 F. Supp. 1279 (D.N.M. 1972); United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), aff'd, 466 F.2d 518 (5th Cir. 1972); Bilingual/Bicultural Education, 19 INEQUALITY IN EDUC. 3 (1975), demands for procedural due process through which school decisions such as expulsion, tracking, and placement can be challenged, see generally Kirp, Schools as Sorters: The Constitutional and Policy Implications of Student Classification, 121 U. PA. L. REV. 705 (1973), access by parents to school records (culminating in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232(g) (Supp. 1976)), and demands for special education for handicapped and other exceptional children, see Kirp, Buss & Kuriloff, Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 CALIF. L. REV. 40 (1974).

With the exception of court decisions requiring special education programs and bilingual or bicultural curricula, a parental right to compel the public schools to add courses or adopt methods of instruction in addition to those adopted by public school authorities or mandated by statute has received no support in the law.

\textsuperscript{10} Conflicts between parents and the schools about the public school curriculum may reflect a debate about "whether schools should be conservative or change-provoking forces." Fiske, Should Schools be Used to Promote Social, Economic Change?, The Courier-Journal (Louisville, Kentucky), Nov. 26, 1975, § A, at 9, col. 1. For full discussion of the functions that schools serve, see notes 15-43 and accompanying text infra.
satisfactory personal life. To serve these purposes, schools require students to receive specified instruction. The issues raised by regulation of the private school curriculum and by curriculum requirements in the public schools are in important respects virtually identical. Nevertheless, because the state both funds and operates the public schools, instruction might be required in the public schools which could not be required in private schools. This Article focuses on curriculum requirements in the public schools.

Parents may object to such public school curriculum requirements because of pedagogical views or personal values. The distinction drawn in this Article between value-based and pedagogical objections may be difficult to apply in a specific case, but it is an important and useful distinction when considering the legal issues raised by curriculum requirements. A pedagogical objection is one based on the judgment of the parents that the physical and mental development of the child requires a different course of study than that provided by the school, or that the method of instruction used is not appropriate for the child, or even that the child’s time is ill-spent on a particular course. For example, parents might object to sex education because they judged their child insufficiently mature to benefit from such instruction. In contrast, a value-based objection stems from the parents’ concern with the character development of the child and their judgment that specific instruction conflicts with and may erode the values they seek to instill in the child. Parents thus might object to sex education on the ground that their ability to teach their child that extra-marital sexual intercourse is immoral would be undermined by such instruction.

Some parents have objected to required schooling and have sought to have their child excused from all attendance at school. The issues raised by such a claim are outside the scope of this Article, which focuses instead on the issues raised by parents who accept instruction of their child in most of the public school curriculum, but object to specific parts of the required

11. The term “values” is used herein to refer to religious, moral, political, and social values, including ideas, attitudes, and opinions.


Recently, parents unsuccessfully challenged the constitutionality of a compulsory attendance law in a federal court on the ground that it violated constitutionally protected parental rights. Sciona v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974).

This Article assumes that compulsory school attendance laws are constitutionally valid.
curriculum. The parents might object to an entire course, a clearly defined segment or pervasive theme of a course, part or all of the textbook used, supplemental printed material, or a teacher's oral statements. Parents might even object to use of a teaching method, such as a competitive spelling bee or the "new math."

The term "curriculum requirement," as used in this Article, refers not only to a situation in which a course is required, but also to components of a course that are required if one is to receive instruction in the course, although the course itself is not required. The decision to impose a curriculum requirement may have been made by the state legislature, the state school board, the local school board, an administrator, or a teacher.

Parents might seek to have the curriculum requirement to which they object either removed from the curriculum or dropped as a requirement for any children. Through the electoral process or other methods of political persuasion, they might accomplish one of those objectives by convincing the legislature or school authorities to change the curriculum decision. This Article explores the possibility that parents have another alternative—a right to have their child excused from the curriculum requirement to which they object. The curriculum requirement would remain in the curriculum and would be required of other children whose parents did not object.

13. The term "state school board" will be used to refer to any agency at the state level that has some decisionmaking power with regard to the curriculum, e.g., a textbook agency or a state superintendent's office.

14. To the extent that objectionable instruction constitutes an establishment of religion, parents could obtain a court order barring such instruction in the public school under the first amendment, as applied to the states through the fourteenth amendment. Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible-reading in the schools held an establishment of religion). The protesting parents in Kanawha County were unsuccessful in their suit to enjoin the use of the textbooks and supplemental materials to which they objected. They claimed that use of the textbooks and materials constituted an establishment of religion, violated their free exercise of religion, and invaded personal and family privacy. Williams v. Board of Educ., 388 F. Supp. 93 (S.D.W. Va.), aff'd, 530 F.2d 972 (4th Cir. 1975). See also Cornell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969) (unsuccessful attempt to have sex education barred from the public schools on similar grounds), aff'd, 428 F.2d 471 (4th Cir.), cert. denied, 400 U.S. 942 (1970); Todd v. Rochester Community Schools, 14 Mich. App. 320, 29 N.W.2d 90 (1972) (unsuccessful suit to prevent the use of Kurt Vonnegut's Slaughterhouse Five in the public schools). Absent a constitutional bar to the instruction, parents must resort to the political process to have objectionable instruction dropped as a requirement of any children or removed from the curriculum entirely.

The initial administrative resolution of the Kanawha County controversy was to require that children have a permission slip from their parents in order to be able to use the books. U.S. News, supra note 3, at 30. The Kanawha County school authorities apparently accepted the recommendation from a study team of the National Education Association to establish an alternative school system for children whose parents objected to the books. Lib. J., June 1, 1975, at 1068.
I. STATE INTERESTS, CURRICULUM REQUIREMENTS, AND CONFLICT WITH PARENTS’ EDUCATIONAL GOALS

Curriculum requirements can serve any of the purposes which the state may legitimately advance through means other than the schools, limited only by judgments as to the usefulness of using formal education to achieve the state’s ends. Some justify the public school system as necessary to preserve children from ignorance or, put more ambitiously, to develop human potential. Many consider the public school system essential to the maintenance of a democratic system of government, often expecting the public schools to create a common people, to serve an assimilative “melting pot” purpose. In this century especially, the public school system has been expected to provide equality of opportunity for individual success and to

15. The word “education” is indeed broad enough to allow an almost infinite range of curriculum choices to those who have authority to make educational decisions. See, e.g., EDUCATIONAL POLICIES COMM’N, THE CENTRAL PURPOSE OF AMERICAN EDUCATION 4-9 (1961) (urging the centrality of the development of the rational powers as a goal of American education and its relationship to the goals of health, command of fundamental processes, worthwhile home membership, vocational competence, effective citizenship, worthwhile use of leisure, and ethical character).

16. In Wisconsin v. Yoder, 406 U.S. 205 (1972), discussed in text accompanying notes 108-11 infra, Wisconsin argued that it had an interest in protecting the individual child from ignorance. Id. at 222. Justice White assumed that a purpose of Wisconsin’s educational system was “to develop the human potential of its children.” Id. at 239 (White, J., concurring).

An early history of the development of compulsory school attendance laws said: “The industrial education of the twentieth century is but a part of a great social movement arising from the new philosophy of education which demands that every child be given opportunity to develop such abilities as he may potentially possess . . . .” F. ENSIGN, COMPULSORY SCHOOL ATTENDANCE AND CHILD LABOR 74 (1921) [hereinafter cited as ENSIGN]. Henry Barnard, Secretary of the Commissioners of Common Schools for Connecticut in the 1840’s, urged that the right to an education was “inherent in every child.” Id. at 92. A child’s right to an education could be considered to rest for its justification on a moral obligation of society, but its historical justification appears to have been both to avoid the harmful consequences to society of not developing the capacities of the child and to reap the benefits of his contribution to economic and social well-being. Id. at 74. Thomas F. Green noted that the goal of cultivating and developing each child to his fullest potential is “frequently articulated as an ideal; but . . . is seldom embodied in the actual conduct of schools.” Green, Schools and Communities: A Look Forward, 39 HARV. EDUC. REV. 221, 235 (1969).

17. “[T]hose whose political ideal is ‘liberty under law’ believe that there can be no real liberty, no true democracy without education, free, universal, compulsory for every citizen.” ENSIGN, supra note 16, at 3.

18. A. BICKEL, POLITICS AND THE WARREN COURT 202 (1965) (“Culturally, no doubt the most significantly nationalizing, egalitarian force, by which we have set immense store for a hundred years, has been the free public school system”); E. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 503-04 (1919) (common schools as instruments of assimilation); D. TYACK, TURNING POINTS IN AMERICAN EDUCATIONAL HISTORY 228-34 (1967) [hereinafter cited as TURNING POINTS] (assimilation of the immigrant through schooling).

19. A recent statement of this purpose is as follows:

Subsidized education is founded on the notion that the untrammeled competition for existence should begin only at adulthood. If that competition is to be fair—in the
assure a sufficiently educated populace to serve the needs of the economy and national defense.\textsuperscript{20} The history of education provides numerous examples of reformers who wanted to use the schools to train children for a new social order.\textsuperscript{21} Not all who support the public school system, however, are likely to agree with all of these normative goals. A more descriptive general categorization of the purposes of the public schools is: preparation of youth for citizenship, preparation of youth for a vocation, and preparation of youth for a satisfactory personal life. These purposes are generally regarded as legitimate ends of the public school system.\textsuperscript{22}


The public generally believes that education is important to individual success, particularly economic success. When asked in a Gallup poll what were the chief reasons for wanting a child to get an education, 44\% of the respondents mentioned "to get a better job," 43\% said "to get along better with people at all levels of society," and 38\% mentioned "to make more money." Just 21\% mentioned "to attain self-satisfaction," and only 15\% said "to stimulate their minds." Gallup, \textit{Fourth Annual Gallup Poll of Public Attitudes Toward Education}, PHI DELTA KAPPAN, Sept. 1972, at 35.

In the introduction to his book, Ensign emphasized that World War I had revealed a high degree of illiteracy and a lack of skilled workmen and that "the man with developed mind and skilled hand, the man whom the schools had trained, could adjust himself readily to new requirements." Ensign, \textit{supra} note 16, at 1-2. The successful launch of the Russians' Sputnik I in 1957 led to the passage of the National Defense Education Act. Perkinson, \textit{The Imperfect Panacea: American Faith in Education} 1865-1965, at 214-15 (1968).

Preparation for employment has long been considered a purpose of the public school system. Tyack, \textit{Ways of Seeing: An Essay on the History of Compulsory Schooling}, 46 HARV. EDUC. REV. 355, 377-83 (1976). \textit{See also} Gardner, \textit{The State and the School}, 20 LAW & CONTEMP. PROB. 184, 193 (1959) (the ultimate justification for compulsory attendance "is nothing other than the whole population must have adequate training to enable it to defend its borders and to sustain the activities which are indispensable to its material life").


Ensign asserted that common principles could be found in the different educational systems of the United States: "Most nearly universal is the conception that the state must offer to every child such educational opportunities as will enable him to become an intelligent citizen, prepared to maintain himself and those who may be dependent upon him." Ensign, \textit{supra} note
As background to consideration of the legal bases for a parental right of excusal, the following discussion examines some of the curriculum requirements that serve these purposes in the public schools and possible conflicts between such requirements and parents' pedagogical views or personal values.

A. SPECIFIC CURRICULUM REQUIREMENTS

Curriculum requirements may be either substantive (e.g., a course in English) or methodological (e.g., the use of audio-visual equipment). The state might justify adoption of a particular substantive curriculum requirement on the ground that all children must be so instructed in order to serve a broad societal purpose. If this is the justification, it is likely that the requirement will also be imposed in the private schools. The state interest, however, may be more limited: public funding of public schools entitles society to receive the benefits of having all children in the publicly supported schools instructed in certain subjects. Methodological requirements serve the state's interests in achieving its educational goals through efficient and effective instruction.

Preparation of youth for citizenship was a primary impetus for support of public schooling following the Revolutionary period and was also important to the decision to require compulsory attendance at school. It is reasonable for the citizens of a country or a state to attempt to assure the good citizenship of future generations. If they believe the system of government is a good one, they will want it preserved for the benefit of their children and grandchildren. A course in American government, for exam-
ple, might therefore be required. 26 Such a course could include not only study of federal and state constitutional provisions and relevant historical material, but inculcation of the values of the governmental system in order to gain adherence to it. 27

The goal of good citizenship might be thought to require much more, however, than knowledge of our system of government and its basic liberties. Certain skills (such as basic reading, writing, arithmetic, and the ability to reason or think critically) 28 might be thought necessary because they are considered essential to intelligent participation in, and hence the proper functioning of, the political system. The state might justify instruction in American history and literature on this ground, or on the ground that they help create a common people through knowledge of a common heritage. Biology, as well as other science and higher mathematics courses, could be justified on the ground that, in an increasingly technological society, many political choices depend on scientific questions. Similarly, economics, sociology, and psychology are certainly relevant to political issues. Virtually every area of social or economic concern is subject to governmental regulation and is therefore a subject of political debate. The state might consider instruction in potential subjects of political decision essential to proper preparation for citizenship.

Some curriculum requirements in the public schools cannot be viewed as having the purpose of assuring either instruction in the system of government or instruction in the proper functioning of the political system. Such courses fulfill the purposes of preparing youth for a vocation or for a


27. Indeed, the revolutionary leaders who argued for a system of public education expected the instruction to gain adherents to the system of government established after the revolution. TURNING POINTS, supra note 18, at 84-85.


The Maine statute, however, expressly requires instruction in history, English, and citizenship without reference to reading, writing, or arithmetic. ME. REV. STAT. ANN. tit. 20, § 102(7) (West Cum. Supp. 1976). The New Jersey statute expressly requires only civics, geography, and history. N.J. STAT. ANN. § 18A:35-3 (West 1968). There is no explicit requirement in the curriculum statutes that children be taught to reason or think critically. It is commonly assumed, however, that development of this skill is essential to good citizenship and thus a central purpose of public schooling. See, e.g., EDUCATIONAL POLICIES COMM'N, THE CENTRAL PURPOSE OF AMERICAN EDUCATION 6 (1961).
satisfactory personal life. The vocational goal may be to prepare individuals to be "self-reliant and self-sufficient participants in society" so that they do not burden society. A state might have the more ambitious purpose of assuring that each member of society be able to contribute to the growth of the economy, or otherwise benefit society to the maximum of his potential. Such a purpose could serve either economic or political goals, e.g., competition with other nations. A state might also wish to develop an educated elite of high talent, as Jefferson suggested, with the "best geniusses [sic] raked from the rubbish annually ...." The vocational goal may also be viewed as a means of achieving a more egalitarian society. Concepts such as equal educational opportunity suggest schooling for individual success and thus for a vocation. Many of the subjects that could be considered useful preparation for a vocation might also be useful training for citizenship. Some, however, such as typing, bookkeeping, home economics, and shop, might be considered to serve only vocational goals.

Numerous courses are primarily designed to prepare youth to lead a "satisfactory" (by implicit government definition) personal life, although they may aid in vocational success as well. Many states require instruction in the effects of alcohol, tobacco, and drugs in order to deter use or abuse of those substances. Sex education has been added to the curriculum of

30. Two motivations behind compulsory schooling and the child labor laws that were enacted about the same time were to assure a productive working class and to assure the strength of the nation. See generally Ensign, supra note 16; Tyack, Ways of Seeing: An Essay on the History of Compulsory Schooling, 46 Harv. Educ. Rev. 355, 377-83 (1976).
schools by statute or state school board regulation, and is often justified by its presumed usefulness in solving the social problems of illegitimate births, teenage marriages, and venereal disease. There is now a movement to require consumer education. Schools take on the task, either explicitly or implicitly, of character development, teaching such virtues as honesty, cooperation, hard work, and punctuality. The education of the immigrant child had as its purpose not merely instruction in our form of government and in English, but instruction in our social mores and the eradication of foreign ways. Although this kind of instruction could be required solely for the welfare of the individual child, it is usually adopted to cope with perceived social problems. The people of the United States have long regarded schools as a preeminent social institution for solving such problems.

The efficacy of these courses is questionable. The NEA Task Force on Drug Education found the greater percentage of existing courses to be superficial and educationally poor. Baker, Drug Education: Is It Doing Any Good?, EDUC. DIGEST, Jan. 1973, at 39. The National Institute on Alcohol Abuse and Alcoholism found that almost every state has legislation concerning alcohol education, but most of the programs have been inadequately implemented. Chafetz, The New Attack on Alcoholism, COMPACT, May-June 1974, at 5-6. The Surgeon General's report on the hazards of smoking prompted greater emphasis on those dangers, yet from 1968 to 1972 there was a 4% increase in smoking among youths. Edson, Schools Attack the Smoking Problem, AM. EDUC., Jan. 1973, at 13-14.

33. See, e.g., Sex Education Act §§ 1-5, ILL. ANN. STAT. ch. 122, §§ 698.51-.55 (Smith-Hurd 1977). Most of the direction with regard to sex education has come from the state school board level. Bartoo, Sex Education, in NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION, FRONTIERS OF SCHOOL LAW 147, 152-54 (1973).


36. Such a purpose is often assumed rather than explicitly required. Some statutes, however, mandate such instruction. Massachusetts, for example, commands that:

[I]nstructors of youth shall exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice and a sacred regard for truth, love of their country, humanity and universal benevolence, sobriety, industry, frugality, chastity, moderation and temperance, and those other virtues which are the ornament of human society and the basis upon which a republican constitution is founded . . .


37. See R. BUTTS & L. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 408 (1953); E. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES, 341-42 (1919); TURNING POINTS, supra note 18, at 228-34.

38. See generally H. PERKINSON, THE IMPERFECT PANACEA: AMERICAN FAITH IN EDUCATION 1865-1965 (1968). For 200 years prior to 1965, "Americans had looked to their schools and school masters to solve their social, economic, and political problems." Id. at 12. Perkinson's
B. PARENTAL CONFLICTS WITH CURRICULUM REQUIREMENTS

With the exception of basic skill instruction, all studies have the potential for generating value conflicts with parents. For example, even if study of the constitutional system of government is limited to the text of the Constitution, its history, and long-settled cases decided thereunder, instruction in constitutional provisions could result in disagreement about proper interpretation. Parents might object that the interpretation presented in school is incorrect. When an amendment to a constitutional provision is under consideration, instruction in that provision could surely lead parents to object to the instruction. Some parents may consider the existing system of government less desirable than other systems; they might object to instruction of their child in the existing system of government, especially if alternatives they prefer are disparaged.

Much of American history covers the political debates of the past over social and economic issues. At times, the instruction may imply judgments as to what the correct positions in those controversies were. The same issues may, in other guises, be current political issues or have the potential to become so in the future. No conflict with parents would occur, of course, over the teaching of facts, such as that Independence Day was July 4, 1776. A discussion of the New Deal, however, which concludes that it was responsible, even without World War II, for bringing the United States out of the Depression might meet with parental objection. A study of the 1920's that discusses changing sexual mores might give rise to conflicts with parents who do not want their children exposed to such information.

thesis is that they have continued to do so despite the absence of convincing evidence of success.

39. For example, the Supreme Court's protection of the right to decide to have an abortion, see Roe v. Wade, 410 U.S. 113 (1973), is now the subject of much criticism and has led to proposals for constitutional amendments. See G. GUNTER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 656 (9th ed. 1975) (noting various proposed amendments); Byrne, The Supreme Court on Abortion: An American Tragedy, 41 FORDHAM L. REV. 807 (1973); Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 CALIF. L. REV. 1250 (1975); Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 SUP. CT. REV. 159 (1973); Rice, The Dred Scott Case of the Twentieth Century, 10 Hous. L. REV. 1059 (1973). For a sample of the reaction of American clergy, see B. SARVIS & H. RODMAN, Preface to THE ABORTION CONTROVERSY at ix-x (1973).

Other areas of study may lead to conflict. Economics is not a discipline free of controversy. Literature may expose children to ideas to which their parents object. The study of evolution in biology is a clear example of possible conflict with parents' values. Sociology is inherently controversial. Instruction in areas likely to become subjects of political decision, e.g., environmental issues and consumer protection, surely have the potential to conflict with parents' values.

Although developing the skill of critical thinking could lead to value-based objections,41 most parents would object to the development of the reasoning powers of their children only in the context of a specific subject. At the extreme, this would be a claim that knowledge of this subject is to come from authority and not from reasoning; most often the conflict will derive from parents' desires not to expose their children to views or values with which the parents disagree. Moreover, the possibility of conflict is increased because of the widespread, but not well-documented, assumption that it is necessary to expose children to conflicting values in order to teach critical thinking.42

41. Adherents of some religions might object to the development of reasoning powers per se.
42. Some educators have argued that in order to develop critical thinking in students, the central content of the school curriculum should be comparative moral systems and ideals, and the central activity of education should be the deliberate examination of conflicts of a moral nature. See R. Raup, G. Axtelle, K. Benne & B. Smith, The Improvement of Practical Intelligence 266-83 (1943). Others have concluded that protection from opposing beliefs and attitudes, coupled with a refusal to permit analysis and criticism of sanctioned beliefs, plays a large part in the development of provincial attitudes. They have found that "full and free discussion of all views and of conflicting beliefs and attitudes" is more likely to lead to the healthy development of critical thinking. See W. Burton, R. Kimball & R. Wing, Education for Effective Thinking 42 (1960).

Others, while concluding that not all controversial subjects should be avoided in the classroom, maintain that certain subjects highly laden with moral issues can be kept out of the classroom without endangering the development of critical thinking. They suggest that the lack of pupil maturity, teacher impartiality, pupil interest, relevance, and time diminish the number of controversial subjects that can be interjected into the classroom. Some suggested taboos are discussions of the relative merits of one religion over another, the reliability of various methods of birth control, issues of trial marriage, and related questions of sex relations. See G. Leinwand & D. Feins, Teaching History and the Social Studies in Secondary Schools 130 (1968). A number of experiments suggest the possibility that a child can learn to think critically in a subject without moral conflicts, and then later apply those thinking skills to controversial areas. See, e.g., H. Lewis, An Experiment in Developing Critical Thinking, 1950 Math. Teacher 411-13. Pupils were taught the art of critical thinking through instruction in geometry. The study found that the thinking skills learned in geometry class led to improved critical thinking of school happenings, advertisements, news reports, magazine articles, and selections from the history of science. See also W. Burton, R. Kimball & R. Wing, supra at 300.
Because most of the curriculum requirements designed to prepare youth for a satisfactory life are directed toward inculcating preferred values or attitudes in children, the potential for conflict with parental values is readily evident. It is unlikely that parents would often have values which conflict with courses serving solely vocational ends. One can, however, imagine such a conflict arising out of instruction in career choices that presents certain careers as male careers and others as female. The more likely parental objections would be pedagogical—e.g., to having the child take typing, shop, or home economics—on the ground that the child has no need for such instruction, given his planned career or lifestyle. Parents might feel that such instruction takes up time which would be better spent in an elective course offered in the school, such as French, or even in out-of-school instruction, such as in music. Such pedagogical objections might also be made to instruction which serves the good citizenship goal or prepares youth for satisfactory personal lives.

In order to serve these societal purposes through curriculum requirements, the public school must also choose methods of instruction. Parents might object to the methods chosen, quite apart from the substance of the courses, on either value-based or pedagogical grounds. For example, parents might object to spelling bees or grading on the ground that such methods teach the value of competition, which is abhorrent to them, or they might object to the use of audio-visual equipment because they believe its use is sinful. Objections to methods of instruction, however, will more likely stem from differences of opinion about the effectiveness of the methods. Parents might object to the use of the "new math," or believe that their child is insufficiently mature or otherwise not psychologically or mentally able to handle certain instruction.

II. COMMON LAW AND CONSTITUTIONAL PROTECTIONS OF PARENTAL LIBERTY TO DIRECT THE EDUCATION OF ONE'S CHILD

Both common law and constitutional precedents support a measure of parental control over the education of one's child. The common law precedents, if still valid, could allow parents to have their children excused from instruction to which they objected, whether on value-based or pedagogical grounds. As a matter of substantive due process under the fourteenth amendment's due process clause and the first amendment's protection of the free exercise of religion, incorporated against the states through the four-

43. Such an objection was made by parents in Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974).
teenth amendment, parents have been accorded some rights of control, but no constitutional precedent directly supports a right to have one's child excused from instruction to which one objects in the public schools, except possibly on strictly religious grounds.

A. THE COMMON LAW RIGHT OF PARENTAL CONTROL

1. The Common Law

Prior to the adoption of compulsory school attendance laws, and, in some cases, even after adoption of such laws, the dominant rule in state courts at the turn of the century was that parents could have their children excused from public school instruction to which they objected, as long as exercise of the right did not affect the "efficiency and good order of the schools" or interfere with the rights of other students in the school. In almost all of the cases, the basis for parental objection was pedagogical. The opinions articulated a requirement that the request must be reasonable, but, given the presumption in favor of parental control, that was not a difficult standard to meet.

In each of the cases, the school had punished, suspended, or expelled the child for following his parent's order not to take a certain course, despite the fact that the relevant school authorities had known of the parent's order. The school authorities in each case claimed that under the statutes establishing the public school system, their powers extended to complete control over the education of the child once he entered school. Thus, they could condition attendance at a public school on compliance with the school's rules and regulations.

The statutes under which the rules and regulations were adopted could have been interpreted to sustain the actions of the school authorities, since they required certain subjects to be taught in the local schools or granted power to school trustees to develop the curriculum or add subjects to the

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44. See Hardwick v. Board of School Trustees, 54 Cal. App. 696, 205 P. 49 (1921) (objection to dancing exercises); Trustees of Schools v. People, 87 Ill. 303 (1877) (objection to grammar instruction); Rullison v. Post, 79 Ill. 567 (1875) (objection to bookkeeping class); Kelley v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914) (parent wanted child instructed in music in lieu of domestic science); Sheibley v. School Dist. No. 1, 31 Neb. 552, 48 N.W. 393 (1891) (objection to grammar instruction); School Bd. v. Thompson, 24 Okla. 1, 103 P. 578 (1909) (objection to singing lessons); Morrow v. Wood, 35 Wis. 59 (1874) (objection to geography lessons).

45. One exception was Hardwick, in which the court allowed a parent to have his children excused from dancing instruction introduced as part of state-authorized physical training, holding it to be a "question of morals and the liberty of conscience upon a subject upon which people have the natural and the constitutional right to hold and put into practice divergent opinions." 54 Cal. App. at 708-09, 205 P. at 54.

46. See note 54 infra.
required curriculum. Viewed as alternatives to private schooling or home instruction by parent or tutor, public schools could have been accorded the same prerogatives as private schools to adopt rules and regulations with which parents and children had to comply in order to attend. Instead, the

47. See, e.g., Act of Apr. 1, 1872, § 48, 1871 Ill. Laws 721 (directors of district schools "shall direct what branches of study shall be taught"); 1885 Neb. Laws, ch. 79, subdiv. 5, § 3 (district board shall cause students "to be taught in such courses and departments as they may deem expedient"). Another statute read: "In every district school there shall be taught, in the English language, orthography, reading, writing, English grammar, geography, and arithmetic, during the time such school shall be kept, and such other branches of education as may be determined upon by the district board." Act of Mar. 28, 1863, ch.155, § 55, 1863 Wis. Laws 255.

48. Several state court decisions of the period, interpreting similar statutes, may be viewed as rejecting the rule that parents could have their children excused from instruction to which the parents objected. Despite language in the opinions to the effect that local school authorities had broad discretionary powers to govern the conduct of pupils in the public schools, however, many of the decisions can be reconciled with the line of cases upholding a parental right to have one's child excused. The case most commonly cited as holding against such a parental right is Andrew v. Webber, 108 Ind. 31, 8 N.E. 708 (1886). In Webber, the school had suspended the child for following his father's direction not to study music. According to the court, the father "did not believe it was for the best interest of his son to participate in the musical studies and exercises of the high school." Id. at 38, 8 N.E. at 712. The court characterized this excuse as an expression of "mere arbitrary will... without cause or reason in its support." Id. at 39, 8 N.E. at 712. The decision left open the possibility that a parent would prevail if he gave a sufficient excuse, and therefore, it may be seen as only a more stringent application of the requirement that a parent's request be reasonable. The Webber court in fact noted with approval cases upholding parental claims for excusal in which parents supported their requests with educational justifications. Id.

Among the cases cited by the court in support of its holding, most did not raise the issue of the conflict between parental and school authority over a child's education. In one case, for example, the court viewed the child's refusal to read a Protestant version of the Bible as a question involving freedom of religion. Donahoe v. Richards, 38 Me. 379 (1854). The issue of parental rights was not considered. Of those cases cited which did deal with parental rights, only one cannot be easily reconciled with recognition of a right of parental control, Kidder v. Chellis, 59 N.H. 473 (1879). It can be distinguished, however, on the ground that the parental request for exemption was made some days after the child's refusal to participate in a classroom exercise.

In a number of the cases which seem to deny a parental right of control, the parents' request came after the student had refused participation in a particular curriculum component. See, e.g., Cross v. Trustee Walton Graded School, 129 Ky. 35, 110 S.W. 346 (1908) (objection to participation in school play at commencement exercise). Some of the cases asserted that school authorities had broad rights to make and enforce rules and regulations governing the schools, but did not involve parental objections to a particular class. Hodgkins v. Rockport, 105 Mass. 475 (1870) (power to expel students for misconduct); Roberts v. Boston, 59 Mass. (5 Cush.) 198 (1849) (reasonable to classify students on the basis of race); Ferriter v. Tyler, 48 Vt. 444 (1876) (reasonable to require consistent attendance). In other cases, the student apparently objected to a course without the support of the parent. See, e.g., Sewell v. Board of Educ., 29 Ohio St. 89 (1876) (student objection to rhetorical exercise); Guernsey v. Pitkin, 32 Vt. 224 (1859) (student objection to writing a composition for class).

A clearer rejection of the rule that parents ought to be able to have their children excused from instruction is found in Christian v. Jones, 211 Ala. 161, 100 So. 99 (1924). A child was denied reinstatement on petition of her parent, following suspension for having, at her parent's
courts that upheld parents' rights of control interpreted the statutory provisions as designed only to afford children the "opportunity" to acquire a free education in whatever subjects the school offered, and not as a grant of authority to school officials to require students to take the subjects offered contrary to their parents' wishes.\(^4\) Under the decisions, parents were free to have their children excused from subjects required to be taught by statute, as well as from those added to the curriculum by local school authorities.\(^5\)

The statutory language permitted either of these two interpretations—first, that the school authorities had complete control of a child's education or that children were being given an opportunity to acquire a free education in the subjects offered.\(^5\) While never expressly so stating, the courts that ruled in favor of the parents in effect decided that any abrogation of the parents' common law rights must be made explicitly. The decisions reflected widely shared assumptions that the common law granted the parent a right to control his child, and specifically that it placed the responsibility for educating the child on the parent, with a commensurate right in the parent to control that education.\(^5\) For these courts, the common law right of parental direction, left school to attend private music lessons. (The school provided a music teacher whom the parents could pay for music instruction, but the court noted that it was "not a part of the course." The parent preferred the private teacher.) This case appears to contradict directly the holding in Kelley v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914), in which a parent had his child excused from domestic science in order to study music. The *Christian* decision quoted with approval the following statement: "'The presumption is in favor of the reasonableness and propriety of the action of the board.'" 211 Ala. at 162, 100 So. at 100 (quoting Kinzer v. Directors, 129 Iowa 441, 105 N.W. 686 (1906)).

Other cases which clearly conflict with those upholding rights of parental control in the public schools include Samuel Benedict Memorial School v. Bradford, 111 Ga. 801, 36 S.E. 920 (1900) (objection to debate topic); State v. Mizner, 50 Iowa 145 (1878) (objection to algebra class).

49. "From these enactments it is manifest that it was a design of the law makers that all of the children of the State should be afforded an opportunity to acquire free of charge, a knowledge of the enumerated branches required to be taught." Rulison v. Post, 79 Ill. 567, 570 (1875). "No particular branch of study is compulsory upon those who attend school, but schools are simply provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages." Trustees of Schools v. People, 87 Ill. 303, 308 (1877).

50. See, e.g., Morrow v. Wood, 35 Wis. 59 (1874) (student not required to take geography lessons prescribed by statute).

51. In some instances, the courts strained to reach the interpretation in favor of parental rights. Such an interpretation of the Nebraska statute, which authorized local school authorities to "cause [students] to be taught," surely ignored the common meaning of the word "cause."

\(^{15}\)

52. *Morrow* stated that the "law gives the parent the exclusive right to govern and control the conduct of his minor children." 35 Wis. at 64. The *Trustees of Schools* case held that the "policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated." 87 Ill. at 308. See also *School Bd. Dist. No. 18 v.*
control over the education of one’s child in the public schools appeared to be based on two assumptions: first, that the parent had equal or superior knowledge of the child’s “physical and mental capabilities and future prospects,” compared to the teacher or other school authorities; and second, that because of the parent’s “natural affections,” the parent was more likely to act for the best interest of the individual child than the teacher or other school authority who, by contrast, had a “mere temporary interest in the welfare of the child.”

Although most of the opinions stated that the parent’s request that the child be excused must be reasonable and consistent with the welfare and best interests of the offspring, one court presumed that the parent’s request was reasonable, even though the parent refused to justify the request. In other cases, a parent was allowed to have his child excused from geography so that the child could devote more time to arithmetic, and a parent was allowed to substitute private music instruction for a required course in domestic science, when he claimed that insufficient time would be devoted to the private instruction unless a public school course were dropped. A parent was even allowed to have his child excused from grammar on the ground that it was not taught as it had been when the parent was in school.

The requirements that the “efficiency and good order of the schools” and the equal rights of other students not be affected by exercise of parental

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Thompson, 24 Okla. 1, 9, 108 P. 578, 581 (1909) (“parents rule supreme during the minority of their children”).

53. Sheibley v. School Dist. No. 1, 31 Neb. at 556, 48 N.W. at 395. In Morrow, the court, having noted the dilemma faced by a child who is forced to disobey his parent in order to obey his teacher, said:

[the parent] is as likely to know the health, temperament, aptitude and deficiencies of his child as the teacher, and how long he can send him to school. All these matters ought to be considered in determining the question what particular studies the child should pursue at a given term.

35 Wis. at 64. In Trustees of Schools the court presumed that the father’s “natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child, will insure the adoption of that course which will most effectually promote the child’s welfare.” 87 Ill. at 308.

54. E.g., Kelley v. Ferguson, 95 Neb. 63, 68, 144 N.W. 1039, 1041 (1914) (parent has right to make “reasonable” selection from prescribed courses); School Bd. Dist. No. 18 v. Thompson, 24 Okla. 1, 11, 103 P. 578, 582 (1909) (parent has a “right to make reasonable selection from the prescribed course of study for his child to pursue”).

55. See, e.g., Morrow v Wood, 35 Wis. 59, 66 (1874) (“[T]t is impossible to say that the choice of studies which [the parent] made was unreasonable or inconsistent with the welfare and best interests of his offspring”).

56. School Bd. Dist. No. 18 v. Thompson, 24 Okla. 1, 11, 103 P. 578, 582 (1909) (parent would not allow his children to take singing lessons required by school authorities).

57. Morrow v. Wood, 35 Wis. 59 (1874).

58. Kelley v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914).

rights of control prevented parents from demanding special instruction for their children, or instruction which would interfere with or retard the study of other students.\textsuperscript{60} Excusing a child from instruction clearly was not considered detrimental to the efficient administration of the school.

2. \textit{Current Validity of Common Law Precedents}

The extent to which the common law cases interpreting educational statutes remain valid precedents depends first on whether the educational statutes have remained significantly unchanged. Even if existing educational statutes are similar to those involved in the common law cases, however, the continuing validity of these cases may be doubted for other reasons. First, lack of effective exercise may have weakened the common law right of parental control over the education of one's child. Second, today's teachers may be considered to have greater expertise than parents because of the more rigorous training requirements imposed by most states. A third possible argument, that changes in the school system make schools today less able to accommodate a request for excusal, is clearly unsupportable, since these changes seem to make accommodation of such requests easier.\textsuperscript{61} The arguments based on abrogation of the common law right of parental control because of disuse and greater expertise of teachers vis-à-vis parents will be considered first. It is beyond the scope of this Article, however, to do more than suggest lines of argument that should be considered in determining whether common law based interpretation of educational statutes would presently allow parents to have their child excused from instruction. A definitive conclusion can only be made upon detailed consideration of the case law and statutes in individual states.

a. \textit{Erosion by disuse:} The absence of cases in the last few decades claiming such a right of parental control on common law grounds raises doubts about the continuing vitality of that common law right.\textsuperscript{62} It is difficult, however, to determine whether the right has been eroded by lack

\begin{itemize}
  \item \textsuperscript{60} [The parent] can not . . . insist that his child shall be placed or kept in particular classes, when by so doing others will be retarded in the advancement they would otherwise make; or that his child shall be taught studies not in the prescribed course of the school, or be allowed to use a text-book different from that decided to be used in the school, or that he shall be allowed to adopt methods of study that interfere with others in their studies.
  \item Trustees of Schools v. People, 87 Ill. 303, 307 (1877).
  \item \textsuperscript{61} See text accompanying notes 220-28 infra. In Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970), three high school students asked to be excused from class because of objections to a Kurt Vonnegut novel assigned by the teacher. The court, in reinstating the teacher, found, \textit{inter alia}, that granting the students an excusal would have created no significant disruption to the educational process of the school.
  \item \textsuperscript{62} Research indicates that the last such case to be brought on common law grounds was brought in 1934. Ruff v. Fischer, 115 Fla. 247, 155 So. 642 (1934) (dismissed for failure to exhaust administrative remedies).
\end{itemize}
of effective exercise. The absence of cases might be accounted for by school officials generally granting parental requests for exemption, thus complying with the common law decisions. In some states, statutes provide for exemption from courses most likely to elicit parental objections. The absence of cases might also be explained by a reluctance of parents to have their children excused because they consider school credentials extremely important to their child's future education and employment opportunities. On the other hand, if parents have not often objected to courses since the early cases, or if parents whose requests for exemption have been denied have been insufficiently motivated to bring suit to challenge school officials, the right may have been weakened by disuse. Parents may have become less confident of their own abilities as educators and thus come to view the school as the primary educator. Nevertheless, the recent controversies about school curriculum indicate that at least some parents have not lost confidence in themselves as educators of their children.

63. E.g., Cal. Educ. Code § 8506 (West 1975) (permitting withdrawal from any class in which "human reproductive organs and their functions and processes are described, illustrated or discussed"); Idaho Code § 33-1611 (Cum. Supp. 1976) (parent or legal guardian may have child excused from any planned instruction in sex education upon written request to the school district board of trustees; alternative education is to be provided for the excused child); Mich. Comp. Laws Ann. § 340.789c (West 1976) (permitting withdrawal from "any class in which the subject of sex education is under discussion"); Wis. Stat. Ann. § 199.22 (West Supp. 1976) (parent may withdraw child from instruction in physiology and hygiene, the effects of drugs and alcohol, and the symptoms of disease).

64. Seventy-eight percent of those dropouts who find employment are employed as either blue collar or farm workers. The unemployment rate for dropouts is much higher than that for high school graduates. Bienstock, The Realities of the Job Market, in Profile of the School Dropout 101-24 (D. Schreiber ed. 1967).

For those students wanting to pursue professions requiring a college degree, successful completion of secondary school is necessary to further education. See College Entrance Examination Board, A Chance to Go to College 6 (1971).

For an argument that, in the absence of compulsory attendance laws, parents would seek their child's education because of its utility, see West, Economic Analysis, Positive and Normative, in The Twelve-Year Sentence 163, 163-88 (W. Rickenbacker ed. 1974); note 169 infra.

65. A 1973 Gallup poll asked: "As you look on your own elementary and high school education, is it your impression that children today get a better-or-worse-education than you did?" Sixty-one percent answered that education was better today, 11% that there was no difference, and 20% that it was worse. Among those asked to give reasons why they thought education is better today, respondents with children in the public schools gave the following reasons: wider variety of subjects; better facilities and equipment; better teaching methods; better qualified teachers; and equal opportunity for all students. Gallup, Fifth Annual Gallup Poll of Public Attitudes Toward Education, 55 Phi Delta Kappan 38, 44-45 (1973). The same poll also asked, "[I]n what ways are your local public schools particularly good?" The most frequent response after "the curriculum" was "the teachers." Id. at 45.

66. See notes 1-9 and accompanying text supra. See also H. Broudy, The Real World of Public Schools 10 (1972) (suggesting that some of the current criticism of public schools results from educated parents who believe that they can do a better job than the teacher).
a conclusion it is that although the right is not as strong as it once was, it retains vitality.

b. Greater teacher and administrator expertise: If parents have increasingly deferred to educational judgments of the schools, an explanation could be that both teachers and administrators in the public schools are better educated than their counterparts of the time of the common law decisions, making parents more inclined to accept their professional judgments. Teachers and administrators must now fulfill specified educational requirements in order to hold their positions. The early cases explicitly assumed that the parents’ expertise with regard to the child’s education was at least equal to that of the teacher and perhaps better. If that assumption is no longer true, then the common law cases are now invalid to the extent that they depend on that rationale.

Teachers and administrators surely have greater expertise regarding educational methods than parents do. Thus, parents ought not now to be entitled under common law precedents to have their child excused because they object to the method of instruction. With regard to substantive pedagogical objections, the parents’ arguably greater intimacy with the child and knowledge of the resources that the family can devote to the child’s future education remain important to reaching the correct decision with regard to the child’s education. On the other hand, the development of testing to determine abilities and personality characteristics, and the training of school authorities to evaluate these tests, give them a basis upon which to claim that they are better able to determine the best training for a career and future lifestyle. The resolution of a conflict between parents and school officials over a substantive pedagogical issue probably should be resolved on the facts of the particular case, depending on judgments about relative expertise with regard to the specific issue. If the parents’ objection is value-

67. Approximately 97% of American public school teachers now have bachelor’s or higher college degrees. CAMPBELL, supra note 8, at 254. In contrast, 19th century teachers frequently lacked formal education, and were usually employed with little regard for their academic or professional training. R. BUTTS & L. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 450 (1953). For a brief history of the development of certification requirements, see D. BEGGS, THE EDUCATION OF TEACHERS 44-45 (1965).


69. See text accompanying note 53 supra.

based, however, the teachers' and school administrators' greater educational training has no relevance, and the parents should prevail.71

c. Abrogation by statutory enactment: When statutes specifically require instruction of all of the children in the public schools in specified subjects,72 parents lose any common law right to have their children excused from the specified instruction. Statutes specifically authorizing local school authorities to require instruction73 also prevent parents from exercising the common law right to have their child excused from such locally required instruction. Other statutes do so by implication. These require the schools to offer instruction in a specific subject, and then set forth limited grounds upon which a child may be excused from attendance.74 Parents whose objection to the course rests on grounds other than those enumerated in the statute could not have their child excused. In the absence of such legislation, the argument for abrogation of the common law right by statute rests on the subsequent enactment of compulsory school attendance laws. In the two common law cases in which compulsory attendance laws had been enacted before the cases arose, the courts did not adequately consider whether the existence of such laws changed the presumption of parental control.75 Those

71. See text accompanying notes 255-56 infra.

72. E.g., the Kansas statute reads:

All accredited schools . . . shall provide and give a complete course of instruction to all pupils, in civil government, and United States history, and in patriotism and the duties of a citizen, suitable to the elementary grades; in addition thereto, all . . . high schools . . . shall give a course of instruction concerning the government and institutions of the United States, and particularly of the constitution of the United States; and no student shall be graduated from such school who has not taken and satisfactorily passed such course.

KAN. STAT. § 72-1103 (1972). See also N.Y. EDUC. LAW § 801 (McKinney 1969) (courses in patriotism and citizenship will be maintained in all schools of state for all pupils over 8 years of age); id. § 804 (nature of alcoholic beverages must be taught all students above third grade).

73. E.g., WIS. STAT. ANN. § 118.01 (West Supp. 1976) (local school board determines additional subjects to be required in elementary school).

74. See, e.g., LA. REV. STAT. ANN. § 17:272 (West Supp. 1977) (requiring the French language and culture to be taught, but allowing parents to exempt their children from the program); TEX. EDUC. CODE ANN. tit. 2, § 21.104 (Vernon 1972) (allowing a child to be exempt from physiology and hygiene courses if the instruction conflicts with the religious teachings of a "well-established church or denomination to which the parent or guardian and the child belong"); WASH. REV. CODE ANN. § 28A.05.030 (West 1970) (requiring instruction of all children in the first through eighth grades in physical education, but allowing excusal because of "physical disability, religious belief or participation in directed athletics").

75. Kelley v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914); School Bd. Dist. No. 18 v. Thompson, 24 Okla. 1, 103 P. 578 (1909). In Kelley the majority opinion ignored the existence of the compulsory attendance laws, although it was noted by a concurring justice. For a discussion of the concurring justice's opinion, see note 80 infra. The majority cited, in support of its decision, the failure of the legislature to disapprove of the earlier Sheibley case, in which the court upheld a similar claim of parental control. The court failed to note that the child in Sheibley had been too old to be subject to the compulsory attendance laws. In Thompson, the court recognized that the compulsory school attendance required by the state's constitution altered the common law rule leaving the child's education in the sole control of the parent, but
cases, therefore, fail to support a conclusion that compulsory school attendance laws left parental rights unchanged.

The enactment of a compulsory school attendance law is surely evidence of a societal judgment that at least some parents cannot be trusted to educate their children "properly" without sending them to school. On that basis, one could argue that any right of parental control has been totally abrogated and that students of compulsory school attendance age must be instructed according to the decision of the school authorities, despite parental objection. Nonetheless, just because parents send their child to school in compliance with the compulsory school attendance law, it does not necessarily follow that parents give up all rights of control over the selection of studies within the school. Depending on the nature of other laws in existence at the time of the enactment of a compulsory school attendance law, or enacted simultaneously, the compulsory attendance law and a right of parental control may coexist.

determined that the parent nevertheless retained the opportunity to select whatever courses the parent wanted for his child, if the parent chose to fulfill the attendance requirement by sending his child to the public school.

A possible explanation for this absence of focused attention on the effect of compulsory attendance laws may be that originally such laws were not vigorously enforced. Only later were effective enforcement mechanisms adopted. See generally ENSIGN, supra note 17.

76. Professor Tyack offers the following analysis: "Advocates of compulsory schooling often argued that families—or at least some families, like those of the poor or foreign-born—were failing to carry out their traditional functions of moral and vocational training. Immigrant children in crowded cities, reformers complained, were leading disorderly lives, schooled by the street and their peers more than by Christian nurture in the home. Much of the drive for compulsory schooling reflected an animus against parents considered incompetent to train their children. Often combining fear of social unrest with humanitarian zeal, reformers used the powers of the state to intervene in families and to create alternative institutions of socialization." Tyack, Ways of Seeing: An Essay on the History of Compulsory Schooling, 46 HARV. EDUC. REV. 355, 363. See also J. BRUBACHER, A HISTORY OF THE PROBLEMS OF EDUCATION 353 (1966). This author notes that, since the time of Plato, the family has been criticized for inadequacies in educating children. This distrust of the parent’s ability to educate is reflected in the fact that most states do not recognize home instruction as a substitute for compulsory attendance at school. See K. ALEXANDER & K. JORDAN, LEGAL ASPECTS OF EDUCATIONAL CHOICE: COMPULSORY ATTENDANCE AND STUDENT ASSIGNMENT 26-30 (1973).

77. In those states where no home instruction is allowed, one might interpret compulsory school attendance laws as only indicating distrust of the parents’ ability to teach, not of their ability to select the course of study. Another possible reason for compulsory school attendance laws might arise from the difficulties of policing parental education. The early child labor laws often required that the child pass an examination in reading and writing before being allowed to work, but the examination process was generally inadequate. See generally ENSIGN, supra note 17. Some commentators and courts have found an implied peer socialization objective in the requirement of compulsory school attendance. See, e.g., Stephens v. Bongart, 15 N.J. Misc. 80, 92, 189 A. 131, 137 (1937); M. RICCARDI, THE MAKING OF THE AMERICAN CITIZENRY 58-61 (1973); Comment, Private Tutoring, Compulsory Education and the Illinois Supreme Court, 18 U. CHI. L. REV. 105 (1950).
It is reasonable to assume that a legislature enacting a compulsory attendance law had in mind instruction that it thought all children should receive. Full recognition of the common law right of parental excusal would defeat the intention of the compulsory school attendance law, since parents could theoretically have their child excused from all school instruction, thus avoiding compliance completely. Such a theoretical possibility could be prevented by interpreting the common law requirement that the request for excusal be reasonable as encompassing a criterion that the school attendance law be given some effect. The problem posed by accommodating both the attendance law and a parental right is how to determine from which courses parents may have their child excused. If the state had statutes explicitly requiring all students to be instructed in specified subjects, that would still entitle parents to have their children excused from any subject not specified. Where the educational statutes are of the kind involved in the common law based cases, the compulsory school attendance law could be given effect by requiring all children to be instructed in subjects that the statutes require the schools to offer, or that the legislature, by other regulation, has indicated it considers important. Parents could not have their child excused from those subjects, but could from all others.

78. The main concern of those who favored compulsory school attendance was the eradication of illiteracy. In order to get a work permit and thus be exempt from school attendance, children were generally required to demonstrate an ability to read and write. See generally Ensign, supra note 17.

79. See, e.g., 1885 Neb. Laws, ch. 79, § 3 (district board "shall cause [pupils] to be taught in such schools and departments as they may deem expedient"); R.I. Gen. Laws § 16-22-3 (1969) (school committees will make provision for the instruction of the pupils in physiology and hygiene); Wash Rev. Code Ann. § 28A.05.010 (West 1970) ("All common schools shall give instruction in reading, penmanship, orthography, written and mental arithmetic, geography, English grammar, physiology and hygiene . . ., the history of the United States, and such other studies as may be prescribed by rule or regulation of the state board of education").

80. See, e.g., Act of Mar. 28, 1863, ch. 155, § 55, 1863 Wis. Laws 255 ("In every district school there shall be taught, in the English language, orthography, reading, writing, English grammar, geography, and arithmetic, during the time such school shall be kept, and such other branches of education as may be determined upon by the district board"). See generally 1865 Ind. Laws 32 (school trustees shall provide instruction in orthography, reading, writing, arithmetic, geography, English grammar, physiology, history of the United States, and good behavior, and other such branches of learning).

The concurring justice in Kelley v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914), looked for evidence that the legislature thought the course from which excusal was sought was important. Finding that teachers were not required to be qualified in the subject from which excusal was sought (domestic science), although they were required to be qualified in other subjects, he was willing to allow the parents to have their child excused. He added, however, that such a study was also not a "fundamental" of education. Id. at 75, 144 N.W. at 1044 (Letton, J., concurring).

For current statutes which could be so interpreted in conjunction with a compulsory school attendance law, see Conn. Gen. Stat. Ann. § 10-15 (West 1977) ("In said schools shall be taught . . . reading, spelling, writing, . . . instruction in the humane treatment and protection
Some of the statutes involved in the early cases, however, did not require that certain subjects be offered, nor did they indicate what subjects of instruction were important. Where only such statutes existed at the time the compulsory school attendance laws were enacted, the compulsory attendance statute would seem to require students to be instructed in whatever subjects the local school board decided to require.

Such a delegation, if explicitly made to a local school board, would surely be reasonable. Local school districts generally contributed most of the financing for local schools at the time the compulsory attendance laws were adopted. Local financing remains significant today in most states. Moreover, variations in the characteristics of the community and geographical area served by school districts might demand commensurate variation in the courses of study required. The school board, at least in theory, is

of animals and birds and their economic importance . . . ’’); LA. REV. STAT. ANN. § 17:154 (West 1963) (’’the branches of spelling, reading, writing, . . . shall be taught in every elementary school’’); LA. REV. STAT. ANN. § 17:268 (West 1963) (’’The Federalist Papers shall be made a required course in all high schools’’); OHIO REV. CODE ANN. § 3313.60 (Page 1972) (’’there shall be included the study of the following subjects: (A) The language arts, including reading, writing . . . . (B) Geography, the history of the United States . . . . (D) Natural science . . . . (G) First aid, safety, and fire prevention’’); TEX. EDUC. CODE ANN. tit. 2, § 21.101 (Vernon 1972) (’’schools in this state shall be required to offer instruction in the following subjects: English, . . . penmanship, . . . physiology and hygiene’’).

81. See Act of Apr. 1, 1872, § 48, 1871 Ill. Laws 721 (directors of district schools ‘’shall direct what branches of study shall be taught’’).

82. In 1890, at which time 28 states had enacted compulsory school attendance laws, K. ALEXANDER & K. JORDAN, LEGAL ASPECTS OF EDUCATIONAL CHOICE: COMPULSORY ATTENDANCE AND STUDENT ASSIGNMENT 19 (1973), local taxing units provided more than 80% of the financial support for the public schools in nearly all of the states with compulsory attendance laws. Notable exceptions, however, included California and New Jersey, where local taxation provided less than 50% of the schools’ support. P. MORT, W. REUSSER & J. POLLEY, PUBLIC SCHOOL FINANCE 196 (1960).

83. In the school year 1971-72, 54.7% of school expenditures were financed by local government, 38.8% by the states, and 6.5% by the federal government. R. REISCHAUER & R. HARTMAN, REFORMING SCHOOL FINANCE 6 (1973).

84. This is particularly true of those states with both urban and rural districts. Increased delegation to the local community would ensure that the curriculum in the urban centers would be tailored to the needs of city life, while the rural districts would be free to emphasize vocational and agricultural education in the curriculum. J. CONANT, SLUMS AND SUBURBS 54-79 (1961). Statutes may formally recognize this diversity:

The Legislature hereby recognizes that, because of the common needs and interests of the citizens of this state and the nation, there is a need to establish a common state curriculum for the public schools, but that, because of economic, geographic, physical, political and social diversity, there is a need for the development of educational programs at the local level, with the guidance of competent and experienced educators and citizens. Therefore, it is the intent of the Legislature to set broad minimum standards and guidelines for educational programs, and to encourage local districts to develop programs that will best fit the needs and interests of the pupils, pursuant to stated philosophy, goals, and objectives.

responsible to the community it serves. To allow it to determine curriculum requirements thus indirectly allows the community to decide what kind of education its money is supporting.

An implied delegation to local school boards is troubling, however, because there is no evidence of focused attention on the specific educational purposes of compulsory attendance laws or on the consequence of such a law to the common law rights of parents. Nevertheless, to give the compulsory attendance statute effect one must consider the common law right to have been abrogated when no state statute indicates what subjects must be offered or are considered important.

To the extent that statutory enactments have overridden the common law, or that common law precedents are invalid in the relevant jurisdiction, parents who wish to have their child excused from objectionable instruction must find protection in constitutional law. Two of the common law decisions suggested that constitutional objections might be raised to school legislation which did not allow for some parental control over education in the public school, reflecting a conviction that respect for parental control is essential to the American system of government and its "free institutions." In *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the Supreme Court, although not considering such rights in the context of the public school, affirmed that view.

**B. DUE PROCESS CLAUSE PROTECTION OF PARENTAL LIBERTY TO DIRECT THE EDUCATION OF ONE'S CHILD**

In *Pierce* a unanimous Court struck down an Oregon statute requiring children between the ages of eight and sixteen to attend *only public schools.* It held that the law was an unreasonable interference "with the liberty of parents and guardians to direct the upbringing and education of children

Furthermore, statewide uniformity might stifle local initiative and originality when state regulations become so rigid that local boards cannot experiment with new ventures in curriculum, methods, and community enterprises. R. Butts, *A History of Education in America* 578 (1953).

85. *Rulison v. Post*, 79 Ill. 567, 573 (1875); *Kelley v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914). In *Kelley*, the court said:

> Wherever education is most general, there life and property are the most safe, and civilization of the highest order. The public school is one of the main bulwarks of our nation, and we would not knowingly do anything to undermine it; but we should be careful to avoid permitting our love for this noble institution to cause us to regard it as "all in all" and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children.

95 Neb. at 73, 144 N.W. at 1043 (emphasis added).

86. 262 U.S. 390, 399-403 (1923).

87. 268 U.S. 510 (1925).
under their control." The Court had recognized such a liberty earlier in *Meyer*, in which it struck down a statute prohibiting the instruction in modern foreign languages of any child who had not completed the eighth grade. In both cases, the opinions assumed, rather than explained, the existence and constitutional protection of parental liberty to direct the education of one's children. The failure of the opinions to explain fully the basis for the decisions, and the fact that they rested on the discredited "substantive due process" of the *Lochner* period, might serve to cast doubt on their continuing validity. Such doubt, at least with respect to the specific holdings, appears unwarranted.

Recent cases have cited *Pierce* and *Meyer* with apparent approval. Among those cases, *Griswold v. Connecticut*, which struck down on the ground that it violated a right of marital privacy a state statute forbidding the use of contraceptives, and *Roe v. Wade*, which struck down on privacy grounds laws prohibiting or regulating abortions, are most accurately viewed as resting on substantive due process. These cases indicate that substantive due process analysis retains vitality, at least outside of economic regulation. The majority opinion in *Griswold* explicitly reaffirmed the "principle of the *Pierce* and *Meyer* cases," and concurring opinions relied on these cases. Justice Blackmun's majority opinion in *Roe* cited *Pierce* as protecting "child rearing and education," even though he did not rely upon it as a basis for decision.

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88. *Id.* at 534-35. The technically accurate holding is that such interference with the liberty of patrons constituted an unreasonable infringement of the plaintiff schools' property rights. *Id.* at 536.

89. *Lochner v. New York*, 198 U.S. 45 (1905), is the symbolic case of a period in which the Supreme Court struck down state social and economic legislation on the ground that it unreasonably infringed on liberty and property rights protected by the due process clause of the fourteenth amendment. Modern courts and commentators have repudiated the cases of that period. See generally G. *Gunther*, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 564-70 (9th ed. 1975).

90. 381 U.S. 479 (1965).


92. *Id.* at 164 ("A state criminal abortion statute of the current Texas type . . . is violative of the Due Process Clause of the Fourteenth Amendment"); *id.* at 168 (Stewart, J., concurring) ("[T]he *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment"); *Griswold v. Connecticut*, 381 U.S. at 499 (Harlan, J., concurring on the basis of the due process clause); *id.* at 507 (Black, J., dissenting on grounds that the decision is based on substantive due process). See also Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159.

93. 381 U.S. at 483.

94. *Id.* at 495 (Goldberg, J., concurring); *id.* at 502 (White, J., concurring).

95. 410 U.S. at 153.

96. *Id.* at 159.
Applying an analysis similar to that generally made in determining what liberties are entitled to protection under the fourteenth amendment’s due process clause, the parental liberty to control the education of one’s child appears to be entitled to at least as much protection as the right of marital privacy upheld in *Griswold*, and surely more entitled to protection than the right to an abortion protected in *Roe*. The very assumption by judges over such a long period of time that the Constitution protects a parental liberty to direct the education of one’s child serves to establish that it is a basic value in the traditions of the American people. Further evidence of the importance of parental control over education may be derived from the previously discussed state court decisions recognizing a common law right of parental control.

Although one may confidently state that the Constitution protects parental liberty to direct the education of one’s child, the extent of the protection against state regulation is unclear. *Pierce* protects the right of parents to send their children to private schools in order to comply with compulsory school attendance laws. There was no issue involving curriculum requirements for private schools in *Pierce*, but the opinion does indicate that the Court envisioned constitutional limitations on the power of the state to regulate the private school curriculum. The opinion spoke of the

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97. In determining whether a liberty is protected, the court looks to its place in the traditions of the people. *Griswold* v. Connecticut, 381 U.S. at 493 (Goldberg, J., concurring). Thus, it was important to Harlan’s opinion in *Griswold* that marriage had long been favored. 381 U.S. at 500. See also *Poe* v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

Moreover, parental liberty to direct the education of one’s child may be viewed as at least within the penumbra of the explicit constitutional protection of freedom of speech and religion. Text accompanying notes 108-13 infra; see *Griswold* v. Connecticut, 381 U.S. at 482 (majority opinion by Douglas, J., in which he views *Pierce* and *Meyer* as based on the first amendment); *Poe* v. Ullman, 367 U.S. at 544 (Harlan, J., dissenting). In *Runyon* v. *McCrary*, discussed at text accompanying notes 107-08 supra, the Court assumed that the first amendment’s protection of freedom of association protected a parental right to send one’s child to private schools teaching views to which the parents adhered. 427 U.S. 160, 176 (1976). For a recent examination of the *Pierce* doctrine in light of the first amendment, see *Arons*, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. REV. 76 (1976).

98. One may view *Pierce* and *Meyer* as protecting the family unit, a value which marital privacy also serves. The right to an abortion surely has not been accorded that status in the traditions of our people.

It could also be argued that, if *Griswold* and *Roe* protect a right to decide whether to have a family, without restrictions as to use of contraceptives or abortions, one has some right to decide how to raise the family one decides to have. The Court’s opinion in *Runyon* recognized such a right, but held that it did not protect against the challenged regulation of private school admissions. 427 U.S. at 178. See text accompanying notes 107-08 infra.

99. See text accompanying notes 44-60 supra. Justice Harlan’s dissenting opinion in *Poe*, on which he based his decision in *Griswold*, made clear that marriage had long been favored as a matter of public policy. 367 U.S. at 552. The state court decisions are evidence of a similar status for a right of parental control over the education of one’s child.
legitimacy of "reasonable regulation" of all schools, including requirements "that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." The only guidance Pierce gives as to what constitutes "reasonable regulation," other than the suggestion that studies essential to good citizenship may be required, is the Court's statement that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

No Supreme Court decision, with the exception of Wisconsin v. Yoder, indicates what limitations exist on the power of the state to require instruction in private schools. Meyer involved state regulation prohibiting, not requiring, instruction in the private schools. Although in Farrington v. Tokushige the Court struck down a regulatory scheme for private schools, the schools in question were not established to fulfill a compulsory school attendance requirement. Because the regulation involved was so extensive, Farrington affords little guidance as to which parts of the regulation might otherwise have been acceptable. In the recent case of Runyon v. McCrary, the Court upheld federal regulation prohibiting nonsectarian private schools from engaging in racial discrimination in admissions, against the challenge that such regulation violated the constitutionally protected right to direct the education of one's child. The Court explicitly noted, however, that such regulation did not "inhibit in any way the teaching in these schools of any ideas or dogma," including the desirability of racial segregation.

Despite the absence of clarity about what constitutes "reasonable regulation," to the extent that Pierce retains vitality as a precedent, con-
institutional limits on such regulation do exist.\textsuperscript{107} Thus, parents who send their children to private schools have a basis upon which to challenge state regulation of those schools in order to avoid instruction of their children in matters to which they object. What \textit{Pierce} leaves unanswered is whether parents who send their children to public schools should be accorded a similar liberty to direct the education of their children.

\section{C. FREE EXERCISE OF RELIGION CLAUSE PROTECTION OF PARENTAL LIBERTY TO DIRECT THE EDUCATION OF ONE'S CHILD}

In \textit{Wisconsin v. Yoder}, Amish parents sought to have their children excused from compulsory school attendance beyond the eighth grade—excusal in effect from the last two years of compelled schooling.\textsuperscript{108} They claimed not only that secondary school attendance conflicted with tenets of the Amish religion, but that it threatened the parents' ability to inculcate their religious values in their children and to preserve the Amish way of life. The Supreme Court concluded that the educational purposes served by the two additional years of schooling from which exemption was sought did not justify the burden on the Amish parents' free exercise of religion.\textsuperscript{109} The Court recognized that the Amish community might be destroyed or severely hampered in maintaining its existence if children of Amish parents had to receive schooling which conflicted with Amish beliefs. The Court required the

\textsuperscript{107} Portions of the Court's opinion in \textit{Runyon} suggest a severely limited view of the extent to which private schools are protected from governmental regulation of the content of instruction. \textit{Id.} at 176-77. The opinion taken as a whole, however, so repeatedly notes that the schools are left free under the federal regulation to inculcate whatever values and standards they consider desirable, that it seems legitimate to assume that the present Court would afford constitutional protection against governmental regulation of the private school curriculum. The extent of such protection is unclear. For a more extensive discussion of \textit{Runyon}'s implications for private school regulation, see Hirschoff, \textit{Runyon v. McCrary and Regulation of Private Schools}, — IND. L.J. — (1977) (forthcoming).

\textsuperscript{108} The Court took note of the \textit{Pierce} decision, but did not rely upon it. It interpreted the statement in \textit{Pierce} that the parent has a right and duty to prepare the child for "additional obligations" to encompass "the inculcation of moral standards, religious beliefs, and elements of good citizenship." \textit{Id.} at 233.

\textsuperscript{109} The two educational purposes considered by the Court were preparation for citizenship and assuring a "self-reliant and self-sufficient" populace. 406 U.S. at 221. \textit{See} text accompanying notes 22, 24-38 \textit{supra}. Because the Court considered those purposes to be adequately served in the case of the Amish children by the conventional schooling already received and the additional informal vocational education of the Amish, it did not directly confront the legitimacy of the state educational ends. The Court purported to act under the following standard: "[O]nly those [state] interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion," \textit{Id.} at 215. Professor Kurland has criticized \textit{Yoder} for ignoring the integrationist purpose of schooling. Kurland, \textit{The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses}, 75 W. VA. L. REV. 213 (1973). Such a purpose directly conflicts with recognition of a right of a societal group to protect its continued existence by exiting from an integrated situation.
Amish, however, to continue to educate their children during the last two years of compulsory school attendance in the informal vocational methods which accorded with their religious beliefs. One may view *Yoder*, therefore, as a case involving only a question of constitutional limitations on state regulation of private schools, the Amish "school" being exempt from all regulation that burdened the free exercise of religion by the Amish.

Few parents could rely on *Yoder* to have their children excused. Even if *Yoder* were extended to parents who send their children to public schools, allowing them to object to curriculum requirements on the basis of religious beliefs, it is clear that the *Yoder* Court intended to limit claims for exemption from schooling requirements to those made on the basis of the tenets of an organized church. An idiosyncratic religious view not shared with an organized group cannot be considered an adequate basis for a claim under the *Yoder* decision. It is likewise clear that those parents whose objec-

110. To restrict religious claims to those based on the tenets of an organized religion seems to be inconsistent with Supreme Court decisions that suggest that a broad view of what constitutes a religious belief is required by the establishment clause. Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). The *Yoder* opinion may be consistent with the language of *Seeger* and *Welsh*, but indicates a far narrower spirit of construction of the word "religious." If *Yoder* were reconciled with *Seeger* and *Welsh*, parents could prevail in claims for excusal of their children from curriculum requirements when those requirements conflicted with deeply held values of the kind recognized as religious by *Seeger* and *Welsh*, even though not shared with others in an organized religion.

The *Yoder* opinion might give the impression that only the Amish can claim exemption from compulsory school attendance. The Court found that the Amish religion "pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community." 406 U.S. at 216. The 300-year-old existence of the Amish as an identifiable religious sect might also have been important to the decision.

Such a narrow reading of *Yoder* has led to the denial of a parental request, based on free exercise grounds, for excusal from courses in health and music and exposure to audio-visual instruction. Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974).

The *Yoder* opinion notwithstanding, any decision based on the free exercise clause which will apply only to one or a few religious sects, excluding most others, is subject to criticism as being itself an establishment of religion. The Court asserts that the opinion does not itself violate the establishment clause because it requires neither direct sponsorship, financial support, nor active involvement of the "sovereign" in religious activity. 406 U.S. at 234 n.22. Obviously, compliance by Wisconsin officials with the Court's opinion would not itself constitute that violation of the establishment clause found by the Court in statutes providing financial support for religious schools. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). It could, however, violate that neutrality toward religion which is the primary requirement of the prohibition against the establishment of religion on the part of the state—a prohibition which courts, too, are bound to observe. If Wisconsin had adopted a statute that was so drafted that only the Amish were in a position to claim exemption from the compulsory school attendance laws, those belonging to other religious groups whose values were in conflict with some or all of the values taught in the schools could forcefully claim that the statute violated the required neutrality. Even if, unlike the Amish, their tenets do not govern every aspect of their lives, conflict between the school curriculum and a religious tenet may just as easily hinder or destroy
tions to schooling are based on only secular values are unprotected by the *Yoder* opinion; the *Yoder* opinion insists that only religious and not philosophical and personal beliefs are protected by the free exercise guarantee.\(^{111}\)

There is, of course, a tension between such a preference for religious over secular values under the free exercise clause, and the neutrality toward religious and secular beliefs required by the establishment clause.\(^{112}\) The Supreme Court, however, is unlikely to reduce that tension by allowing secular claims for exemption from general laws to have the same status as religious claims for exemption. Such a doctrinal extension of the free exercise clause would seriously erode the ability of government to enforce laws admittedly within its power to enact.\(^{113}\)

D. CONSTITUTIONAL ISSUES LEFT UNRESOLVED BY EXISTING PRECEDENTS

Regardless of whether schooling is compelled, public school curriculum requirements from which parents cannot have their children excused pose constitutional questions left unresolved by *Pierce* and *Yoder*. If attendance at school is compelled, those parents who satisfy the requirements by sending their child to public school may be forced to have their child instructed in subjects or by methods to which they object. If attendance is not compelled, curriculum requirements impose conditions on public school attendance that force parents who object to a curriculum requirement to their religion. For a similar criticism, see Kurland, *The Supreme Court, Compulsory Education and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 237-44 (1975).

But see Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1230 (disputing this narrow interpretation of *Yoder*).

111. "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life." 406 U.S. at 235. Where one has not shown that the state action in any way coerces him as an individual in the practice of his religion, no violation of the free exercise clause has occurred. Board of Educ. v. Allen, 392 U.S. 236, 249 (1968); McGowan v. Maryland, 366 U.S. 420 (1961).

The Court even seems to treat *Pierce*’s protection of a right to send one’s children to private schools as though it were limited solely to religious schools. 406 U.S. at 213-14, 233. Since the *Pierce* case involved not only a religious school, but a military school, it cannot be so limited.


choose between foregoing a public benefit in order to avoid exposing their child to objectionable subject matter or instructional methods, and gaining the benefit at the expense of having their child instructed in that subject matter or by that instructional method. Both cases affect the liberty of parents to direct the education of their children. The central issues are: (1) the degree to which societal interests of constitutional dimension support the claims of parents to have their children excused from curriculum requirements to which they object; and (2) the extent to which other state interests, some of constitutional dimension, justify the infringement of the parents' liberty.

Section III examines these issues as they pertain to value-based parental objections. Section IV examines them in the context of pedagogical objections to curriculum requirements.

III. VALUE-BASED PARENTAL OBJECTIONS

Parents might be entitled under the common law based decisions to have their child excused from that public school instruction to which they object because of value conflict. When the state requires specific instruction, that basis for a parental right is an inadequate ground upon which to gain excusal. Parents who object to such curriculum requirements on value-based grounds do, however, have an independent basis for a claim for excusal. A right to have one's child excused because of value conflict finds support in the first amendment's protection of freedom of speech and its implicit protection of freedom of thought, and in the general principle that our government is a government by consent of the governed. Although the state has interests that justify limiting the exercise of the right, no state interests justify overriding the right completely. The arguments in favor of a right of excusal for value-based objections are considered first.

A. RIGHT OF EXCUSAL FOR VALUE-BASED OBJECTIONS TO INSTRUCTION

Parents who object to curriculum requirements on value-based grounds do so because they believe that their ability to transmit ideas and values to their child is weakened by conflict with ideas and values taught explicitly or

114. See Moskowitz, Parental Rights and State Education, 50 WASH. L. REV. 623, 646-47 (1975) (rejecting the argument that the state may condition the opportunity to attend school on the surrender of the parent's right to control the education of his child).

Much of the analysis in Sections III and IV is similar to that generally used in determining whether conditions placed on receipt of government benefits are constitutional. See R. O'NEIL, THE PRICE OF DEPENDENCY (1970). Among the factors O'Neil suggests must be considered are the importance of the benefit to the individual, the availability of similar benefits in the private sector, the ability of the government to achieve the purpose of the condition through direct means, and the ability of the government to achieve its ends through alternative means. Id. at 48-49.
implicitly at school. The argument that they should be able to excuse their child from such instruction rests first on the probability that schooling interferes with their ability to inculcate their values in their children, and second on recognition that required schooling in conflict with parental values may have indoctrinative effects. Such effects are inconsistent with first amendment values and government by consent of the governed. Given these consequences, neither the right to send one's child to a private school under *Pierce* nor the protection of religious values under *Yoder* is a sufficient protection of parental liberty.

1. The "Captive Audience" and Indoctrination

A teacher cannot effectively control his students or keep their attention unless they have some respect for him. When a teacher is the object of such respect and teaches ideas and values contrary to those taught by the parents, or teaches subjects from which the parents want their child shielded, the child is likely to have doubts about his parents' teaching that could decrease their ability to mold the character of their child. Even assigned readings not discussed by the teacher may have such an effect. Children are


116. One cannot be certain about the extent to which schooling hampers parents' ability to inculcate their values in their children. For most children, all influences probably have some effect on their development. With regard to any individual child, it is probably impossible to predict what influence would predominate in the formation of values. Social science exploration of the effects of the curriculum and teachers on political attitudes of students tends to suggest a slight effect compared to parents and other socializing influences, but results are mixed. The age and background of the student, the particular issue, whether parents disagree on the issue, and the characteristics of the individual teacher appear to be significant factors. The studies also suffer from the absence of either longitudinal or experimental evidence. M.K. JENNINGS & R. NIEMI, THE POLITICAL CHARACTER OF ADOLESCENCE 181-227 (1974) (reviewing the literature, including that dealing with elementary school children).

If, however, one could be certain that schooling had a negligible effect on the development of values, that knowledge would surely not justify compulsory instruction. The societal interest in the compulsion would seem weak indeed if no societal benefit is thought to flow directly from the compelled instruction. If the objectionable instruction is ancillary to another goal (e.g., critical thinking), nonobjectionable instruction could be substituted. See note 42 supra.

In *Yoder*, the Court assumed that the conflict between school and parental values would harm the ability of parents to inculcate their values in their children and thereby destroy the Amish community. 406 U.S. at 217-19.

Children are not, of course, exposed to information and values just from schools and parents. Other external influences, especially the mass media, are likely to impinge upon a child in today's society. Nevertheless, the parent and the school still remain important influences. Television is, after all, a medium over which parents can exercise control in the home. Even if the school is not the most significant influence on children besides parents, it does not follow that the school should be allowed to throw weight on the side of those societal forces that the parent is striving to resist.
indeed captive auditors in the public schools. Such a status for children should be far more troubling than any captive audience situation for adults, short of extended isolation. For at least ten years, most children spend a significant part of each weekday in public schools. They are likely to be far more susceptible to indoctrination than adults, since most adults have formed attitudes and views of their own which give them a better basis upon which to resist indoctrination.

Indoctrination may occur even if the school system is required to adhere to a norm of neutrality. The norm of neutrality or “balanced presentation of views” is often assumed to be required of public school curriculums and of school officials generally. This norm might be thought adequate to eliminate the potential for indoctrination in the classroom. Such a norm is both achievable and enforceable if it means that if the schools allow access by one outside group, they must allow access by all. As a solution to problems posed by classroom instruction, however, it is unlikely to be achieved in practice. Even if achieved, it could nevertheless lead to indoctrination. If the teacher makes a balanced presentation, including the parents’ own views or values, and then states his own view, the

117. Attendance at school is generally required in most states for about 180 days a year from ages 7 to 16. K. ALEXANDER & K. JORDAN, LEGAL ASPECTS OF EDUCATIONAL CHOICE: COMPULSORY ATTENDANCE AND STUDENT ASSIGNMENT 14-15 (1973).

118. Thus, even if the phenomenon of cognitive dissonance (the tendency to reject or alter messages incompatible with one’s own beliefs) might negate concern with some captive audience situations for adults, it does not do so with children. Compare Haiman, Speech v. Privacy: Is There A Right Not To Be Spoken To?, 67 Nw. U.L. REV. 153, 199 (1972) (arguing that, while escape generally should be protected, escape from a first contact with an idea should not be; the argument in part relies on cognitive dissonance) with Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum. L. Rev. 960, 969 (1953) (rejecting such a defense as disingenuous). In considering constitutional issues raised by aid to religious schools, the Court has made the assumption that college and university students are less susceptible to indoctrination than younger students. Tilton v. Richardson, 403 U.S. 672, 686 (1971).

119. See, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (discussed in text accompanying notes 139-57 infra); Bonner-Lyons v. School Comm., 480 F.2d 442 (1st Cir. 1973) (use of school distribution system to dispense information of group opposed to busing is a violation of first amendment and equal protection clause, if opposing group not also allowed to use distribution system). See generally Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975).

Neutrality or balanced presentation is distinct from intellectual integrity. Intellectual integrity requires that one consider whatever arguments appear relevant to an issue, or at least recognize that one is not considering possibly relevant arguments, but ultimately one may legitimately reach a nonneutral conclusion with regard to the issue at hand.


121. The schools have no affirmative obligation to assure that a balance of groups uses the access provided. The initiative would come from the outside groups themselves.
teacher's own view is likely to have greater impact.\textsuperscript{122} Even without an indication of teacher preference for one view or value, the mere exposure of the child to views other than those of his parents may erode parental effectiveness in inculcating their values in their child. Although school authorities would not thereby necessarily inculcate any particular view, the diversity of students' views would be reduced. Moreover, elimination of views or values contrary to those which one prefers may lead, almost as effectively as direct indoctrination, to the dominance of preferred views or values. Indeed, such balanced presentation of all views or values may itself lead some children to adopt the values of relativism or even nihilism.\textsuperscript{123}

Practical obstacles to achieving the norm of neutrality are considerable. Time constraints may prevent even the most highly conscientious teacher from presenting all views on an issue. Some views are likely to receive more attention than others because of greater complexity or more student questions. A teacher could comply in terms of equal time allocation, but undermine the neutrality by tone or sarcasm. Such differences in treatment cannot help but have some effect on the student's judgment about which views are entitled to more serious consideration and possible acceptance. There is also the obvious practical difficulty of adequately policing the classroom and instructional materials to assure that neutrality is being maintained. Policing the classroom to assure neutrality may have detrimental consequences to the educational process in terms of added costs and in reduced effectiveness of the teacher because of outside intrusion into the teacher-pupil relationship.

In addition, although concepts such as neutrality, balanced presentation, and objectivity can be understood as goals, reasonable disagreement is inevitable in applying these terms to a particular class. Is it neutrality over a day, a week, a semester, or a school year that is necessary? Assuming one could decide on the relevant unit of time, application of such a standard is

\textsuperscript{122} Goldstein makes this criticism of the balanced-presentation solution proposed by Nahmod to deal with the captive-audience problem posed by teacher academic freedom. Goldstein, \textit{The Asserted Constitutional Right of Public School Teachers to Determine What They Teach}, 124 U. Pa. L. Rev. 1293, 1345 (1976) [hereinafter cited as \textit{Constitutional Right}]. \textit{Contra}, Nahmod, supra note 120, at 1049.

\textsuperscript{123} "A teacher's equal approval of acts based on values is not a neutral stand either, for the teacher seems to be sanctioning all the values expressed. The student may come to believe that any action is morally justified if it is sincere or 'authentic'." Colby, Book Review, 45 Harvard Educ. Rev. 134, 140 (reviewing L. Raths, M. Harmin & S. Simon, VALUES AND TEACHING (1966) and S. Simon, L. Howe & H. Kirschenbaum, VALUES CLARIFICATION: A HANDBOOK OF PRACTICAL STRATEGIES FOR TEACHERS AND STUDENTS (1972)). An objection which appears to reflect these concerns is that the schools are inculcating "secular humanism." Davis v. Page, 385 F. Supp. 395, 456 (D.N.H. 1974) (objection to health course because it teaches "humanist" philosophy).
hampered by the problem that one person's neutrality is often another person's bias. Textbooks might be the easiest component of the curriculum to which the standard could be applied, yet one would be surprised if a book were not given different interpretations by those who read it. Thus, within the administrative structure of the school or at the time of judicial enforcement of the standard, the judgment whether classroom neutrality is met probably would vary significantly from one decisionmaker to another.

A public school could also achieve neutrality in areas of controversy by eliminating any discussion of controversial ideas and values. Even this type of instruction, however, could have indoctrinative effects. The child may be led to question whether the "neutralized" subject raises the issues or questions of values for which his parents claim answers. Thus, if sex education were limited to presentation of technical information with no mention of the moral issues involved,\textsuperscript{124} the ability of parents to teach their child that, for example, sexual intercourse should only take place between married partners, could be hampered. To be taught in the public schools by an authorized teacher how to have sexual intercourse could be regarded by some children as a sanction of sexual intercourse outside of marriage and perhaps encourage them to engage in it.

There is surely harm to the parents if their child grows up to hold ideas and values incompatible with those of his parents. The child, too, may suffer from any such parent-child conflict. At the very least, the parents and child will bear the burdens of efforts to undo the effects of schooling to which the parents object.

Of more significance, the effective ability of parents to inculcate their ideas and values in their children may be the only way to maintain a diverse, pluralistic, nonstandardized society. Diversity enriches the quality of life. In our society, diversity has further importance for the breadth it brings to the marketplace of ideas implicit in the first amendment protection of freedom of speech\textsuperscript{125} and to the range of alternatives open for individual and political choice.\textsuperscript{126} If parents are hindered in their efforts to foster adherence by their


\textsuperscript{125} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . ."); Associated Press v. United States, 326 U.S. 1, 20 (1945) ("[W]idest possible dissemination of information from diverse and antagonistic sources is essential . . ."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (free discussion "indispensable to the discovery and spread of political truth").

children to their views and values, the society risks losing these ideas or values from the marketplace or weakening their "competitive position." The countervailing power of individuals and groups leading diverse lives and holding diverse ideas and values serves as well to protect against tyranny.\textsuperscript{127}

Unless parents are able to excuse their children from curriculum requirements to which the parents object, the captive audience status of children in the public schools affords government officials the opportunity to reduce diversity. This contradicts basic principles of our society that freedom of thought is to be protected and that government rests on the consent of the governed.\textsuperscript{128} A mind free from indoctrination by the government is essential under our system of government not only for determining what one might say or think, but also for reaching decisions on issues about which one might vote. If children cannot be excused from instruction to which their parents object on value-based grounds, those who control the public schools may be able to indoctrinate children to an acceptance of the status quo or of their own ideas and values, assuring a virtual monopoly for their views in the marketplace of ideas. Although the government, or, more accurately, those in control of the schools, may not completely eradicate opposing views through schooling, they may give their views a far greater chance of being accepted in the majoritarian political process in the future. Thus, measures or ideas might be perpetuated or adopted which would not have been supported had citizens been free of indoctrination as children.

\textsuperscript{127}See generally 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 137-38 (1835) (the "tyranny of the majority" may threaten the independence of the individual); J.S. MILL, ON LIBERTY 22-68 (1859) (the maintenance of diversity and individual opinion is the fundamental protection against despotism).

\textsuperscript{128}See, e.g., Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system"); cf. Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (while upholding campaign contribution restrictions, supported idea that first amendment protects "political expression . . . 'to assure [the] unfer-
2. First Amendment Case Law

No cases have raised directly the legitimacy of government's having a captive audience. The absence of such cases may indeed indicate that any such situation contradicts basic constitutional values. Thomas I. Emerson has characterized the "principle that the government may not engage in expression directed at a captive audience, or otherwise force its citizens to listen" as "central to any system of freedom of expression."\(^{129}\)

A case which involves a situation close to that of a government captive audience is Public Utilities Commission v. Pollak.\(^{130}\) A bus company, licensed by the government, piped in news, music, and advertising to its buses, thus making bus riders captive auditors. State action was found because of the licensing, but the action of the licensing authority allowing the programming was held to be constitutional.\(^{131}\) Charles L. Black, Jr., has criticized Pollak because forced listening "rigs the market in ideas" and is out of accord with "any notion of free competition among ideas, or, indeed, of freedom of any kind."\(^{132}\) Emerson has suggested that had the government owned and operated the buses, its piped-in music, news, and advertising would have been held unconstitutional.\(^{133}\)

Even assuming that the Pollak case was correctly decided, the situation with which it dealt is significantly different from the captive audience status of children in school. The Pollak majority noted that the piped-in programming led to no interference with ordinary conversation. In school, children are expected to listen, read assigned readings, and learn the mate-


\(^{130}\) 343 U.S. 451 (1952).

\(^{131}\) The Court did not find substantial interference "with the conversation of passengers or with rights of communication constitutionally protected in public places." Id. at 463.

\(^{132}\) Black, He Cannot Choose but Hear: The Plight of the Captive Auditor, 53 Colum. L. Rev. 960, 968 (1953).

rial taught, not to engage in conversation while the lessons go on. The majority opinion in *Pollak* suggested that had the bus company piped in "objectionable propaganda," the result would have been different. Justice Black stated that he would find a violation of the first amendment if there had been "propaganda." He did not, however, make clear what constitutes "propaganda" and how one would distinguish it from news programs. Given the potential for schooling to favor one position over another, schooling may have a greater tendency toward propaganda than piped-in news and music. Moreover, bus riders have more readily available alternatives for transportation than parents have for educating their children.

Although some courts and commentators have noted the captive audience status of children in the public schools, only one case, *West Virginia Board of Education v. Barnette*, has demonstrated a concern with the possible indoctrinative effects of public schooling. Although the Court did not explicitly note that children were a captive audience, it did mention that attendance was compelled. The State Board of Education had adopted a requirement that all children in the public schools salute the flag. The Court held that children could not be required to participate in the flag salute ceremony as a condition of attendance at public school. The requirement

134. 343 U.S. at 463.
135. *Id.* at 466 (Black, J., concurring).
136. "Propaganda" is defined as "any systematic, widespread, deliberate indoctrination or plan for such indoctrination; now often used in a derogatory sense, connoting deception or distortion." To indoctrinate is "to instruct in doctrine, principles, theories, or beliefs; to instruct, teach." *WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE* (college ed. 1960).
137. *See* text accompanying notes 164-67 *infra* (discussing the difficulties parents face in exercising the option to send their children to a private school).

Judge Wyzanski in *Mailloux* distinguished between the scope of academic freedom for the college professor and the high school teacher as follows:

Moreover, it cannot be accepted as a premise that the student is voluntarily in the classroom and willing to be exposed to a teaching method which though reasonable, is not approved by the school authorities or by the weight of professional opinion. A secondary student, unlike most college students, is usually required to attend school classes, and may have no-choice as to his teacher.

323 F. Supp. at 1392.
139. 319 U.S. 624 (1943).
140. The children in the case were expelled and were threatened with placement in a reformatory school. Their parents were threatened with prosecution for causing the delinquency of a minor. The suit was brought to enjoin enforcement of the flag salute requirement. *Id.* at 630.
had been adopted pursuant to a statute mandating course requirements for "teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." State authorities thus viewed the flag salute ceremony as part of the curriculum, and the Court found that the statute had been adopted to serve educational purposes. *Barnette* may therefore be treated as a case setting forth principles for determining the legitimacy of a public school's curriculum requirements.

Although, as an oath of allegiance, a compulsory flag salute may be so different from other curriculum requirements that one arguably ought not to extend *Barnette* beyond its particular facts, the Court's opinion goes far beyond making an analogy to other oaths of allegiance in justifying the decision. The opinion indicates that not only the method, a required oath, but also the fact that government officials had prescribed the opinions to be expressed by the symbolic salute and pledge determined the Court's decision. In one of the concluding paragraphs of the opinion, Justice Jackson said that "[i]f 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." The Court appeared to recognize that controlling the content of the school curriculum afforded an opportunity for political groups and others to gain children as adherents to their points of view: "If [the school] imposed any ideological discipline, . . . each party or denomination must seek to control, or failing that, to weaken the influence of the educational system." It predicted that serious and harmful division could occur among citizens from a battle over what doctrine public educators would compel children to accept. The Court's apparent solution to the problem was that public schools should adhere to a norm of political neutrality.

As already indicated, however, the norm of neutrality suggested by the *Barnette* opinion cannot be achieved in practice and does not eliminate

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141. W. Va. Code § 1734 (Supp. 1941), quoted in 319 U.S. at 626 n.1. The course requirements were history, civics, and the United States and state constitutions. 319 U.S. at 626 n.1. The statute could have been interpreted as not granting the state board authority to adopt the flag salute requirement, but the Court assumed that the statute did provide such authority.

142. In its discussion of oaths of allegiance required in other historical periods, the Court suggested a general abhorrence for such oaths. 319 U.S. at 632-33. Nevertheless, discussion of other oaths takes up only one paragraph of the opinion.

143. 319 U.S. at 642 (emphasis added).

144. *Id.* at 637.

145. *Id.* at 641.

146. *Id.* at 637.
problems of indoctrination. To the extent that the basis for the Court's decision is a concern to avoid indoctrination by those in control of the public schools, the differences between a compelled flag salute and required instruction do not lead to less concern about required instruction than about compelled salutes. Although it is immediately more coercive to be forced to speak than to listen, no evidence suggests that compelled listening (or seeing or reading) leads to less indoctrination than compelled speech. The more subtle indoctrination of compelled listening may be an even more effective determinant of future action or thought than the more direct, and therefore more resistable, compelled statement. Methods of instruction, such as requiring students to recite, answer questions, or take examinations, may also lead students to express opinions not held by them, but which represent what the students think the teacher believes to be correct. This is done to avoid the risk of sanction in the grading process. Indeed, these methods undoubtedly lead many students to accept what they are taught as valid.

_Barnette_, then, supports but does not compel a right in parents to have their child excused from curriculum requirements to which they object on value-based grounds. _Barnette_ showed a concern with indoctrination of school children in one point of view in "matters of opinion and political attitude." The very existence of a value-based parental objection to a subject indicates that different opinions and attitudes on that subject exist. The _Barnette_ solution does not require holding the curriculum requirement unconstitutional. Students whose parents did not object would still be

147. See text accompanying notes 119-28 _supra_. If instruction does not result in dissension within the community, it is not necessarily because such instruction is neutral, but more likely because a sufficient consensus exists within the community as to the validity of what is taught. Absence of controversy can also favor the political or moral positions of those who wish to preserve the status quo by implying that everything is satisfactory, thereby encouraging attitudes of complacency. Assuming that the majority of the people in a community want children in the public schools to learn about controversial values and ideas, the search for neutrality must be considered highly detrimental to that educational function of the public school. Rather than strive for a neutrality which must always be to some degree elusive, it would seem far better to allow children to be excused from instruction that conflicts with parental values.

148. Goldstein notes that a possible distinction between the compelled flag salute and compelled instruction is that the latter is "subject to student resistance and opportunity for others to counter-indoctrinate outside school," but the flag salute cannot be retracted. S. _GOLDSTEIN_, _LAW AND PUBLIC EDUCATION_ 130 (1974). He immediately suggests, however, that the flag salute may be meaningless as indoctrination because mechanically performed. _Id._

149. See _id._ at 130-31. Traditional methods of instruction do bear a similarity to the compelled flag salute as an infringement on the right not to speak. Students may be required to recite publicly or to answer questions, thus being required to express an opinion, belief, or attitude of mind. While such recitation or question-answering is unlikely to take on the ceremonial attributes of the flag salute, which might be described as a patriotic "prayer," it could be viewed as a violation of the "right to remain silent" which _Barnette_ protects.

150. 319 U.S. at 636.
required to be instructed; only those whose parents objected on value-based grounds would be excused.\textsuperscript{151}

3. \textit{The Inadequacy of a Right of Parental Excusal Limited to Conflicts with Religious Beliefs}

A right of parental excusal because of value-based objections is arguably inconsistent with the normal requirement that persons within our society obey all laws and regulations, regardless of whether their views or values accord with the law. Effective government would be impossible without such a requirement. It is for this reason that only the very limited exceptions made under the free exercise clause can generally be tolerated.\textsuperscript{152} Thus, as \textit{Wisconsin v. Yoder} suggests, a right of parental excusal might be constitutionally required only for parents whose objections stem from religious beliefs.

As the previous discussion indicates, however, curriculum requirements are significantly different from other laws and regulations. One may comply with most laws and regulations without being forced to change one's mind. One may think and speak against the objectionable legal obligation, and act for its repeal. One may choose whether to listen to a law's supporters. Schooling that conflicts with the values and ideas of parents, and from which parents cannot have their children excused, however, may lead children to hold views or take future actions which accord more with what they were taught in school than with their parents' ideas, values, and actions. There is a crucial distinction between requiring the obedience of

\textsuperscript{151} The \textit{Barnette} opinion is ambiguous about whether the right of excusal from participation in the flag salute encompasses a right to be excused from the classroom during the flag salute, since excusal from the classroom was not requested by the defendants. Nevertheless, excusal from instruction to which one's parents object is analogous to excusal from participation when one objects to participation. A right to remain seated in the classroom during the ceremony, as a protest, has been held to be protected. \textit{Tinker v. Des Moines Ind. Community School Dist.}, 393 U.S. 503 (1969); \textit{Frain v. Baron}, 307 F. Supp. 27 (E.D.N.Y. 1969) (remaining in seats during Pledge of Allegiance not disruptive).

\textit{Barnette} is technically not a case involving parents' rights. The court accorded a right of nonparticipation to the students. In \textit{Barnette}, however, there was no conflict between parent and student desires, and it is reasonable to assume that the children's refusal to salute was based on values inculcated by their parents. For further discussion of the consequences of conflict between parent and child over a curriculum requirement, see text accompanying notes 182-89 infra.


persons to laws enacted on the basis of views with which they disagree and allowing the government to use the schools to inculcate views or values in future participants in the political system.

The Barnette decision could have been based on free exercise grounds, since the appellees were Jehovah’s Witnesses for whom saluting the flag was a violation of a religious tenet. Instead, the Court relied on general principles of the system of government and especially of the first amendment. The Court stated that the Bill of Rights denied the government any power to coerce public opinion. The opinion spoke of a preference for “individual freedom of mind” over “officially disciplined uniformity,” and the protection of the “sphere of intellect and spirit . . . from all official control.” The Court seemed to recognize, as well, the value of diversity in our society and the adverse effect coerced consent would have on that diversity.

Given the importance of freedom of mind and diversity to the system through which general laws are enacted, protection of religious values and religious diversity alone is inadequate. Even the Yoder opinion appeared to recognize the importance of diversity broader than religious diversity, and values other than religious values. It said of the Amish that “their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.” Though the opinion noted that religious orders were instrumental in preserving Western values in the Middle Ages, a society cannot safely rely solely on religious communities to preserve important nonreligious values.

153. 319 U.S. at 629 (conflict with religious prohibition of bowing down to graven image).
154. Id. at 641.
155. Id. at 637.
156. Id. at 642.
157. Id. at 641-42.
158. See Arons, The Separation of School and State: Pierce Reconsidered, 46 HARV. EDUC. REV. 76, 99 (1976) (suggesting that “issues of conscience and belief are no longer fought under religious banners”).
159. 406 U.S. at 226.
160. The Court said:
We must not forget that in the Middle Ages important values of the civilization were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today’s majority is “right” and the Amish and others like them are “wrong.” A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.
161. The Supreme Court has recognized the importance of protecting the continued existence of nonreligious groups, holding that there is a first amendment right “to engage in association for the advancement of beliefs and ideas.” NAACP v. Alabama, 357 U.S. 449, 460 (1958). Such a right is considered essential to the “[e]ffective advocacy of public and private views, particularly controversial ones.” Id.
4. The Inadequacy of the Private School Alternative

The Pierce opinion demonstrated a concern that a general power in the state to standardize the education of children would have undesirable consequences for our society and system of government. The right to send one's child to a private school in which state regulation is constitutionally limited, however, is an inadequate protection of the liberty to direct the education of one's child, and hence an inadequate protection against the societal consequences just described. There are two reasons why this is the case. First, the private school option is not available to all parents. Second, even if it were, the private school might not provide an escape from the curriculum requirement.

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162. 268 U.S. at 535. The Court had earlier evidenced a concern to protect against undue standardization:

> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent . . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.


Justice Douglas' majority opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), suggests that the continuing validity of the Pierce and Meyer decisions rests on the first amendment, made applicable to the states through the fourteenth. 381 U.S. at 482-83. Douglas erroneously stated that the first amendment had been the original constitutional basis for the decisions. Compare id. at 482 with Pierce v. Society of Sisters, 268 U.S. at 535 and Meyer v. Nebraska, 262 U.S. at 399. Runyon explicitly assumed that the first amendment protects the right to send one's child to a private school. 427 U.S. at 176.

163. Justice Frankfurter's dissent in Barnette, 319 U.S. at 646, appears to have been based in part on an assumption that under Farrington v. Tokushige, 273 U.S. 284 (1927), the state could not force private schools to require their students to salute the flag. To him, private schools provided an option to parents who objected to the flag salute. He could therefore ask: "Why should not the state [like the private schools] have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?" 319 U.S. at 658. The question would have more merit if parents were indeed able to exercise the private school option effectively.

It might also be argued that parental objections could be satisfied by moving from one public school district or attendance zone within a district to another. This is an option, however, only to the extent that the curriculum requirement to which the parents object is mandated only at the district or school level. When significant local control exists with regard to curriculum, the different values of different communities could lead to significant differences among community schools. It is, however, unlikely that significant educational differences exist among school districts within a given geographical area. Even if they did, parents might be unable or unwilling to move solely for educational reasons.
Most parents provide instruction for their children only in public schools.\textsuperscript{164} The option of sending one’s children to private schools in order to comply with compulsory attendance laws is realistically limited to parents who are wealthy enough to pay private school tuition or who desire and can pay the lower tuition of a church-subsidized parochial school.\textsuperscript{165} Although the government has no obligation to provide the means to exercise the private school option, the financial difficulties of exercising that option, compounded by the support of public schools through public taxation,\textsuperscript{166} make conditioning public school attendance on requirements that could not be imposed in private schools questionable.\textsuperscript{167}

To the extent that curriculum requirements in the available private schools are identical to those in the public schools, private schools do not provide an option even to parents who can afford them. If a private school’s curriculum requirement is mandated by state regulation, the school, on behalf of its patrons, can question the constitutional legitimacy of the regulation. If, however, a private school’s curriculum requirements are the result of voluntary decisions by its governing body, then patrons of that school who objected to a requirement would have no recourse other than attending another school without the objectionable curriculum requirement, if one could be found. If neither the available public school nor private alternatives were free of the objectionable curriculum requirement, then compulsory attendance laws would force objecting parents to have their child instructed in that requirement, because it could be avoided only by not attending school. There would therefore be a deprivation of parental liberty.

\textsuperscript{164} In the spring of 1970, among students enrolled in kindergarten through grade 12, 88.6% attended public schools, 9.0% attended church-related nonpublic schools, and 2.4% attended non-church-related nonpublic schools. \textit{Education Division, U.S. Dep’t of Health, Educ. & Welfare, Digest of Education Statistics} 42 (1975). The percentages were 90.2%, 6.8%, and 3.0%, respectively, for grades 9-12. \textit{Id.} at 43.

\textsuperscript{165} See O. Kraushaar, \textit{American Nonpublic Schools} 204-09, 223 (1972) for an examination of tuition charges in nonpublic schools.

\textsuperscript{166} Regardless of whether the societal benefits from public education justify what has been termed “double taxation”—taxing parents whose children attend private schools for support of public schools—the public schools have a clear competitive cost advantage in attracting students. For arguments that “double taxation” is so justified, see R. Reischauer & R. Hartman, \textit{Reforming School Finance} 124-25 (1973). Support for educational vouchers comes in part from their virtual elimination of “double taxation.” See M. Friedman, \textit{Capitalism and Freedom} 93 (1962); West, An Economic Analysis of the Law and Politics of Nonpublic School “Aid,” 19 J. L. & Econ. 79 (1976).

\textsuperscript{167} It should be noted that even though the state might have the power to require the private schools to instruct in specified general subjects, e.g., American history, the private schools would maintain considerable discretion to choose how and what to teach within the confines of the course. A military school might emphasize military history; another school might emphasize social and economic history.
to control the education of one's child (unless home instruction were allowed under state law).

In the absence of compulsory attendance laws, the direct deprivation of liberty which concerned the Pierce Court does not arise. Parents are free to avoid curriculum requirements to which they object by not sending their child to any school. Most children, however, complete high school despite the fact that attendance in the last two years is usually not compelled. Even if compulsory attendance laws were repealed, most parents would want their children to attend school in order to improve the chances of their economic and social success. Curriculum requirements in the public schools infringe parental liberty because they condition access to an important public benefit on the child's instruction in subjects to which the parents object. The societal consequences of not allowing parents to have their child excused from curriculum requirements because of value conflict remain the same whether or not school attendance is compelled.

Thus, because most parents are not financially able to exercise the private school option and because private schools might not provide a way out of an objectionable curriculum requirement, parents who object to public school curriculum requirements on value-based grounds seem to be entitled to have their children excused from such instruction to the same extent as the state is prohibited from requiring such instruction in the private schools. In important respects the issues raised by regulation of the private school curriculum and by curriculum requirements in the public schools are identical. Nevertheless, because the state funds the public schools and has interests in efficient operation of the public schools, parents might not be able to have their children excused from instruction in the public schools which could not be required in the private schools. The next section considers state justifications for not allowing parents to have their children excused from curriculum requirements in the public schools to which the parents object on value-based grounds.

B. STATE INTERESTS LIMITING THE RIGHT OF EXCUSAL

There are three possible general arguments why parents should not have the right to have their child excused from public instruction on value-based grounds. First, children have rights to receive such instruction that cannot

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169. Eighty-one percent of parents who have children in public schools believe that education is "extremely important" for one's future success. Only 2% of the parents found education to be "not too important." PHI DELTA KAPPAN, THE GALLUP POLLS OF ATTITUDES TOWARD EDUCATION 168-69 (1973). See also notes 19 and 64 supra.
be infringed by the exercise of parental control. Second, the societal purposes served by curriculum requirements in the public schools outweigh the interference with parental liberty and societal effects which follow from denial of a right of excusal. Third, administrative needs of a state as proprietor of the public schools and the interests of other children in the public schools prevent full recognition of such a right. None of these arguments is sufficient to override a parental right to have one's child excused from instruction on value-based grounds. All, however, justify some limitations on the exercise of such a right.

The conclusion reached is that parents may have their child excused from curriculum requirements on value-based grounds, with the exception of instruction in basic reading, writing, arithmetic, and the constitutional system of government. When excusal is sought from a component of a course rather than an entire course, parents may have their child excused from that component only if such excusal does not disrupt the education of other children in the school. If excusal from only a component would be disruptive, the parent may, however, have the child excused from the entire course.

1. The Rights of Children To Receive Instruction Contrary to Their Parents' Values

Three arguments based on protection of the rights of children may be made against any right to excuse one's child from instruction objected to on value-based grounds. First, a child excused from instruction may be stigmatized and suffer psychological harm from which the state is entitled to protect him. Second, students in the public schools have a right to learn that requires exposure to a wide range of information and views in the public schools. A third argument, that parents should have less control over the ideas to which their children are exposed when the child reaches a certain age, would permit parents to have their child excused only until that age is reached.

a. The "psychological harm" argument: The argument that parents should have no right to have their child excused from instruction to which they object on value-based grounds because the child may suffer harm from being "different" from other children is inadequate. It is true that the school will not be able to prevent all ostracism and that, even in the absence of taunts by other children, an excused child may feel "left out." It is

170. In one Alabama case, for example, a parent who objected to immodest dress in a physical education class opposed his child's remaining in class in modest dress, not only because the child would see others clad immodestly, but because the child would appear to be a "speckled bird," subject to derision by classmates. The court responded that this is simply an
equally possible, however, that a child may suffer psychological harm from being instructed contrary to his parents’ strongly held values. Such speculative concerns are inadequate to override the consequences to our system of government and first amendment values of denying parents the right to have their children excused on value-based grounds. The parents are probably in the best position to judge the possible effects of excusal on their child and to balance any harmful effects against the desired benefits to the child’s development of having the child excused. A child whose parents are able to instill in him values which run counter to the values of the majority will eventually have to learn to cope with his “deviance.” It is reasonable to allow him to learn in school how to do so. Not only may his classmates learn to tolerate dissent if an agency of authority, the school, respects his differences, but the child may be better able to cope with feelings of being different and to withstand peer pressures to change.

b. The “right to exposure to ideas” argument: Another argument against value-based parental excusal is that parents cannot deny their children the right to learn by being exposed to a wide range of information and views. This argument is based primarily on cases that protect teacher and student freedom of speech and expression in the public schools, and that appear to rest on a model of the public school as a “marketplace of ideas.” In *Tinker v. Des Moines Independent Community School District*, the Court held that students in the public schools were entitled to protection of nondisruptive freedom of speech and expression under the first amendment. Justice Fortas’ majority opinion in *Tinker* stated: “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” Lower federal courts have held that teachers are entitled to first amendment protection in determining what they teach. The opinions so holding are not clear as to the source of the constitutional protection, but, like *Tinker*, appear to rest on a model of inconvenience attached to being different, and that it is the right to be a “speckled bird” that the state and federal constitutions protect. Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962).


172. *Id.* at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)). See Project, *Education and the Law: State Interests and Individual Rights*, 74 Mich. L. Rev. 1373, 1441 (1976) (“The exchange of ideas and exposure to diversity within the school curriculum prepare the student for life in a democratic society that values a certain degree of heterogeneity. They are a prerequisite to good citizenship, and it is in the state’s interest to expose all children to the experience”).

173. *See, e.g.*, Mailloux v. Kiley, 323 F. Supp. 1387, 1391 n.4 (D. Mass. 1970), *aff’d on other grounds*, 448 F.2d 1242 (1st Cir. 1971) (academic freedom “is akin to, and may indeed be a
the school as a "marketplace of ideas." This reliance on the "marketplace of ideas" model has led some commentators to suggest that student and especially teacher rights are protected in order to serve students' constitutionally protected right to learn. On the basis of such a constitutional protection one could argue that a public school cannot constitutionally deny a child the opportunity to be instructed, despite parental objections to the instruction on the basis of a value conflict.

Under existing precedents and the current trend of state action doctrine, the public school's denial of instruction to a child in response to a parental objection to that instruction would not appear to constitute state action in regard to a student's right to learn, since the impetus for the denial comes from the parents and not from the state. This seemingly technical point illustrates a crucial difference between the cases upholding rights of student and teacher expression and those sustaining the claim of parents to have species of, the right to freedom of speech ... Analytically, as distinguished from rhetorically, it is less a right than a constitutionally-recognized interest); Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969) (assuming, without discussion of the source, the existence of a "principle of academic freedom to teach"); Parducci v. Rutland, 316 F. Supp. 352, 355 (M.D. Ala. 1970) (teaching method protected although "academic freedom is not one of the enumerated rights of the First Amendment"). But see Parker v. Board of Educ., 237 F. Supp. 222, 229 (M.D. Md.), aff'd, 348 F.2d 464 (4th Cir. 1965), cert. denied, 382 U.S. 1030 (1966) (a high school teacher's speech may be reasonably curtailed as a prerequisite to continued government employment).

For an argument that there is no constitutional right to academic freedom in the public schools, see Constitutional Right, supra note 122. Goldstein cites all such cases and scholarly commentary on them at n.4.

174. The "marketplace of ideas" model for the public school ignores the significant practical difficulty of actually exposing the child to all views within the public schools. The "marketplace" in the society at large exists because of the absence of restriction on what may be expressed. The schools necessarily restrict access to some views by choosing a curriculum, by denying or restricting access by outside groups, and by selecting one teacher over another in the hiring process. In the latter regard, it would surely violate first amendment freedom of speech protections for the schools to use the views of the teacher as a criterion of the selection process in order to assure that, in the school itself, there would be a balance which approximated the outside society's marketplace. See Constitutional Right, supra note 122, at 1343.

175. Nahmod, Controversy in the Classroom: The High School Teacher and Freedom of Expression, 39 GEO. WASH. L. REV. 1032, 1053 (1971) ("The student interest in learning, and thus in access to classroom discussion of controversial subjects may be analogized to a college student's right to hear controversial speakers on campus—a right which recent decisions have consistently held may not be regulated arbitrarily"); Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 DUKE L.J. 841, 857 ("Against a state law provision that a student might be disciplined for consulting any source of education save that prescribed in regimented detail, the student could also succeed on a first amendment claim").

their child excused from instruction to which they object. The difference is between the state's denying all children in a class, school, or school system access to a particular viewpoint because school authorities find it objectionable and a parent's denying access to his individual child in order to preserve a value. Denial of access to views that the state does not support reduces diversity; the parents' excusal rights preserve it.

Indeed, if the state were entitled to protect a child's right to learn against parental infringement, the state would seem to be entitled to prevent parents from sending their child to a private school that is not required to conform to the "marketplace of ideas" norm. The right to send one's child to a private school has long been protected as a matter of constitutional law, making the use of a broad right-to-learn argument against a parental right of excusal anomalous.

Besides Tinker's concept of a "marketplace of ideas," support for protection of teacher academic freedom and, indirectly, a child's right to learn is arguably found in Epperson v. Arkansas. In Epperson, a state statute that prohibited teaching the doctrine of evolution in the public schools was held unconstitutional as an establishment of religion in violation of the first amendment. The Court found that fundamentalist sectarian conviction clearly was the reason for the law's existence. To prohibit teaching a theory because it was "antagonistic" to a particular religious dogma was not a legitimate state interest. Although Justice Fortas' majority opinion in Epperson declined to consider whether there was a constitutional protection against a state's forbidding instruction for nonreligious reasons, the Court hinted that Meyer v. Nebraska, which struck down a state law effectively forbidding private schools from teaching modern foreign languages, also applied to public schools. Thus, Epperson can be

177. 393 U.S. 97 (1968).
178. Id. at 107-08.
179. Id. at 106-07.
180. Id. at 105-06. Meyer is discussed in text accompanying notes 86-89 supra. In addition to the fact that the opinion explicitly stated that no "challenge [has] been made of the state's power to prescribe a curriculum for institutions which it supports," 262 U.S. at 402, it is difficult to see how Meyer could be applied to the public schools. If those who control the public schools fill the day with other studies, they necessarily exclude, and thus in practical effect prohibit, some studies. Nevertheless, it might be that, within those practical limits, the public school authorities are constrained by the general principles of Meyer so that, as Justice Stewart's concurrence in Epperson can be read to suggest, once a school decides to prescribe a broad subject, such as biology, the school authorities may not restrict the teacher in his teaching of it. For a discussion of the relevance of Meyer to a right of academic freedom for public school teachers, which concludes that it does not support such a right, see Constitutional Right, supra note 122, at 1305-12. Goldstein also discusses and rejects the possible interpretation of Justice Stewart's concurrence that school authorities may not restrict a teacher within a broad subject category. Id. at 1313-14.
read as prohibiting states from forbidding instruction in any body of knowledge for religious or nonreligious reasons.

Even if the academic freedom of teachers were protected under *Epperson*, the constitutional protection of such a freedom would not conflict with the constitutional protection of a right of parents to have their children excused from instruction. The Arkansas statute involved in *Epperson* prevented all children in the public schools from learning about the doctrine of evolution, whether their parents objected or not. It would be consistent with the holding of *Epperson* to allow parents holding fundamentalist beliefs to have their children excused from attendance at such instruction, under the principles of *Wisconsin v. Yoder*.181 *Epperson* holds only that such parents are not entitled to secure the enactment of legislation that would prevent other parents from having their children instructed in the theory of evolution at public expense. Similarly, if the state is prohibited from forbidding instruction for even nonreligious reasons, parents would remain free to have their children excused because of value-based objections without affecting teachers' rights.

On whatever basis teachers may be thought to have a constitutionally protected right of academic freedom within the public schools, it is surely important that the granting of a parental right to excuse one's children from teacher-determined instruction impose no sanction on the teacher such as the loss of his job. In the cases where courts have protected a degree of academic freedom, the school board had dismissed or had statutory authority to dismiss a teacher because of the teacher's curriculum decision. At most, if many of the parents of children in a teacher's classes make value-based objections to particular instruction, the teacher simply loses an audience. The first amendment does not guarantee one an audience, let alone a captive one.

*Tinker* and other cases upholding students' rights against school authorities, such as *Goss v. Lopez*,182 which protected the right to procedural

181. See text accompanying notes 108-13 supra.

182. 419 U.S. 565 (1975) (students entitled to a brief hearing before being suspended from school for more than a trivial period). Lower courts have upheld far more extensive hearing rights for expulsion from school, and *Goss* appears to affirm them. Id. at 576 n.8. *Tinker* has spawned lower court decisions too numerous to note. For a sampling of some of them, see S. Goldstein, *Law and Public Education* 308-414 (1974); D. Kirp & M. Yudof, *Educational Policy and the Law* 152-75 (1974). Research discloses only one case that directly supports a right in children independent of parental wishes (school dress code struck down despite the fact that upon parental request a student would be excused from compliance). *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972).

A recent case that held unconstitutional a statutory requirement that an unmarried minor must have one parent's consent before obtaining an abortion during the first 12 weeks of
due process, suggest that students may be entitled to exercise rights within the school independent of their parents’ wishes. On this basis, if the child wants to receive instruction to which his parents object, the school arguably would be entitled to disregard the parents’ objections. One might indeed grant a right to children to be excused from instruction quite apart from parental objections. Cases such as *Tinker* or *Goss*, which protect the rights of students, do not, however, directly confront the question of children’s rights versus parental control. It may be assumed that the parents in these cases did not oppose their children’s positions. One could even characterize these decisions as affording parents more power to control their children’s education.

c. *The “student’s age” argument:* It might be argued, however, that parents should have less control over the ideas to which their children are exposed as the children get older. This contention derives support both from the view that the “marketplace of ideas” model is essential to our system of government and from the students’ rights cases. The argument is that children, before reaching the age of majority, must learn to evaluate ideas and opinions on their own and make independent choices regarding their future. This view is apparent in lower federal court decisions that consider the age and sophistication of the students as one criterion in the standard for determining what materials and methods a teacher may properly use in the classroom.


184. This is based upon the assumption that children will often be directed and will be supported financially in their legal actions by their parents.

argued that the mature child should be allowed to testify whether he wished to continue schooling despite his parents' religious objections.\footnote{Judge Wyzanski's opinion in Mailloux v. Kiley, 323 F. Supp. 1387, 1389 (D. Mass.), \textit{aff'd on other grounds}, 448 F.2d 1242 (1st Cir. 1971), included a finding that students in the 11th grade are sufficiently sophisticated to treat an obscene word from a serious educational viewpoint. He found the secondary school situation distinguishable from higher levels of education, however, noting that the secondary school more clearly acts \textit{in loco parentis} with respect to minors, and that most high school students have "limited intellectual and emotional maturity." \textit{Id.} at 1392.}

Justice Douglas' point in \textit{Yoder} does not account for the necessarily implicit premises of compulsory attendance laws that the child is not mature enough to make the choice of whether to attend school and that those to be taught do not fully know what they should be learning. Someone must decide and the decisionmaker must be either the parent or the state. At some point, of course, a child has learned enough to be in a position where his choices might be respected. Any determination of maturity based upon age is arbitrary, however, and hence will be inaccurate for some children. Legislatures could adopt a more flexible standard for determining maturity but have not done so. For a court to make such a determination without a legislative mandate raises significant administrative problems for both the courts and the schools. Whether the school or a court makes the judgment as to the maturity of a child, the decision would probably rest more on the decisionmaker's attitude toward the parents' claim than on an objective determination of maturity.

One could argue, however, that the child beyond the age of compulsory attendance can no longer be considered immature with regard to educational decisions and that parents lose their right to have their child excused from a curriculum requirement after that age is reached. It is unclear, however, that society considers the child fully mature once he is beyond the age of compulsory attendance. The child is still considered a minor for many purposes.\footnote{Most states limit the power of those under 18 years in some respects, limiting their rights to contract, own property, make wills, marry, consume alcoholic beverages, serve on a jury, vote, and hold public office. \textit{See COUNCIL OF STATE GOVERNMENTS, THE AGE OF MAJORITY} 15-23 (1972).} It will be assumed, therefore, for purposes of this Article, that
the parents' request to have their child excused should be considered irrespective of the desires of the child. The possibility is left open that a child who does not want to be excused and who is beyond the age of compulsory attendance might be entitled to attend the instruction to which his parents object, or even not to attend instruction to which he (and not his parents) objects on value-based grounds.

Since children's education must be directed either by the state or by their parents, the constitutional interests in protection of diversity and freedom of mind require that parents have a right to have their child excused on value-based grounds. Children do, however, become adults to whom freedom of thought is accorded by this system of government. Because of this, the state is justified in refusing to allow parents to have their children excused from instruction in basic reading, writing, and arithmetic, despite value-based objections. If parents were able to deny their children the basic rudiments of education, the children might be so handicapped as adults as to be unable to choose meaningfully a life different from that of their parents. If the children have learned the basic skills, however, they can learn about those matters to which their parents objected.

2. Balancing State Educational Goals and the Parental Right of Excusal

If one considers whether the state interests in preparation of youth for citizenship, a vocation, and a satisfactory personal life outweigh the parents' interest in inculcating parental values, one might conclude that the state

parents "have substantially and continuously neglected to provide the child with necessary . . . education"). Even under such statutes, however, neglect proceedings would be inappropriate against parents who refused to send their child to school beyond the age of compulsory attendance. To uphold such a use of the child neglect laws would in effect increase the age of compulsory attendance beyond that judged necessary by the legislature. Cf. Note, College Education As a Legal Necessary, 18 VAND. L. REV. 1400 (1965) (noting and discussing state court decisions ordering the father to provide for the college education of his children when the parents are divorced, but concluding that the failure of parents generally to provide a college education would probably not constitute criminal neglect).

188. The state could require instruction designed to develop a high degree of proficiency in all three subject areas. It is highly unlikely, however, that any parents would seek to limit the instruction of their child to these studies.

189. This is not to deny that children may be harmed by their parents' refusal to let them take instruction which they would later find necessary for pursuit of a career or style of life. Such harm is, however, remediable, if the child upon becoming an adult is willing to pursue further instruction. The harm to the child would seem to be less than the harm in the case when parents are permitted, against medical advice, to refuse medical treatment of a child because of religious objections. Yet courts have not recognized a state power to overrule the parents' choice unless the child's life is endangered. See In Re Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955) (refusal to order correction of hare lip and cleft palate); Green Appeal, 448 Pa. 338, 292 A.2d 387 (1972) (refusal to order surgery to correct the residual effects of poliomyelitis); Note, Parent-Child—The Right of a State to Order Surgery on a Minor in a Nonterminal Situation Despite the Religious Objections of the Parent, 77 DICK. L. REV. 693, 695 (1973).
must prevail against any claim by parents to have their child excused from schooling. That, however, is not the issue. The legitimacy of those state interests is admitted; the question is whether the means used to effectuate those state purposes are legitimate. If the means used are curriculum requirements from which parents cannot have their child excused on value-based grounds, such means have at least the potential for indoctrination. The justification for denying a right of excusal must be a justification for indoctrination. Moreover, the justification must be a justification for indoctrination of all children. It could be argued that no instruction should be required of any child since the excusal of just one child is unlikely to affect significantly the achievement of any societal purpose to be attempted through the public school curriculum. The consequences of a right of excusal, however, must be considered from the standpoint of numerous parents within a state exercising such a right.\textsuperscript{190} Beyond assuring that each child has received instruction in reading, writing, and arithmetic so that he may avail himself of future instruction, the only state interest capable of justifying the denial of a right of excusal is that of preparing youth for citizenship, and that only to the extent of instruction in the constitutional system of government. Other potential justifications will be considered first.

\hspace{1em} a. \textit{Relevant characterization of the state's interest:} The purposes of any state regulatory system may, of course, be so broadly stated that acceptance of the purposes logically entails acceptance of the means. Thus, if one describes the purpose of the public school system as protecting children from ignorance or developing human potential, it necessarily follows that parents must be compelled to allow children to take advantage of the benefit provided. Similarly, if one describes the purpose of the public schools as being to create a "common people," acceptance of that purpose necessarily leads to a denial of the parents' claim of a right to keep their child from becoming like every other child. Both of these justifications beg the question. As to the first, the question is, in what subjects is it legitimate for the state to assure that each child not be ignorant?\textsuperscript{191} As to the second, the question is, in what values is it legitimate for the state to seek to perpetuate or establish a uniformity of acceptance?

\textsuperscript{190.} If a substantial minority or even a majority of parents exercised such a right, one might question the degree to which a consensus exists sufficient to make the requirement legitimate. \textit{See} text accompanying notes 233-37 \textit{infra.}

\textsuperscript{191.} A purpose to protect a child from ignorance or develop human potential is similar to the equal opportunity purpose which has been the subject of much current legal interest. Such interest began with Brown v. Board of Education, 347 U.S. 483 (1954). It is important to remember that \textit{Brown} involved a denial of equal educational opportunity to children by the state because of racial discrimination. It does not follow that because the state may not deny one a benefit, it may force one to accept it.
In *Yoder*, the Court accepted the state’s argument that compulsory education was justified because “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” The Court also recognized that “education prepares individuals to be self-reliant and self-sufficient participants in society.” The Court found that the state’s interest in self-reliance and self-sufficiency was met by evidence that the Amish were productive, law-abiding members of society. The Court appears to have considered not only the Amish child’s vocational preparation but also, to some degree, his preparation for a satisfactory personal life. The *Yoder* Court did, of course, assume that schooling statutes were similar to other laws regulating conduct from which exemptions, even on the basis of religious values, could not be given without harm to the “concept of ordered liberty.” If one recognizes, instead, that curriculum requirements have the potential for indoctrination, neither the interest in a child’s vocational preparation nor the interest in his personal well-being should be sufficient to deny parents the right to have their child excused from instruction when the instruction conflicts with their values.

b. **The state interest in vocational training:** As previously noted, value conflicts with courses justified solely on vocational grounds are least likely to occur. If they do occur, however, parents should be entitled to have their children excused. The liberty to choose one’s occupation is protected under our constitutional system of government. Compelling people to follow certain occupations has not been thought to be within the power of the government, except in the case of military conscription. To the extent that regulation of vocations has been permitted, it has been designed to exclude persons from occupations ostensibly on the basis of merit and for the benefit of the public. Thus, it should be beyond the power of government to compel people to prepare for a career or to influence a child’s career when the instruction conflicts with parental values.

c. **The state interest in preparation for a satisfactory personal life:** When a request for excusal relates to instruction justified as preparation for a satisfactory personal life, the state could argue that unless society can use the schools to achieve the social goals of the moment, it might have to take

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193. *Id.* at 224-25. Since the Court found the education that the Amish accepted for their children adequate to serve the state’s claimed purposes, it did not actually face a decision as to the legitimacy of the educational purposes argued in support of the requirements by the state.
194. *Id.* at 223.
measures that more drastically restrict the liberty of its citizens in order to cope with problems that might have been avoided by indoctrination of children in the schools. Yet, even if the state has the power to affect individual conduct by banning the use of tobacco, alcohol, and drugs, or by making fornication criminal, it does not follow that the state can require children to be indoctrinated in the values which underlie these prohibitions. Within our society, citizens may violate the law and take the consequences, or may risk the adverse consequences of an activity; more legitimately, they can act to change the law. If, however, they have been indoctrinated as children to regard those laws as compatible with their own views, change is less likely.

Parents should also be entitled to have their child excused from curriculum requirements purporting to prepare youth for a satisfactory personal life on the ground that the decisions which such instruction may influence are committed by the Constitution to personal decisionmaking. Such decisions include the use of contraceptives or the decision to have an abortion. Full discussion of such a basis for a parental right of excusal is, however, beyond the scope of this Article.

Most parents would not, of course, have their child excused from most instruction serving the satisfactory personal life purpose, assuming that the curriculum requirement did reflect a community judgment on the matter. It is nevertheless important to preserve the right of excusal so that the views of those who disagree are not effectively eliminated.

d. *The state interest in preparation for citizenship:* Many curriculum requirements that could be defended on either vocational or personal development grounds may also be justified as serving the state’s interest in preparing youth for citizenship. The *Pierce* opinion specifically mentioned that the state could require private schools to instruct in "studies plainly essential to good citizenship," but gave no indication as to what these

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198. A Gallup Poll taken in 1975 indicated that 87% of all public school parents agreed that the schools in their community should require students to attend instruction on the effects of drugs and alcohol; 10% were opposed and 3% did not know or did not answer. Gallup, *Seventh Annual Gallup Poll of the Public’s Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Dec. 1975, at 230.

199. 268 U.S. at 534. See text accompanying notes 88-101 *supra*. 
might be. Instruction designed as preparation for citizenship beyond instruction in the constitutional system of government is considered first.

The Yoder Court's approach to the problem of balancing the state's admitted interest in preparation for good citizenship against the parents' interest in preserving religious values was to determine what schooling adequately met the the state's interests. It found adequate the "basic education" which the Amish children had already received in the first eight years of schooling. Although it is not entirely clear what the Court meant by a basic education, it had earlier referred to basic reading, writing, and elementary mathematics, the "three R's," by that term. To support its conclusion, the Court invoked the name of Thomas Jefferson, suggesting that he would have thought a basic education sufficient. Jefferson's plan for public education in Virginia (which did not involve compulsory attendance at school) included, however, not only instruction in the "three R's" in the first three, and only three, years, but also instruction in the "most useful facts from Grecian, Roman, European, and American history" and the "first elements of morality." It is unlikely that the Court meant to include all that Jefferson envisioned in his concept of a basic education; it surely did not inquire into the nature of the education in the first eight years beyond assuming that the "three R's" were taught. Even if it had, however, reliance on Jefferson as a guide to what is currently essential to good citizenship is questionable: what was adequate preparation for citizenship in his day is not necessarily adequate preparation for citizenship today. Our society is far more complex and more involved with scientific and technological questions; the concerns of government are far more extensive and its size and complexity much greater than in Jefferson's time.

Once one recognizes that preparation for citizenship requires much more than basic reading, writing, and arithmetic, it is difficult to decide which subjects can be so justified, and can, therefore, override claims for excusal. The Barnette opinion specifically noted the legitimacy of requiring instruction in American history, governmental organization, and the guarantees of civil liberty in the public school. As the discussion of American

200. 406 U.S. at 212.
201. Id.
203. The growth of government is illustrated by the existence of over 2,000 state administrative agencies. I F. COOPER, STATE ADMINISTRATIVE LAW 2 (1965). It has been suggested that the number of federal administrative agencies has grown so large that no one knows how many agencies there are in the federal government. Gardner, The Administrative Process, in LEGAL INSTITUTIONS TODAY AND TOMORROW 111 (Paulson ed. 1959).
204. 319 U.S. at 631. See text accompanying notes 139-57 supra.
history in Section I illustrates, however, instruction beyond that necessary to understand constitutional provisions has the potential for conflicting with currently held values.\textsuperscript{205} If American history were required against parental objection because of its importance to citizenship preparation, then economics, sociology, biology, literature, consumer education, ethical values, and indeed, any subject which is a potential topic of political debate might be legitimately required. Legitimate charges of inconsistency would surely meet any court that attempted to define and apply a standard for determining which curriculum requirements were sufficiently important to the proper functioning of the political system to be required despite parental value-based objection. It is impossible to draw principled distinctions among such courses to determine that, for example, American history and economics are essential to good citizenship, but sociology, biology, and consumer education are not.\textsuperscript{206} Suspicions would probably abound that personal prejudice had been the determinative factor, making disagreement with specific results likely. In short, a court would be open to charges of acting like a superlegislature.

The only alternative is to allow parents to have their child excused from any such course on value-based grounds. Because it is so widely assumed that a "well-educated" citizenry is essential to the maintenance of democratic government, such a conclusion may not seem reasonable.\textsuperscript{207} Nevertheless, parental objections on value-based grounds to courses justified by the goal of preparation for good citizenship almost necessarily involve matters about which debate, dissent, and efforts directed toward majority change are legitimate and expected within the confines of the democratic political system. Allowing the schools to indoctrinate in those matters erodes the basic principles of democratic government instead of serving them.

Prior discussion of instruction in the constitutional system of government indicates that such instruction also is not free of the potential for value conflict with parents. The indoctrinative effects of such instruction can, however, be justified.

The argument in favor of allowing parents to have their child excused from instruction in the system of government on grounds of value conflict rests on one possible reading of \textit{Barnette}. The actual words of the Pledge from which the Court excused the children may reasonably be interpreted to bespeak allegiance not to particular positions in current political controver-

\textsuperscript{205} See text accompanying notes 40-41 \textit{supra}.
\textsuperscript{207} See text accompanying notes 24-28 \textit{supra}. 
sies, but to general republican principles of government, the concept of a
unified nation, and the ideals of liberty and justice for all.\textsuperscript{208} The Court
viewed the flag as a "symbol of adherence to government as presently
organized."\textsuperscript{209} Nevertheless, the Court thought that the flag ceremony
touched "matters of opinion and political attitude."\textsuperscript{210} An explanation for
the decision is that the first amendment protects not only debate within the
confines of the existing governmental system, but also debate about amend-
ments that could abridge the rights protected by the first amendment.\textsuperscript{211}
Thus, based on this reading, parents could have their children excused from
instruction in the system of government on the ground that instruction in
conflict with their values interferes with the protected political process for
amending the Constitution.

Although there is a similarity between instruction in the constitutional
system of government and the Pledge involved in \textit{Barnette}, the societal
interest in preserving a democratic form of government, itself designed to
preserve liberty, can justify required instruction of future generations in the
virtues of that form of government, even if it does not justify the compelled
Pledge and salute. They are far more immediately coercive than required
instruction. The compelled Pledge and salute may also carry a message that
disagreement is not tolerated within our society and thus be inconsistent
with indoctrination in the democratic political system. Compelled listening
is not as objectionable from that standpoint since no one is likely to assume
that one agrees with that to which one is being forced to listen.

More important, those matters about which parental conflict would
arise in a course in the system of government would primarily involve
questions to be determined, in terms of the political process, by amendment
of the Constitution. Although the amendment process makes all constitu-

\begin{enumerate}
\item The West Virginia school children were required to recite the following Pledge: "I
pledge allegiance to the Flag of the United States of America and to the Republic for which it
stands; one Nation, indivisible, with liberty and justice for all." 319 U.S. at 628 n.2.
\item Id. at 633.
\item Id. at 636. The flag may convey ideas beyond those communicated by the Pledge;
thus, the flag may convey ideas about which there is widespread disagreement and controversy.
For example, during the Vietnam war people often associated flag lapel pins with support of the
war. Justice Jackson did not seem to have this possibility in mind, however, when he spoke of
the salute as touching "matters of opinion and political attitude."
\item The Court has held that there is:
practically universal agreement that a major purpose of [the first amendment] was to
protect the free discussion of governmental affairs. This of course includes discus-
sion of candidates, structures and forms of government, the manner in which govern-
ment is operated or should be operated, and all such matters relating to political
processes.
\end{enumerate}
tional provisions subject to change and therefore potential topics of political controversy, the process is made deliberately difficult to effect and thus is not encouraged.212 There is, therefore, at least a formal consensus in support of the constitutional system of government.213 Since the Constitution represents the basic political norms of the society, and it is impossible to predict what positions of power any one child will hold in the future, it appears justifiable to require all children to be sufficiently instructed in the system of government to facilitate their operating within its norms.

Because the amendment process does exist, however, the schools ought to be required to attempt a norm of neutrality.214 Thus, the school should present the currently established interpretation or interpretations of a constitutional provision, a fair description of contrary interpretations, and a description of proposed amendments. Indoctrinative effects may be justified in order to preserve a governmental system that protects liberty, but schools are not entitled to give undue preference to either opponents or proponents of change.

Thus, the only state educational goal sufficient to justify refusing to excuse children from instruction because of value-based objections is preparation of youth for citizenship, and even that only to the extent of instruction in the constitutional form of government. A basic education in reading, writing, and arithmetic might be so justified, but, in any case, can be required against parental objection on value-based grounds because of the need to protect the child's interest in being able to choose a life different from his parents upon reaching majority.

212. Constitutional amendments are proposed by two-thirds of both Houses of Congress, or at a convention called for that purpose on application of the legislatures of two-thirds of the states. Amendments must be ratified by either the legislatures of, or conventions in, three-fourths of the states, as Congress determines, before becoming effective. U.S. CONST. art. V. In the 188-year history of the Constitution, only 26 amendments have been adopted. The Supreme Court commented on this burden against change early in constitutional history:

The exercise of this original right [to establish, in a written constitution, principles for future government] is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.


To the extent that a state constitution is more easily amended, a parental right to excusal from objectionable instruction in its distinct provisions should prevail.

213. As to some provisions, there may be a real consensus. For example, an overwhelming majority of Americans claim that they support freedom of speech. See S. CHASE, AMERICAN CREDOS 152-67 (1962); Erskin, The Polls: Freedom of Speech, 34 PUB. OPINION Q. 483 (1970).

214. Cf. Bonner-Lyons v. School Comm., 480 F.2d 442 (1st Cir. 1973) (school distribution system cannot be used by groups to distribute material opposed to busing if groups in favor of busing are denied access). Contra, Pare v. Brennan, 54 Misc. 2d 194, 281 N.Y.S.2d 884 (Sup. Ct. 1967) (denying challenge to distribution for parental signature of petition opposing state constitutional amendment which children were directed to return signed to their teacher).
3. State Administrative Needs and the Interests of Other Children as a Limitation on the Right of Excusal

To accord parents a right to have their children excused from curriculum requirements to which they object on value-based grounds raises two problems for the administration of the schools which might prevent or severely limit the exercise of the right. First, the difficulty of assuring that the parents' objection is value-based, rather than pedagogically based, might make it impractical to allow parents to have their child excused because of value conflict. Second, exercise of a right of excusal might adversely affect the efficient operation of the schools by disrupting classes, increasing school costs, and otherwise frustrating the ability of the school to educate other children in the school in the manner in which the majority of the community or state want them to be educated. The possibility of such effects is best examined in the context of objections to specific components of a curriculum, e.g., objections to a course, part of a course, a textbook, or a particular method of instruction. Such an examination indicates that, with only limited exceptions, exercise of a parental right of excusal will not have the adverse effects posited.

a. The difficulty of ascertaining whether the objection is value-based or pedagogical: Although the public school would be entitled to require parents to specify the grounds upon which they want their child excused from a curriculum requirement, some parents whose objections are really pedagogical would undoubtedly object on value-conflict grounds in order to have their child excused from instruction. This deception would be more likely to occur when the objection is to an entire course or a significant segment of a course than when objection is made only to a small part of the instruction. Thus, parents who think sex education is a waste of time or that their child is not ready for such instruction might state that they object to such instruction because it conflicts with their values. Parents who do not want their daughter to take home economics because it contradicts their ideas about alternative careers for women would have a legitimate basis upon which to have her excused. The parents of a girl who object only that it is a waste of time given her future career or existing knowledge would not. The latter, therefore, would surely be tempted to claim that such instruction conflicted with their values. Any standard based on motivation invites self-serving statements. Moreover, when it is not required that the ground for

215. Value-based objections can prevail against curriculum requirements explicitly required by an electorally responsible decisionmaker, but pedagogical objections cannot. See text accompanying notes 115-69 supra; text accompanying notes 229-59 infra.

exemption be religiously based, an independent verification of the beliefs is impossible. Even in the case of religiously based claims, sincerity is difficult to prove. In Yoder, in fact, the sincerity requirement was met by stipulation.

The possibility of deception is troubling because, absent a value conflict, the state has legitimate interests, stemming from public funding, in requiring all public school children to be instructed in subjects considered beneficial to society. The concern about possible deception, however, does not justify denial of a right to have one's child excused on value-based grounds.

Most parents will be unlikely to want school officials and others to believe that they hold views contrary to those of the majority in the community or even the state, if they do not in fact hold them. The extent to which parents would actually practice deception can only be a matter of speculation until a right of excusal on value-based grounds has been accorded to parents for a considerable period of time. If few parents engaged in such deception, the state's purposes would not be significantly hampered and the possibility of deception would be an inadequate basis upon which to deny all parents a right of excusal. Even if deception were widespread, however, it would not be easy to conclude that the right of excusal should not be accorded to parents. If many parents so strongly object to instruction on pedagogical grounds that they are willing to be known as holding values they do not hold, this in itself indicates that the societal consensus in favor of such instruction, on which the legitimacy of infringing parental liberty is based, is subject to question. Both the felt pressures to conform on the part of the parents and the perhaps even stronger reluctance to subject one's child to derision by his peers are likely to make most parents reluctant to have their child excused unless their objections, whether value-based or pedagogically based, are strongly held. Given the societal consequences which denial of value-based claims for excusal entails, the admitted difficulties of distinguishing value-based from pedagogical objections so as to avoid deception are, at least for the present, an inadequate basis upon which to deny the right of excusal.

See Marcus, The Forum of Conscience: Applying Standards Under the Free Exercise Clause, 1973 Duke L.J. 1217, 1243-44 (difficulties in determining whether religious belief is sincere). In an alleged free exercise of religion infringement case, the task of the court "is to decide whether the beliefs possessed . . . are sincerely held and whether they are, in [their] own scheme of things, religious," United States v. Seeger, 380 U.S. 163, 185 (1965). Precise standards for both have not been developed.

See text accompanying notes 233-37 infra.
b. **State administrative interests in the efficiency of the schools:** School administrators might consider any deviation from the uniform treatment of all children in a school to affect the efficiency of the schools adversely, and thereby justify denial of any parental request for excusal. The common law cases granting parents a right to have their children excused did not regard the inconvenience of treating some children differently from others as sufficiently detrimental to the operation of the school to justify denying the right. Although the structure of the school system has changed significantly since the turn of the century, the modern school is at least equally able to accommodate such requests. The greater complexity of the present school system, its larger administrative staff, plant size, and, particularly in the secondary schools, range of course offerings would seem to make it better able to accommodate a request for excusal than the simpler school system that existed at the time of the common law cases. Therefore, limitations on the right to excuse one's child from instruction on value-based grounds cannot be based upon administrative inconvenience or upon increased cost, but must be primarily concerned with the effect on the

220. See Turck, *State Control of Public School Curriculum*, 15 Ky. L.J. 277, 283 (1927) (arguing that parental selection of courses would wreck the discipline and orderly development of common school courses, and that students should be allowed to profit from the educational selections made by the educational experts, because they may know more than the parents about education). Turck does not explain why educational experts would know more than parents. See also Valen v. New Jersey State Bd. of Educ., 114 N.J. Super. 63, 274 A.2d 832 (1971) (State Board of Education described as having refused the state legislature's suggestion that students be permitted not to take sex education if their parents object, because a right to be excused could impair the efficacy of the public school system). Of course, parents could not have their child excused from a course needed for further study. For example, parents could not excuse their child from French I, and then have their child take French II unless the child could demonstrate a sufficient proficiency in the language. See *Trustees v. People*, 87 Ill. 303, 307 (1877) (school may prescribe rules with respect to proficiency and advancement in branches of study).

221. The Wisconsin Supreme Court held that:

> [T]he parent has the right to make a reasonable selection from the prescribed studies . . . and this cannot possibly conflict with the equal rights of other pupils . . . And how [such a selection] will result disastrously to proper discipline, efficiency and well being of the common schools . . . is a proposition we cannot understand.

Morrow v. Wood, 35 Wis. 59, 65-66 (1874). See Kelley v. Ferguson, 95 Neb. 63, 74, 144 N.W. 1039, 1044 (1914) (court unable to see how withdrawal could "have caused any break in the discipline of the school"); Sheibley v. School Dist. No. 1, 31 Neb. 552, 557, 48 N.W. 393, 395 (1891) ("There is no good reason why the failure of one or more pupils to study one or more prescribed branches should result disastrously to proper discipline, efficiency, and well-being in the school").

222. The early school system, with its emphasis on teaching English skills and basic arithmetic, along with instilling the prevailing social norms, had limited subject offerings. In contrast, the modern school system offers considerable diversity in courses, with efforts made to tailor the curriculum to meet individual needs and desires. See N. Edwards & H. Richey, *The School in the American Social Order* 712-60 (1947). See also Campbell, note 8 supra, at 45-73 (description of the modern school); *Turning Points*, supra note 18, at 119-227 (general description of schools in the 19th century).
Exercise of a parental right might prevent those other children from receiving the kind of schooling the majority of the community or state wants them to have. An obvious consequence of any excusal is that other children are deprived of the potential benefits of the presence and participation of the excused child. Acceptance of the arguments in favor of a right of excusal for value-based objections, however, necessarily entails rejection of this consequence as a ground for denial of the right. To examine the extent to which limits may be imposed on the exercise of the right, the following discussion focuses on the consequences to other children of excusal from the particular curriculum components to which objection might be made.

Accommodation of a parental request to excuse one's child from an entire course or from a segment of a course does not appear difficult. If objection is to a course, the school would only have to put the child in a supervised room for the class period of that course or, if there are other courses offered at the time, as is likely in a secondary school, allow the student to take another course. Excusal would in no way interfere with the ability of other students to take the course.

Excusal based on an objection to a clearly defined segment of a course offering, such as instruction in sex education in a health or science course, or an objection to a specific area of instruction in an elementary school in which the class day is not normally segmented into course offerings, might have a somewhat greater impact on the efficient operation of the school than a request that a child be excused from an entire course offering. The detrimental effect would seem to be minimal, however, and unlikely to harm the schooling of other children. In the elementary school situation, if the class is operated as an open classroom, the norm of individual instruction would permit parents to have their child excused with no detrimental consequences.224

223. This limitation is consistent not only with the limitations articulated in the common law decisions, see text accompanying notes 44-60 supra, but also with Supreme Court decisions upholding constitutionally protected individual rights in the schools. Barnette noted that refusal to salute the flag did "not interfere with or deny rights of others to do so." 319 U.S. at 630. Tinker explicitly excepted from its protection any student conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 513.

224. The open classroom model prescribes a minimum of teaching to the class as a whole, with flexible scheduling designed to allow each child to pursue his individual interests. Students are trusted to direct many aspects of their own learning. Most open classrooms lack a rigid, prescribed curriculum and permit the children to investigate matters of concern to them. See L. Stephens, The Teacher's Guide to Open Education 26-27 (1974). The child could simply study that to which his parents did not object.
If, because of inadequate staff or insufficient space, a school could not supervise a child excused from instruction for whom no other instructional possibilities existed, it would seem appropriate to require the parent to take responsibility for the child during the time for which he has been excused. Such a requirement admittedly would place a burden on one-parent families or families in which both parents work. The burden of finding someone to care for the child during the time excused, however, is less than the burden of sending the child to a private school in order to avoid an objectionable curriculum requirement. Making the parents responsible for the child also poses a problem when the objectionable segment is only a small part of one class day. In such a case, the best solution would be to excuse the child for whatever time is necessary to allow the parent to take responsibility for him. The child would thereby miss instruction to which his parents did not object, but that is a consequence that the parents can consider in deciding whether to seek excusal of their child.

When the objectionable instruction does not constitute a segment of a course, but permeates the course, i.e., it is always or usually made a part of the study of other, nonobjectionable topics of instruction, the difficulties of accommodating a request for excusal are greater. For example, discussion of sexual mores and behavior in all possible courses has been suggested as the best method to achieve sex education. Although such treatment might be segmented and entirely teacher-initiated so as to facilitate the kind of accommodation possible with a defined segment of a course, the topic will more likely arise in the course of discussion with little warning. Where student discussion is encouraged, the teacher may not exercise control over what issues are to be discussed at a particular time and thus will not be in a position easily to excuse a child whose parents object to the particular topic of instruction. Even if one were to rely on the child to excuse himself in such a situation, this could disrupt the smooth flow of class discussion, resulting in detriment to the schooling of the other children. Indeed, a child would rarely be confident enough to do this without adult direction.

The parents would seem to have to choose, therefore, between having their child excused from the entire course and allowing him to be exposed to the objectionable material to the extent that excusing the child would be disruptive. Such a conclusion is troublesome, of course, since by changing the method by which objectionable instruction is taught, the school may be able to achieve indoctrinative effects which it could not otherwise achieve,

especially if the course as a whole is considered important to future success. The alternative, however, is to deny the other children in the class and the community the benefits of the instruction by eliminating the material. Another possible alternative, requiring segmented instruction, would deny other children the benefits of a potentially more effective method of teaching, i.e., pervasive instruction.

Objections to textbooks raise somewhat distinct problems. Although parents would not be entitled to demand use of a different textbook than that which had been chosen for a course, attempts should be made to accommodate their request to excuse their child from exposure to the textbook. If a parent objects to a segment of a textbook or a teacher's supplementary material, the same solution as that for objections to a segment of a course would apply. A parent would presumably have sufficient advance notice of the contents of a textbook to request excusal. Although the child would have access to the objectionable segment of a textbook, at least the teacher would not instruct the child in that material. There seems to be no practical way in which exposure can be entirely avoided unless the parent is allowed to object to the entire text on the basis of one section, which, given the interests of the state in instruction in the remainder of the text, would seem unjustifiable. A child might also be exposed to written supplementary material if the teacher were not forewarned of the parents' objections. To avoid that, parents could inform the teacher early in the school year of those matters to which they do not want their child exposed.

Objection to the textbook used in a course is not unlike objection to the entire course, since the textbook is likely to be the focus for most, if not all, class instruction. It raises problems similar to those raised by pervasive instruction, since the parents are not objecting to the course, but only to the text. One must assume that the parents would accept another text for the course if it did not conflict with parental values. As with pervasive instruction, one could nevertheless put the parents to the choice of having their child excused from the course or allowing their child to use the objectionable textbook. If the course itself is required rather than optional, however, school authorities may think it is important that the child take the course. Since they could not avoid exposure of the child to the textbook (in classroom discussion, for example), the school authorities might decide to substitute another text for all children or separately instruct the child. If the

226. *See Trustees of Schools v. People*, 87 Ill. 303, 307 (1877) (parent could not insist that his child use a textbook different from that chosen for the school). *See also* cases cited note 223 *supra*.

227. Textbooks and other instructional materials could also be kept on file at the school for inspection by parents, to afford them an opportunity to make timely objections.
number of children whose parents sought their excusal were great enough, a separate class with a different textbook would be feasible. In any case, if the child were expected to learn and be examined in the course material, the school would have to substitute another text for the child whose parents objected to the originally chosen text.

In those school systems in which parents pay for textbooks, this would not impose additional costs on the school. If the school system were required to pay for textbooks, however, this would add to school costs. If parents were not made aware of the objectionable contents of the textbooks until after they had been purchased by the school district and put into use, the school would have wasted its resources on unusable textbooks. This would be particularly onerous if objections were widespread, and numerous children had to be excused from use of the textbook. This cost could be avoided, however, by early parental review of proposed textbooks, possibly through open forums for discussion of the textbooks before selection.228

Neither the possible increased costs nor the risk of wasting money are adequate justifications for denying an otherwise legitimate parental request that a child not use a particular textbook. If the school substitutes a text for the one that prompted parental objections, however, those children whose parents did not object to the text will have been denied the opportunity to learn in school the material which has been removed. A similar objection is that school officials, charged with the task of selecting textbooks and faced with the prospect of monetary losses and inconvenience from having selected the "wrong" book, would be timid in textbook selection and thus deny those children whose parents would not object to a more controversial book the opportunity to learn a body of material. Neither result, however, is compelled by the grant of a right in parents to have their children excused from using a textbook to which they object on value-based grounds. If a community consensus is strongly in favor of using the textbook to which a minority does or may object, the textbook will be used. If it is not, the substitution of a less objectionable textbook is simply a product of a political

228. In Indiana, textbooks are now selected by the school board after an advisory committee comprised of teachers (a majority of the members) and parents (at least 40% of the members) has reviewed available textbooks and made recommendations to the superintendent, who, in turn, makes recommendations to the school board. The school board is not, however, required to abide by these recommendations. A parent-teacher committee may be established to review other instructional materials. IND. CODE ANN. § 20-10.1-9-21 (Burns Supp. 1976). This solution does not, of course, eliminate the problem of the parent who objects. It does, however, help to ensure that the textbook choice will meet with general acceptance among parents. The New York State Board of Regents suggests that local school boards have an advisory committee for selection of instructional materials, the membership of which should represent various segments of the community, including teachers, parents, pupils, administrators, and school librarians. N.Y. Times, Oct. 30, 1976, at 27, col. 1.
system in which significant minority positions may influence political decisionmaking. It is true, moreover, that if parents want their child to learn a body of material not taught in school, they are free to supplement the school instruction.

The problems posed by excusal of a child because of parental objection to a method of instruction on value-based grounds (e.g., objection to grading because it may inculcate the value of competition) are likely to vary considerably depending on the method to which objection is made. Only relevant considerations will be noted. Excusal could significantly impair administrative efficiency beyond simply increasing costs, or could disrupt the education of other children in the school, thus justifying not excusing the child. In addition, excusal of the child could thwart the state's interest in efficient and effective instruction of the child in a subject, despite the fact that the parents raise no value-based objections to the substantive content of the instruction. School authorities should accommodate the parental objection if administrative efficiency or the interests of other children are not impaired. If they cannot do so and the instruction is not required, the child can simply be excused from the instruction to the extent necessary. If, however, the instruction is required, the school should be allowed to deny excusal.

One remaining question of administration is whether the school could deny a student a diploma or other certificate of graduation, or deny him participation in a graduation ceremony, for failure to take instruction because of parental exercise of a right of excusal. Although the school could and undoubtedly should indicate which requirements a student has not completed on a diploma or certificate of graduation, the opportunity to do so adequately protects any state interest in accurately informing the public about the instruction the child has received. It also would not impose any significant burden on the administrative efficiency of the school. The state clearly has no legitimate interest in denying a child the right to participate in a graduation ceremony because his parents have exercised a right of excusal.

IV. PEDAGOGICAL PARENTAL OBJECTIONS

A. The Nature of Pedagogical Objections

Parents who object to curriculum requirements in the public schools on pedagogical grounds do so because they believe that either the instruction received or the methods used to instruct the child do not educate the child properly for his future career and lifestyle. Objections that a child is being exposed to a subject at the wrong time, with harmful effects to his personal development, or that a child should be allowed to take an elective course which is useful to his planned career instead of a required course, are
substantive pedagogical objections. Objections that the method of instruction in the course is less effective than alternative methods, or hampers rather than aids the child's ability to learn, are methodological pedagogical concerns. Since the parents may have better knowledge than teachers of the child's abilities, aspirations for the future, and psychological characteristics, the parents rather than the school authorities may make pedagogical decisions which better serve the child's interests. Thus, denial of a right to have one's child excused because of pedagogical objections could result in harmful consequences to the child.

To the extent that the common law based interpretations of educational statutes retain vitality, parents would often be entitled to have their child excused from instruction to which they object on substantive pedagogical grounds. In the absence of such common law protection, parents should nevertheless be entitled to have their child excused from curriculum requirements imposed by a decisionmaker who is not electorally accountable. This latter ground for having one's child excused finds support in the doctrine of nondelegation of legislative powers. If the curriculum requirement to which the parents object on substantive pedagogical grounds has been imposed by an electorally accountable decisionmaker, however, parents should have no right to have their child excused. Neither on a common law basis nor on a nondelegation of legislative powers basis should parents be entitled to have their child excused because of methodological pedagogical objections.\textsuperscript{229}

B. RIGHT OF EXCUSAL BASED ON THE DOCTRINE OF NONDELEGATION OF LEGISLATIVE POWERS

When parents object to curriculum requirements on pedagogical grounds, they do so because they consider the particular course or the method used inappropriate for their child. Their concern is that the school does not adequately serve the career and personal life-style goals planned for the child. Denial of their request for excusal could indeed be detrimental to the child's educational development and could even lead to some reduction in diversity. Parents are, however, in a far better position to overcome whatever disadvantages the denial of the request for excusal on pedagogical grounds may cause than is the case when their objections stem from value conflicts. The parents are free to supplement the deficient instruction with home instruction, tutoring, or supplementary school instruction.\textsuperscript{230} In most

\begin{itemize}
\item[229.] See notes 67-70 and accompanying text \textit{supra}.
\item[230.] It is, of course, possible that conflict between the method used at school and the supplemental method might confuse the child and hamper learning. The parent would then have to either forego such supplemental instruction or seek another public or private school that teaches by the preferred method.
\end{itemize}
cases, pedagogically objectionable instruction will at worst be an inefficient use of the child's time. Only when pedagogical objections stem from concern about potentially more serious psychological or learning difficulties\textsuperscript{231} does denial necessitate instructing the child in a private school or moving to another school district. In any case, such consequences, unlike the consequences of denial of value-based claims, do not normally involve risks of indoctrination and thus do not impair first amendment values which are basic to an open political system. Therefore, a parental right of excusal based on first amendment protections would not be available for pedagogical objections.

Such serious consequences, however, do impair liberty, and it is unlikely that, under \textit{Pierce}, the state could require private schools to instruct their students in specified courses designed to serve vocational or personal life-style goals.\textsuperscript{232} Nevertheless, assuming that private schools would be free of such regulation, the funding of the public schools by the state justifies denial of pedagogical objections as a basis for excusal when parents choose to send their children to public schools. The residents of a community or state might not want to pay for the education of a student who is not being instructed in those courses which they think are necessary; instruction in such courses may be part of their justification for supporting the schools.

Denial of a parental pedagogical request for excusal necessarily implies that a decision has been reached by the state or local community that the instruction is necessary. If, however, one cannot say that the people of the state or relevant subdivision think the curriculum requirement necessary, then the infringement of parental liberty would be unjustified. To assure that a consensus exists within the relevant community, parents ought to be entitled to have their child excused from any instruction to which they object\textsuperscript{232}. If the psychological harm is potentially severe, the parents ought to be able to obtain medical certification to that effect and have their child excused for reasons of health—a long-recognized ground for excusal. \textit{See} Woltz, \textit{Compulsory Attendance at School}, \textit{20 LAW \\& CONTEMP. PROB.} 3, 14 (1950).

\textsuperscript{231} If the psychological harm is potentially severe, the parents ought to be able to obtain medical certification to that effect and have their child excused for reasons of health—a long-recognized ground for excusal. \textit{See} Woltz, \textit{Compulsory Attendance at School}, \textit{20 LAW \\& CONTEMP. PROB.} 3, 14 (1950).

\textsuperscript{232} \textit{See} Pierce v. Society of Sisters, 268 U.S. 510 (1925) (discussed in text accompanying notes 87-101 supra). Regulation of private schools presents somewhat distinct issues. It is not the intention here to develop a complete argument for the freedom of private schools from curriculum requirements that serve only vocational or personal life-style goals. Such a freedom seems implicit in the \textit{Pierce} decision. Surely a private school may orient its curriculum toward the needs of the students it serves, so that it may have only a college preparatory curriculum with no vocational instruction or vice versa. \textit{See} State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (striking down extensive state regulation of nonpublic schools not only because it burdened the free exercise of religion of parents, but also because it deprived parents of their liberty to direct their children's education). Hirschoff, Runyon v. McCrery and \textit{Regulation of Private Schools}, — IND. L.J. — (1977) (forthcoming) (\textit{Runyon} ought not to be interpreted as allowing the state to regulate the private school curriculum without constitutional limitation).
if the decision to require the instruction was not made by an electorally responsible decisionmaker, unless the request for excusal is based on a methodological pedagogical objection.

The doctrine of nondelegation of legislative powers supports this conclusion. A primary function of the nondelegation doctrine is to assure that fundamental policy decisions will be made by a body immediately responsible to the people and not by an appointed official, such as a school administrator.\textsuperscript{233} When the governmental action interferes with a liberty protected by the Constitution, a fundamental policy issue calling for strict application of the doctrine surely exists.\textsuperscript{234} The state's interests in preparing a child for a vocation or for a satisfactory personal life are inadequate to justify the indoctrinative effects which could arise from denial of value-based objections. Although the public funding of the schools justifies requiring students whose parents do not object to the instruction on value-based grounds to take courses designed to serve those state ends, the liberty to choose one's occupation and lifestyle is entitled to significant protection under the Constitution,\textsuperscript{235} and if it is to be limited to some degree, such a


\textsuperscript{234} See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975). Stewart defines the application as follows:

A concern that administrative intrusions on private interests be explicitly authorized through the consensual mechanism of the legislature underlies both the clear statement requirement and the doctrine against delegation. The clear statement technique could be thought of as operating on a sliding scale: the more vital the individual liberty infringed, the more explicit must be the expression of consent.

\textsuperscript{235} See text accompanying notes 195-97 supra.
limitation certainly involves fundamental policy questions. State courts still generally adhere to the doctrine of nondelegation of legislative powers.\textsuperscript{236} Even at the federal level, where the nondelegation doctrine has long been considered moribund, its principles are often applied when constitutional values are affected by the delegation of power to an administrative agency.\textsuperscript{237}

Since value-based parental objections are even more deserving of constitutional protection than pedagogical objections, parents would necessarily be entitled on the basis of the nondelegation doctrine to have their child excused from instruction to which they object because of value conflict. Reliance on the nondelegation doctrine ground for excusal, however, would make it unnecessary for parents to show that their objection stems from value conflict rather than a pedagogical objection.

Under this rule, parents making pedagogical objections would have no right to have their child excused from a curriculum requirement that is imposed by state statute, or made by decision of an electorally responsible state or local board. The parents would, however, have a right to have their child excused from a curriculum requirement made by decision of a school administrator or teacher, if the parents object on substantive pedagogical grounds.\textsuperscript{238} An objection merely to method, however, would not entitle the parents to have their child excused: methods of instruction do not directly infringe upon the freedom to choose one’s occupation or lifestyle and therefore do not raise fundamental policy questions. Moreover, a recognized qualification of the nondelegation doctrine is that broader delegations are justifiable when the delegation is to a body that possesses greater exper-

\textsuperscript{236} For a discussion of the vitality of the doctrine in state courts, see Cooper, supra note 203, at 31-94.


\textsuperscript{238} Methodological considerations, such as holding the student’s interest, could of course motivate a teacher to introduce substantive matter, but, just as the interest in teaching critical thinking cannot justify potential indoctrination in values to which the parents object, such motivation cannot overcome an objection to substantive instruction that no electorally responsible decisionmaker has adopted.

Some may claim that parents are not good judges of their own children because the parents are not objective and have an unrealistically high view of their child’s abilities. See Ackerman v. Rubin, 35 Misc. 2d 707, 231 N.Y.S.2d 112 (Sup. Ct. 1962) (denial of petition for order compelling school to admit petitioner’s son to special advanced program, reflecting suspicion of parents’ judgment, which was assumed to be influenced by pride in the child, vis-à-vis experienced educators). Although it seems reasonable to assume that parents do not see their children as others see them, it does not follow that parents are necessarily the less accurate observers. In any case, the proposed right would not allow parents to compel the school to instruct the student in subjects that the school does not believe the child to be competent to study. To allow that could disrupt the education of other children.
tise than the legislature with regard to the matters in question. Educational agencies, and especially school administrators and teachers, may be considered to have expertise with regard to methods of instruction.

1. Curriculum Decisions at the State Level

The best evidence of the existence of a state-wide consensus that instruction should be required is a statute requiring it. However imperfect or inaccurate the legislative process may be as an expression of public consensus, it is the only viable mechanism which our system of government provides for that expression. In the absence of legislation, there is no reliable indication that the people of a state think that the specific instruction is so important that they would override parental objections to it. A state law prohibiting children from being excused from any curriculum requirement adopted by any school authority must of course be rejected as too broad a delegation of power, given the impact on liberty.

If the parents object on substantive pedagogical grounds to a curriculum requirement imposed by a state agency or board whose members are directly elected or elected by local school authorities (if those voting on behalf of the local school districts are themselves directly elected by the people within the district), the state should deny the parents' request for

239. For an early argument that state education statutes should not be explicit with regard to matters that may be thought to be within the expertise of educators, see Remmlein, Statutory Problems, 20 LAW & CONTEMP. PROB. 125 (1950).

240. Certification requirements for teachers and administrators include methodological training. See note 67 supra.

Perhaps the most difficult area in which to distinguish between substantive and methodological-pedagogical objections is the issue of tracking. A democratically responsible decisionmaker surely ought to make the decision whether to have a tracking system in the school. Not only does placement in a particular track have an impact on future career and lifestyle choices, but, even if tracking is not a violation of equal protection, it impinges on values of equality existing in the penumbra of that clause and therefore calls forth the protections of the nondelegation doctrine. See Kirp, Schools As Sorters: The Constitutional and Policy Implications of Student Classification, 121 U. Pa. L. REV. 705 (1973). If, however, a tracking system has been adopted by the school system, one may view placement in a track as methodological.

241. For a more specific discussion of state curriculum controls, see Reutter, The Law and the Curriculum, 20 LAW & CONTEMP. PROB. 91 (1950).

242. But cf. Tribe, Structural Due Process, 10 HARV. C.R.-C.L.L. REV. 269, 315 (1975) ("In a society whose legislative and administrative processes of value formation and conflict resolution seem to resemble less the ancient ideal of the polis than the contemporary notion of pluralist compromise, any suggestion that bartered rules are necessarily expressions of true substantive consensus seems difficult to maintain") (emphasis in original).

243. Technically, of course, such a decision by the agent to whom the power is delegated is the decision of the state, but only technically, for the people have not through their representatives decided whether the instruction is important. They have only decided not to decide. See Cooper, supra note 203, at 72 (the "legislature has in effect expressed its judgment that this vague suggestion is the most definite standard which the nature of the case permits").
excusal. If, instead, the state board is appointed by the legislature or by the governor, then the parents’ request should be granted, even though the governor or legislature could respond to objections to curriculum decisions of the state board by exercising the power of removal. A wide range of issues other than educational issues compete for the attention of elected state officials. Thus, one cannot be sure that such elected officials will respond to public opinion about curriculum decisions. Nor is an appointed state educational agency likely to have sufficient contact with the public to be responsive to current opinion.

2. Curriculum Decisions at the Local Level

Local school boards often have some power to adopt additional course requirements. Even if the only courses that may be required are those required by state authority, however, the determination of the content of the courses is likely to rest with the local school board or with administrators and teachers.

244. Each state has at least one education agency at the state level (a state board of education, a state superintendent of education, or a textbook agency), referred to herein as the state board of education. Most state boards are appointed by the governor, although some are directly elected, appointed by the legislature, or elected by local school districts. They are generally given the responsibility for setting state educational policy, usually including the power to establish minimum course offerings and sometimes an entire course of study for the public schools. CAMPBELL, supra note 8, at 54-69. Most states give state boards of education the power to select textbooks, usually by providing a list of “approved” textbooks from which local school authorities may choose. In some states, however, the state agency may have the authority only to establish standards to guide local boards in the selection of textbooks. LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, A STUDY OF STATE LEGAL STANDARDS FOR THE PROVISION OF PUBLIC EDUCATION 71 (1974).

245. Some political scientists consider the power of removal one of the governor’s most important political tools. J. FESLER, THE 50 STATES AND THEIR LOCAL GOVERNMENTS 356, 359 (1967); D. LOCKARD, THE POLITICS OF STATE AND LOCAL GOVERNMENT 375-80 (1963). But see Schulzitze, On The Governors’ Powers, in NEW PERSPECTIVES IN STATE AND LOCAL POLITICS 247, 253 (J. Riedel ed. 1971) (suggesting that a governor may not be anxious to acknowledge that an appointee disagreed with stated policies publicly by exercising the power of removal). Where the only control is nonreappointment after a fixed term, political control is insufficient.

246. In about one-half of the states the local community must offer the curriculum prescribed at the state level, some with the option to add certain subjects if approved by the state board of education. Many of the remaining states delegate authority to the local school board to develop the curriculum within the broad outlines established by the legislature or the state board of education. E.g., FLA. STAT. § 230.33(9)(a) (West Supp. 1976) (after consultation with teachers and principals, each local school board prepares courses necessary to supplement those prescribed by the state board); see LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, A STUDY OF STATE LEGAL STANDARDS FOR THE PROVISION OF PUBLIC EDUCATION 73 (1974).

247. Local control over textbook selection is extensive. Although a state textbook commission is responsible in a minority of states for statewide adoption of the textbooks to be used at the local level, the more typical method is for a state educational agency to adopt a list of approved texts for each subject. The local board is then given the option to choose from that list. In about one-third of the states the local board or school has complete autonomy in text
If the local school board is elected, parents should not be able to have their child excused from explicitly required instruction because of substantive pedagogical objections. The decentralized decisionmaking made possible by a delegation of authority to local school boards to adopt curriculum requirements probably increases the responsiveness of the democratic processes of control. The decisionmaking process of an elected school board may be close to that of the town meeting of the idealized past. The citizens whose children and neighbors’ children will be affected by curriculum decisions have a greater influence over those decisions if they are made at the local school board level rather than at the state level. A minority of parents might indeed be able to exert an influence over the decisionmaking that would not be possible at the state level. Assuming they have been allowed to participate in the decisionmaking process, the minority parents may be more willing to accept the decision if it is made at the local level, even though the decision is contrary to their views.


248. Local school board members are directly elected by the citizens in the school district in about 85% of all districts. In more than one-half of all districts with populations over 500,000, however, the members of the school board are appointed. Cunningham, Community Power: Implications for Education, in The Politics of Education in the Local Community 40 (R. Cahill & S. Henley eds. 1964).

249. See E. Erickson, Dimensions of a New Identity 123 (1974) (arguing that American democracy’s survival “is predicated on personal contacts within groups of optimal size—optimal meaning the power to persuade each other in matters that influence the lives of each”). But cf. Goldstein, The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis, 117 U. Pa. L. Rev. 373, 391-94 (1969) (arguing that forcing conformity to a social value system, e.g., in the matter of teenage marriages, is the function of the general legislature, not local school boards).

250. The PTA, for example, has both local and statewide influence but is stronger at the local level. While interest groups at the state level have increased in strength, they have not had concomitant effect upon state educational policy. See generally Campbell, supra note 8, at 298-323.

251. But cf. Elson, State Regulation of Nonpublic Schools: The Legal Framework, in Public Controls for Nonpublic Schools 123 (D. Erickson ed. 1969) (arguing that local school officials “are often influenced by personal animosities, loyalties, or local pressures to the disregard of objective educational issues,” and thus calling for broad judicial review of decisions made by local school officials). It is, of course, true that a minority might have insufficient power within its local community, but significant power at the state level through combined action with similar groups or individuals in other communities.


Even when the local board is appointed, if it is subject to a broad and immediate power of removal by an elected official, parents ought not have a right to have their child excused from explicitly required instruction because of substantive pedagogical objection. The range of political issues competing for the attention of a local elected official is not as great as the range of issues with which a state elected official must deal. Thus, the local official is likely to be aware of educational decisions and to respond to criticism of educational decisions by exercising some control over the appointed board.  

It may be argued that denying parents a right of excusal where the local board is appointed, but subject to removal, is inconsistent with the purpose of requiring electorally responsible decisionmaking, *i.e.*, to assure that *before* a curriculum component is required of all students, a sufficient consensus exists as to its importance to justify the compulsion. It must be recognized, however, that even decisions by elected officials only tend to achieve that purpose and do not guarantee that it will be met. Non-re-election is, like removal, a post-decision check. It is the risk of removal or non-re-election which should lead officials to reach decisions attuned to current opinion. If the board is not subject to removal, parents should, of course, be entitled to have their child excused from curriculum requirements to which they object.

At the next two levels of decisionmaking, *i.e.*, local school administrators and teachers, direct responsibility to the electorate is clearly absent. Parents should therefore be entitled to have their child excused from curriculum requirements imposed at these levels. Although it could be argued that administrators and teachers ought to have the power to make curriculum requirements if they are subject to immediate removal by a directly elected local school board, such a delegation of power is not necessary. Unlike the legislature, a governor, or a mayor, the local school board's sole responsibility is governance of the schools. The local school board cannot claim, as can the other elected officials, that its other responsibilities necessitate the delegation of authority to a more specialized body. It is the specialized body. In addition, curriculum requirements imposed by decisionmakers below the level of the superintendent's office, such as principals and teachers, would have insufficient generality of application to generate a political response from the larger community. A curriculum decision affecting one school in a system of many schools or only one classroom will not have widespread impact. The community as a whole is thus unlikely to be aware of the decision or to be sufficiently affected to respond to it.

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253. Even in a large city school system this would seem to be true. Educational expenditures are a significant part of the budget and are of pressing concern to the citizens.
While the local board is a specialized body, it normally consists of lay members without educational training.\textsuperscript{254} It thus may be claimed that delegation of the power to decide curriculum requirements is necessary because of the expertise of the school administrators and teachers. It is reasonable for the board to delegate authority to school administrators and teachers to select textbooks, determine course outlines, select supplementary materials, and impose other curriculum components beyond general course requirements. Such delegation appears to be the norm.\textsuperscript{255} Those decisions may lead to parental objections. The fact that the school board finds it necessary to delegate the determination of the various curriculum components to administrators and teachers should not be taken to mean, however, that it has delegated or properly can delegate the decision as to which curriculum components are to be required despite parental objection. The expertise of school administrators and teachers to determine the curriculum components of courses, combined with the necessity of their doing so, does not lead to the conclusion that their expertise extends to determinations that certain instruction is required to prepare children for good citizenship, a career, or a lifestyle. The board remains the proper decisionmaker as to that question, because it is responsive to the consensus of the community through the electoral processes.

\textsuperscript{254} For a discussion of the characteristics of local school board members, see CAMPBELL, supra note 8, at 166, 178-81. Teachers have, however, begun to seek positions on school boards. \textit{Id.} at 267.

\textsuperscript{255} Elliot, \textit{Toward an Understanding of Public School Politics}, 53 AM. POL. SCI. REV. 1032, 1037-38 (1959) (because most members of local school boards lack educational training and expertise, curriculum decisions in most communities are left to the school supervisors); McNally, \textit{What Shall We Teach . . . and How?}, 36 NAT'L ELEMENTARY PRINCIPAL 6, 6-11 (1957) (the primary unit for curriculum development is the principal and his staff).

The most significant decisionmaking power of individual teachers probably comes in the use, rather than the selection, of instructional materials. Because of practical exigencies precluding continuous supervision, teachers can omit certain portions of the textbook. More important, they are often free, at least at the high school level, to supplement the text with such things as paperbacks and magazines. They are certainly free to deviate from the text in their oral presentation and discussion of the subject matter.

Some new conceptions of the curriculum envision the classroom teacher as the heart of the system, principally responsible for making the actual decisions as to which strategy and which materials are best suited for the students. \textit{See} Clegg, \textit{The Teacher as “Manager” of the Curriculum?}, 30 EDUC. LEADERSHIP 307 (1973).

Some states make explicit delegations of authority to the teacher by regulation. COLORADO STATE BOARD OF EDUCATION HANDBOOK FOR COLORADO SCHOOL BOARD MEMBERS 8 (1964) (textbook selections to be made with consultation of principal and teachers); NEBRASKA STATE BOARD OF EDUCATION AA CLASSIFICATION GUIDELINES 5.5 (1971) (curriculum decisions must involve teaching staff); TENNESSEE STATE BOARD OF EDUCATION MINIMUM STANDARDS FOR SCHOOLS 46 (July 1973) (teachers shall participate in curriculum improvement). \textit{See also} IND. CODE ANN. § 20-10.1-9-21 (Burns Supp. 1976) (textbooks selected following recommendations by an advisory committee comprised of teachers and parents); note 228 supra.
A related consideration is that teachers may have a right to be free of administrative or school board control over their curriculum decisions. Tenure statutes may limit the grounds upon which a teacher may be dismissed. By school board rule, individual contract, or collective bargaining agreement, teachers may have been granted rights of academic freedom in the classroom with regard to instruction in their assigned courses. As previously noted, some federal courts have held or suggested that some measure of academic freedom to choose methods or supplementary materials for instruction in a teacher's subject areas is constitutionally protected. Whatever the source of the teacher's right to be free from external control in the instruction of an assigned course or subject, the absence of school board and administrative control over teachers supports the conclusion that, with regard to a teacher-determined substantive curriculum requirement, parental objections should prevail and the child should be excused.

If the state or a community has determined that full academic freedom for teachers is beneficial for its public schools, one can hardly claim that instruction in any particular curriculum component selected in the discretion of an individual teacher has been determined to be so important by the state or local community that overriding a parental objection is justified. It is even possible in such a case that the majority of a community or state objects to or is neutral toward the particular curriculum component to which a parent objects. The absence of evidence of a community consensus in support of

256. The Louisiana statute reads: "A permanent teacher shall not be removed from office except upon written and signed charges of wilful neglect of duty, or incompetency or dishonesty, or of being a member of . . . any group . . . prohibited from operating in the State . . . ." LA. REV. STAT. ANN. § 17:443 (West Supp. 1977). But see Note, Developments in the Law—Academic Freedom, 81 HARV. L. REV. 1045, 1095 (1968) (stating that tenure laws "often are broadly construed, and school boards are thus allowed to exercise rather extensive and often unnecessary control over teachers' activities both within and without the classroom").

257. See, e.g., Board of Education, Los Angeles, Cal., Policy on the Study of Current Public Problems, in G. LEINWAND & D. FEINS, TEACHING HISTORY AND SOCIAL STUDIES IN SECONDARY SCHOOLS 129-30 (1968). This opened the classroom to controversial subjects "in an atmosphere as free as practicable from partisanship or emotional approach."


For a suggestion that the NEA Code of Ethics may be an instrument of academic freedom for the public school teacher, see Note, Developments in the Law—Academic Freedom, 81 HARV. L. REV. 1045, 1113-18 (1968).

258. See notes 173-81 and accompanying text supra.
the teacher's particular curriculum decision is even greater if the source of the teacher's discretionary rights lies in the Constitution.

C. STATE INTERESTS LIMITING A RIGHT OF EXCUSAL FOR SUBSTANTIVE PEDAGOGICAL OBJECTIONS

In many respects the conclusions reached with regard to the extent to which state interests limit a right of parents to have their children excused from instruction on value-based grounds under the first amendment fully apply to a right of excusal on pedagogical and value-based grounds under the non-delegation doctrine. Differences exist because the claimed societal interests to be served by curriculum requirements cannot be as strongly relied upon by the state, and the relative weight of the state and parental interests in the context of the state's administrative needs differs.

1. Claimed Societal Interests

If the basis for a request for excusal is that no electorally responsible decisionmaker has made the decision to require that component of the curriculum to which objection is made, then the state educational justifications previously discussed—preparation for citizenship, a vocation, or a satisfactory personal life—cannot be made. No societal consensus evidences that the instruction from which excusal is sought is necessary to serve those ends. Thus, even instruction in the constitutional system could not be required against substantive pedagogical or value-based parental objection. Since there is no evidence of a societal consensus that every child in the public schools should be instructed in the subject, the argument that the state is entitled to protect the child's educational interest against his parents' control is even weaker, and the conclusions reached with regard to this issue in the previous discussion remain the same.

The one possible exception is that, if basic instruction in reading, writing, or arithmetic were not required by an electorally responsible decisionmaker, parents would appear to be entitled to have their child excused.259 Even if such instruction were not required by such a decisionmaker, however, the administrative needs of the state, as proprietor of the school, would justify such requirements as a basis for further instruction, and parents could therefore not have their child excused.

2. Balancing the State and Parental Interests

The different weights to be accorded the state and parental interests when the basis for excusal rests on the nondelegation doctrine, as opposed to the

259. It is, of course, highly unlikely that the decisionmaker would not require such instruction.
first amendment, lead to some different conclusions as to limitations on exercise of the right stemming from state administrative needs. The conclusions are the same as to participation in a graduation ceremony and receipt of a diploma or certificate of graduation. They are also the same if the objection is to an entire course, to a defined segment of a course, or to supplementary material. In these cases, the child should be excused with no limitation. Objectionable instruction which permeates the course and wholly or partly objectionable textbooks raise slightly different problems than they did in the context of value-based objections protected by the first amendment.

The parents could either allow their child to be instructed in the objectionable material or have their child excused from the course entirely if the course itself is not required in accordance with the nondelegation doctrine. If the course is required in accordance with the nondelegation doctrine, however, then, despite administrative costs or possible disruption to other children in the class, the parents’ request that the child not be exposed to the objectionable subject matter in the classroom must be accommodated. Accommodation must occur because the judgment by a democratically accountable body that the course should be required is a judgment that all students must be so instructed either for the benefit of society or for the benefit of the child. For a nonelectorally controlled decisionmaker to condition attendance on instruction in subject matter which is not necessarily a part of the course is therefore unjustifiable. Thus, substitution of another text or separate instruction of the child should be required.

The introduction of objectionable instruction in a required course could arise for several reasons. The electorally accountable decisionmaker may only require a general course such as American history. If no curriculum guide is adopted by such a decisionmaker, school administrators or teachers may include subjects of instruction in the course that the relevant community would not agree were subjects that should be taught to all children despite parental objection. Moreover, textbooks are published for a national market and may not conform to the dominant educational objectives of a particular community or state. Teachers may also have been accorded

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260. Although there may be a substantial consensus within most communities that American history should be required, a broad consensus about the content of the course is unlikely to exist. A right of excusal, therefore, affords an opportunity to assure that a consensus exists with regard to specific content as well.

261. The national market in textbooks has in the past led to the omission by textbook publishers of material that will offend particular regions, communities, or groups. See H. Black, The American School Book (1967). In 1844, the advertisement for the McGuffey Reader read:
a right to academic freedom that allows them to introduce material that does not correspond with any community consensus.

There are significant problems, however, in determining when the instruction to which the parents object is instruction which the electorally accountable decisionmaker considered to be necessarily included in the required course. If, for example, the legislature required instruction in American history, some agreement likely existed within the legislature about what instruction would be included in the course. To decide what is the “normal” content of the course is, however, troubling. One could look to the course as it had generally been taught at the time that the decisionmaker decided to require instruction in the course, but, aside from the significant problem of determining the general content, it is reasonable to assume that the legislators contemplated some change in course content as new developments in the field, occurred e.g., new historical events or new interpretations of historical events. Almost all bodies of knowledge change over time. The best solution, then, must be to allow the parents to have their child remain in the course, but excused from any instruction to which they object if, through a curriculum guide or otherwise, school authorities are unable to show that an electorally responsible decisionmaker has required the objectionable instruction.

A possible objection to this conclusion is that a particular community should be able to adopt a system of education for its children in which curriculum decisions are delegated to professional control. According parents rights to have their children excused from curriculum requirements made only by such professionals would impose added costs on the educational system and conflict with the community’s decision.

The response is, however, that because such a curriculum requirement does infringe on parental liberty, the parents are entitled to a more focused decision of the community that the objectionable instruction is considered necessary. The community can maintain its system of widespread academic

NO SECTARIAN matter has been admitted into this work. It has been submitted to the inspection of highly intelligent clergymen and teachers of the various Protestant and Catholic denominations, and nothing has been inserted, except with their united approbation . . . NO SECTIONAL matter, reflecting upon the local institutions, customs, or habits of any portion of the United States, is to be found among their contents, and hence they are extensively used at the South and at the North, in the East as well as in the West.

TURNING POINTS, supra note 18, at 178-79.

Recently, however, publishers have responded to criticisms that the textbooks are too bland by introducing more controversial material. This may indeed be the explanation for the Kanawha County and other textbook controversies. See note 3 supra.

The cost of textbook development and production appears to necessitate national marketing standards and preclude regional adaptations. See THE AUTHOR AND HIS AUDIENCE 67-70 (J.B. Lippincott ed. 1967). See also Redding, Revolution in the Textbook, Occasional Paper No. 9, at 19-22 (National Education Ass’n).
freedom for most children. If it opposes allowing children to be excused from specific curriculum requirements adopted by professional decision, it can indicate that by making a specific political decision to require that instruction of all children. Indeed, neither significantly increased costs nor adverse impact on other children in the school is at all likely to occur unless significant numbers of parents object. In such a case, the degree of consensus in favor of infringing parental liberty may be considered slight or perhaps nonexistent. Recognition of such a right is therefore clearly compatible with and supportive of the democratic political process.

V. THE RIGHT OF EXCUSAL, THE MAJORITARIAN POLITICAL PROCESS, AND VALUES OF FEDERALISM

A right of excusal on value-based grounds is technically anti-majoritarian, but often the exercise of a right of excusal because of value-based objections, and certainly the exercise of such a right on the basis of the nondelegation doctrine, will serve the majoritarian political process and democratic control of the public schools. Allowing parents to have their children excused from curriculum requirements to which they object on either ground would probably inform school decisionmakers of community dissatisfaction with the public school curriculum more quickly than would formation of an interest group. The right of excusal, indeed, could come in time to be regarded as an effective method of political protest. On the other hand, if parents have an excusal right, a strong minority of parents may not be as likely to seek to control the curriculum by lobbying to have instruction removed from the curriculum entirely. Thus, dissension within the community is likely to be reduced, and the majority are more likely to be able to achieve their educational goals for most of the children in the community through the public schools. It is only if the option of excusal is unavailable that parents wanting to protect their own children from objectionable instruction must seek to control the curriculum for all children.

Recognition of a right of excusal for parents by state courts, based upon the nondelegation doctrines of state constitutions or state constitutional protections of freedom of speech, obviously presents no conflict with values of federalism. Because the government of the public schools has traditionally rested with the states, however, recognition of a right of excusal on value-based or nondelegation doctrine grounds as a matter of federal constitutional law, enforceable by federal courts, may be regarded as conflicting with

262. See generally A. HirsCHMAN, EXIT, VOICE AND LOYALTY (1970). Parents are not, of course, the only citizens interested in the curriculum of the public schools, but they are likely to be among the most interested. See Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (limitation of franchise on school bond issues to parents and property holders unconstitutional).

263. HIRSCHMAN, supra note 262, at 43.
values of federalism. Other federal constitutional standards, however, have already been applied to the public schools under the fourteenth amendment. The interference with the functioning of the schools which a parental right of excusal would create is probably less than occurs from exercise of other constitutionally protected rights in the public schools.

A possible related argument against recognition of a right of excusal for value-based objections as a matter of federal constitutional law is that governance of the schools by the states already protects considerable diversity in schooling within the United States and affords objecting parents the opportunity to move to another state or locality to avoid curriculum requirements. Even assuming that meaningful diversity in schooling among states and communities does exist, a proposition for which no significant empirical data can be found, the opportunity to move to avoid objectionable curriculum requirements must surely be regarded as only theoretically available to most parents. In any case, unlike imposition of some other federal standards on the states, protection of a right of parental excusal on value-based grounds would not erode any diversity which a state owes to the dominant character and values of its people. Instead, such a right could augment that diversity by protecting the continued existence of the views and values of those within the state who dissent from the dominant opinion.

A far more serious problem of conflict with values of federalism arises from the implication of the argument in favor of a parental right of excusal based on the nondelegation doctrine that federal courts would be entitled to apply the nondelegation doctrine to decisions of the state legislature, state agencies, and state officials. This is because the reasons for invoking the doctrine stem not from concerns for separation of powers, a matter of state law, but instead stem from concerns about the impairment of a parental liberty protected under the federal constitution, thus justifying imposition of federal standards on state action. Such an application of the nondelegation doctrine would be novel, and obviously raises significant problems of federal jurisdiction.


265. Brown surely has; Tinker and Goss both would seem to impose greater administrative burdens.

266. The traditional view, based on the nondelegation doctrine's protection of separation of powers, is that the Constitution does not require a norm of internal state organization. COOPER, supra note 203, at 45. Nonetheless, the Supreme Court has stated:
CONCLUSION
State use of curriculum requirements to accomplish legitimate social goals through the education of children in the public schools potentially conflicts with parental interests in the education of their children. Common law precedents according parents extensive control over the education of their children in the public schools may no longer be valid or may have been abrogated by statute. Constitutional law precedents protecting parental liberty to direct the education of one's children are presently limited to the right to send one's child to a private school and a right to have one's child excused from instruction to which the parents object because of religious beliefs. For children of most parents, the public school is the only schooling available, and, absent a religious objection to instruction, no precedent extends to parents a constitutional right to control the content of the education one's child receives in the public schools.

Although the state has legitimate interests in preparing youth for citizenship, for a vocation, and for a satisfactory personal life, the potential for indoctrination of children in the public schools in values which conflict with those of their parents necessitates limitations on the power of the state to require instruction. Such potential indoctrination conflicts with the first amendment's protection of freedom of speech, its implicit protection of freedom of thought and the "marketplace of ideas," and the general principle that our government is a government by consent of the governed. To avoid possible indoctrinative effects, parents must have a constitutionally protected right to excuse their children from instruction which conflicts with the parents' values. Only instruction in our constitutional system of government and instruction in basic reading, writing, and arithmetic may be required despite parental value-based objection. Such rights of excusal must, however, be exercised in such a way as not to interfere with the legitimate administrative needs of the school system and the rights of other children in the school to instruction.

No one would deny that the infringement of constitutional rights of individuals would violate the guarantee of due process where no State interest underlies the state action. Thus, if the Attorney General's interrogation of petitioner were in fact wholly unrelated to the object of the legislature in authorizing the inquiry, the Due Process Clause would preclude the endangering of constitutional liberties . . . .
Sweezy v. New Hampshire, 354 U.S. 234, 254 (1956). Frankfurter objected that this was an unprecedented determination of the "appropriate distribution of powers and their delegation within the states." Id. at 256 (Frankfurter, J., concurring).

For problems of federal jurisdiction which application of the delegation doctrine by the federal courts to state government as a matter of due process would entail, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 921-22, 985-96 (2d ed. 1973). Beyond their being noted, these problems are beyond the scope of this Article.
Pedagogical objections to required instruction, whether substantive or methodological, do not raise first amendment issues and would not normally justify excusing a child at parental request, absent a valid common law basis. The doctrine of nondelegation of legislative powers, however, supports a right of excusal when parents object on substantive pedagogical grounds to instruction required only by decision of a nonelectorally responsible decisionmaker. Neither the common law nor the doctrine of nondelegation of legislative powers, however, supports excusal for methodological pedagogical objections.

Thus, based on the nondelegation doctrine, parents should have a right to have their child excused because of substantive pedagogical objections from instruction required by decision of appointed state officials, local school board members appointed by an elected official without an immediate and broad power of removal, appointed local school administrators, and teachers. Parental objections should also prevail over broadly granted authority, such as a statute or ordinance granting full academic freedom for teachers or prohibiting excusal from any curriculum requirement. If the instruction is required by decision of an electorally responsible decisionmaker, however, there would be no right of excusal on nondelegation doctrine grounds.

Parents whose objections are value-based rather than pedagogical would obviously be entitled to rely on the nondelegation doctrine ground of excusal, and, if it is available, they should. A nondelegation doctrine basis for excusal will normally require greater efforts by school officials to allow excusal from objectionable instruction without forcing the child to forego desired instruction. This is because the instruction from which excusal is sought lacks the support of a societal consensus that all children should be so instructed and is therefore an illegitimate condition on attendance at instruction which has that support.

Apart from disagreements with these conclusions, there are two reasons why courts might be unwilling to recognize the right of parents to have their child excused from curriculum requirements on either value-based or substantive pedagogical grounds. The first is that the adverse political reaction to the recognition of such a right might be considerable, especially on the part of school administrators and teachers. A concern to avoid such a reaction, of course, ought not play a role in the decision. This is especially so since such a parental right will not interfere to any significant extent with the ability of school administrators and teachers to perform their functions, nor with the ability of other children in the school to receive the educational benefits which the public schools provide.
The second reason for judicial reluctance to accord parents such a right would rest on a perception that curriculum requirements have been tolerated for so long that courts ought not disrupt the allocation of decisionmaking power between the courts and state legislatures and educational agencies. Minority rights entitled to constitutional protection should not be considered eliminated by long-term acceptance by the majority of their violation. This basis for not recognizing a parental right of excusal should also be rejected because it is difficult to know in fact whether curriculum requirements have long been accepted as legitimate or have simply not been a significant issue until recently for reasons unrelated to a societal judgment of legitimacy. For much of the period of time in which widespread and compulsory school attendance has been in existence, it is likely that communities were more homogeneous than they are now and that the teachers and school administrators were not only more like the community in which they served, but also more subject to community control through the local school board. Under such circumstances, parental objection to the public school curriculum would be less likely. Parental objections to the curriculum have nonetheless occurred ever since public schools began. If this problem has not previously reached national attention to the degree of present day controversies, it is because the issue of the extent to which parents may retain control over the education of their children in the public schools has simply been latent.