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A Classroom for All: Why Controversial Curriculums Have No Place in Our Public Schools

Monica Shenoda

INTRODUCTION

The United States prides itself on valuing the importance of schooling and education. While there are many variations of schooling in our society today, Americans heavily rely on public schools to ensure their children receive a quality education.[1] Most people can agree that a major role of our local, state, and federal governments is to provide a "free" and effective education—though much of our taxes go towards funding public schools. Moreover, unlike other types of schools, such as private and charter, that can discriminate on the basis of wealth or intellectual abilities, public schools educate students of all different ethnicities, economic statuses, and religions. Therefore, public schools should be inclusive institutions for all students, in order for everyone to feel welcomed and be able to learn. However, since the twentieth century, religion and public schools have frequently been in tension.

In general, the Constitution clearly sets out the role of religion in our country through the Religion Clauses of the First Amendment which state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[2] As a result, it is established principle that public schools cannot teach about religion in a devotional way without violating the Establishment Clause. However, while our governments have consistently ensured public schools do not promote religion, the opposite cannot be found true as well. In other words, school curriculums have increasingly been including, or even mandating, certain topics be taught which are in clear violation of many students' faiths. In fact, some of these topics may offend parents and students of little or no faith as well, simply because they push for a certain belief which might be contrary to personal viewpoints. Two common topics in this area include teaching about the LGBT

[1] As of 2021, over fifty million K-12 students attend public schools. *See* Melanie Hanson, *K-12 School Enrollment & Student Population Statistics*, EDUCATION DATA INITIATIVE (September 19, 2021), https://educationdata.org/k12-enrollment-statistics.
[2] U.S. CONST. amend. 1.

movement and evolution science. These topics pose a problem in public school curriculums because they send a certain message to children, namely that the LGBT movement should be accepted and that the universe started in a particular way. Thus, it is important to note that not all controversial topics present this same problem. For example, many may consider sex education to also violate some beliefs; however if public schools simply inform students that if they *choose* to engage in certain activities they should learn how to mitigate subsequent consequences, then the school has not endorsed a certain belief.[3]

In our ever pluralistic society, many topics can run counter to different types of religions. While public schools cannot realistically cater to every single belief in classroom curriculums, focusing on topics that are largely and historical known to be in direct violation of many religious beliefs should not be taught. In the same vein of neutrality, topics on religion, albeit taught in a non-devotional way, should not be included in public school curriculums either. The cases will show that even when schools attempt to impartially teach about different religions, some will argue the fine line between devotional and non-devotional teaching has been crossed. Therefore, a common theme to draw from cases in this space can be that both the Free Exercise Clause and the Establishment Clause may be violated when religious or anti-religious views are taught in public schools. Plaintiffs in these suits range from parents claiming their Free Exercise right has been violated if they feel their beliefs have not been respected, or conversely, parents claiming the Establishment Clause has been violated if they believe a school is advancing a certain religious viewpoint that undermines their children's alternative belief or lack thereof. Therefore, this paper proposes that in order for public schools to be an inclusive place for all students, they should refrain from teaching controversial topics that could offend either religious or non-religious students.

[3] However, sex education in public schools has been a contentious debate for many years, which has caused parents to seek opt-outs for their children. Opt-outs will be discussed in Section III of this paper.

This paper is organized as follows: Section I describes new laws that mandate LGBT curriculums. Section II provides the constitutional framework of parental rights to their children's upbringing as well as tests the Court uses to determine whether a violation of the Religion Clauses occurs. Section III will then discuss accommodations the Court has opined about over the years, such as opt-outs, as a remedy for these curriculums. Finally, Section IV will analyze voucher programs as a unique approach to accommodations as well as provide some other thoughts moving forward.

SECTION I: NEW LAWS AFFECTING PUBLIC SCHOOL CURRICULUMS

In recent years, some state legislatures have heavily focused on including LGBT teachings in their public school curriculums. Currently, six states actually mandate these teachings: California, New Jersey, Colorado, Oregon, Illinois, and Nevada.[4] California became the first state to require this reworked school curriculum through the FAIR Education Act passed in 2011,[5] which seeks to include a study of "the role and contributions" of LGBT Americans, among other minority groups.[6] As a result of this Act, teachers began using new textbooks that furthered this goal starting in the 2017-2018 school year.[7] Interestingly, the Act prohibits schools from "adopting instructional materials that contain any matter reflecting adversely upon persons" because of their religion, among other factors.[8] Yet, at the same time, the revised curriculums set out to educate children from as young as kindergarten about LGBT familial structures, while ensuring older students learn about LGBT figures and history.[9] Since then, the remaining states followed

[4] Sabia Prescott, *Six states have now passed LGBTQ+ inclusive curriculum legislation—each with a different definition of 'inclusion,'* NEW AMERICA (June 17, 2021), https://www.newamerica.org/education-policy/edcentral/six-states-have-now-passed-lgbtq-inclusive-curriculum-legislationeach-with-a-different-definition-of-inclusion/.
[5] *Id.*
[6] Los Angeles County Office of Education, *About the FAIR Education Act*, https://www.lacoe.edu/Curriculum-Instruction/History-Social-Science/FAIR-Act.
[7] Prescott, *supra* note 3, at 3.
[8] FAIR Education Act
[9] Prescott, *supra* note 3, at 3.

California's lead in requiring these curriculums, but have called for variations among them. For instance, in Colorado, school boards may receive state funding for these new textbooks and in Illinois, a coalition called the "Illinois Inclusive Curriculum Advisory Council" formed to determine curriculum content.[10]

In 2019, New Jersey became the second state to mandate LGBT-inclusive curriculums and required this change to "take effect immediately" in the 2020-2021 school year through New Jersey S1569.[11] However, unlike California or Colorado which only require LGBT implementation in social sciences and history courses, New Jersey became the first state to mandate the curriculum in all subjects.[12] The legislation seeks to teach "the political, economic, and social contributions" of LGBT figures to middle and high school students.[13] Moreover, in just March of this year, the state legislature also enacted New Jersey A4454, which seeks to highlight and promote tolerance "in connection with gender and sexual orientation," in all subject areas starting from kindergarten.[14] While some state representatives felt more comfortable allowing older students to learn from this curriculum, they were more opposed to teaching younger students these topics.[15]

New Jersey S1569 passed partly due to the advocacy of a group called Garden State Equality (GSE), which then launched a pilot program in the beginning of 2020 to prepare for the

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[10] *Id.*
[11] N.J. Stat. § 18A:35-4.35.
[12] Sammy Gibbons, *New Jersey's LGBTQ-inclusive curriculum a 'mindset shift' to help center diverse voices*, NORTHJERSEY.COM (June 1, 2021), https://www.northjersey.com/story/life/2021/06/01/new-jersey-lgbtq-curriculum-requirement-boosts-student-confidence/7243359002/.
[13] N.J. Stat. § 18A:35-4.35.
[14] N.J. Stat. § 18A:35-4.36a.
[15] Assemblyman Brian Bergen, who previously supported New Jersey S1569 stated, "'There's a certain level of naivety that our children enjoy, and we should really protect that.' Assemblyman Gerald Scharfenberger also argued that 'the proposed curriculum changes stray too far from the purposes of the educational system, which he said is to prepare students for the world and pass on knowledge and skills as to guide them to college or into a trade.'" Samantha Marcus, *N.J. schools would teach lessons in diversity under bill headed to governor*, NJ.COM, (January 12, 2021), https://www.nj.com/politics/2021/01/students-in-nj-would-take-courses-in-diversity-under-bill-headed-to-governor.html.

2020-2021 curriculum changes.[16] In developing the program, GSE created lesson plans for grades spanning from fifth to twelfth so that curriculums would be ready for the start of the school year.[17] A GSE spokesperson expressed that he hoped the program would not face delays like those which occurred after California passed its Act in 2011, but there, the curriculum "has not been fully implemented" due to opposition from conservative parents.[18] Similarly, New Jersey has also faced pushback from conservative groups and parents who have sought accommodations in response to these two laws. This paper will return to those accommodations in Section IV.

SECTION II: CONSTITUTIONAL FRAMEWORK

The Court has emphasized the right for parents to raise their children as they each see fit over the government's interests throughout the twentieth century. However, the cases will show that while parental rights to their children's upbringing are protected, they face limitations in public schools. These limitations often clash with parents bringing both Free Exercise claims because they believe certain teachings violate their religious faiths, as well as parents bringing Establishment Clause claims because they feel certain teachings are enforcing faiths contrary to their own. Thus, the common theme to take away from the following cases is that regardless of whether students and their families are devoutly religious to a particular creed, not religious at all, or fall somewhere in between, they all believe public schools should not interfere with their approach to childrearing.

a. Parental Rights Cases

Meyer v. Nebraska became one of the earliest and most influential cases where the Court

[16] Melanie Burney, *LGBTQ education is now mandatory in N.J. schools. Here's how teachers are preparing*, THE PHILADELPHIA INQUIRER, (January 20, 2020), https://www.inquirer.com/education/nj-lgbtq-education-curriculum-lesson-plans-mandate-20200120.html.
[17] *Id.*
[18] *Id.*

establishes parental authority over childhood education in 1923. There, a teacher was convicted for violating a state statute that prohibited teaching students any subject in a language other than English unless they passed the eighth grade.[19] Although the state sought to discourage immigrants from growing their foreign presence by ensuring school-aged children learn in English until "it had become a part of them,"[20] the Court held "the legislature ha[d] attempted materially to interfere . . . with the power of parents to control the education of their own."[21] It reasoned that the right to raise children constituted a liberty guaranteed by the Fourteenth Amendment just as the right to marry and the right to worship God according to each individual's conscience.[22] As a result, the Court reversed the decision below because the state's interest in promoting American patriotism did not supersede the parents' right in so choosing to promote their children's education through learning foreign languages.[23]

Less than two years after the *Meyer* decision, the Court opined on another case involving an Act interfering with parental rights in education, not in deciding *what* children can learn but rather *where* children can learn, in *Pierce v. Society of Sisters*. There, Oregon enacted the Compulsory Education Act which required parents to send their children to public school or else be charged with a misdemeanor.[24] The Act purportedly sought "to compel general attendance" for students,[25] and as a result, parents began to quickly pull out their children from private schools for fear of being criminally charged.[26] Two private corporations brought suit due to decreased enrollment and loss of profitability: the Society of Sisters, which provided both religious and

[19] *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).
[20] *Id.* at 396.
[21] *Id.* at 401.
[22] *Id.* at 399.
[23] *Id.* at 403.
[24] *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530 (1925). The Act required "every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides; and failure so to do is declared a misdemeanor."
[25] *Id.* at 531.
[26] *Id.* at 532.

secular education as well as care for orphans, and a military academy, which offered both academic and military training for males from ages five to twenty-one.[27] Although these corporations had very different missions and approaches towards education, they both offered an education comparable to that offered in public schools.[28] As a result, the harm the Compulsory Education Act sought to mitigate did not pose a threat for the children attending these private schools.

While the private schools brought this suit because of the Act's interference with their institutions, the Court looked to its decision in *Meyer* in reasoning that the Act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[29] Notably, the Court in *Pierce* further stated that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[30] As a result, the Court affirmed the decision below, holding the state could not threaten the private schools with enforcing the arbitrary Act.

Fast forwarding to 1972, the Court decided another case in the realm of restricted education, but this time, it focused heavily on the parents' rights under the Free Exercise Clause in addition to the substantive due process reasoning of *Meyer* and *Pierce*. In *Wisconsin v. Yoder*, an Amish community brought suit arguing the state's compulsory school attendance policy violated their religious way of life, as guaranteed to them under the Free Exercise Clause. The law required children to attend either public or private school until at least the age of sixteen, but the respondents refused to send their children to *any* school after the eighth grade because a high

[27] *Id.* at 531-532.
[28] *Id.* at 532-533.
[29] *Id.* at 534.
[30] *Id.* at 535.

school environment would go against their way of life, regardless of where the education took place.[31]

Like in *Pierce*, the Wisconsin law intended to ensure children attend school so they could later become productive members of society. On these facts alone, one might argue that while the state did not have a strong claim for the law in *Pierce*, since the private school students attended schools that offered an analogous education to that of public schools, the state in *Yoder* did have a strong claim, since the Amish students did not attend any school to receive a secondary level education. While one may wonder why the Court did not compel the Amish children to attend high school in a religious institution or be home-schooled to reach a compromise between the two parties' interests, the Court instead focused on the preserved Amish tradition of being a self-reliant community through the practical skills the children continue to learn.

Relying on both *Meyer* and *Pierce*, the Court stated that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."[32] It further reasoned that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment."[33] Overall, while subsequent cases will display the limitations to the parental rights of child upbringing, *Meyer*, *Pierce*, and *Yoder* established that fundamental liberty which many today argue must be emphasized more against controversial curriculums state legislatures continue to impose.

Yoder became not only a fundamental parental rights decision, but also a significant Free Exercise Clause decision as well. Pointing to the influential case of *Sherbert v. Verner*, the Court

[31] *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).
[32] *Id.* at 213-214.
[33] *Id.*

stated, "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[34] In *Sherbert,* a Seventh-Day Adventist Church member was discharged by her employer for failing to work on Saturdays, "the Sabbath Day of her faith."[35] When she then filed for unemployment benefits, the South Carolina Employment Security Commission found that the plaintiff restricted herself in accepting available work, thus disqualifying her from receiving benefits. Just like the Court in *Sherbert* found that the decision of the Commission forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand,"[36] the Court in *Yoder* found that the compulsory school attendance policy forced the Amish to "either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[37]

Sherbert established the rule that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[38] This strict scrutiny standard of review meant that even generally applicable laws that do not seek to target religious views can still pose a Constitutional violation. The "*Sherbert* test" remained the operative standard until the 1990 decision of *Employment Div., Dept. of Human Resources of Oregon v. Smith*. There, members of the Native American Church were fired from their jobs because they ingested peyote for sacramental purposes.[39] When they then applied for unemployment compensation, "they were determined to be ineligible for benefits because they had been discharged for work-related

[34] *Id.* at 220 (*citing Sherbert v. Verner*, 374 U.S. 398 (1963)).
[35] *Sherbert*, 374 U.S. at 399.
[36] *Id.* at 404.
[37] *Wisconsin v. Yoder*, 406 U.S. at 218.
[38] *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990).
[39] *Id.* at 874.

'misconduct.'"[40] While the Oregon Supreme Court found in favor of the respondents using the reasoning of *Sherbert*, the United States Supreme Court established a new "*Smith* test," in which a neutral law of general applicability cannot give rise to a religious exemption.[41] As a result, religion-based exemptions received reduced protection, since the *Smith* test lowered the strict scrutiny standard to rational basis review. However, if a law is not neutral or generally applicable, strict scrutiny still applies. Currently, the Court appears to be edging towards a return to mainly applying the *Sherbert* test because it has increasingly found that the contested laws before it are not neutral laws of general applicability.[42]

As these cases have shown, plaintiffs claim their Free Exercise rights have been violated when they cannot receive a religious exemption to a law that runs counter to their religious views. Therefore, parents who claim their children's school refuses to accommodate their religious views when it comes to classroom curriculums will likely turn to the Free Exercise Clause in claiming a violation. If the Court continues to move towards strict scrutiny, schools will be faced with the difficult task of proving that their approach towards the affected students was the least restrictive alternative to the compelling educational interest. Recent decisions like *Tandon* and *Fulton*, though outside the educational context, lead to the conclusion that many opt-outs will be granted. Section III of this paper will discuss opt-outs in greater detail.

b. No Devotional Exercise in Schools Cases

The 1960s began the limitation on parental control in child upbringing over school influences. Beginning with the landmark case of *Engel v. Vitale*, the Court established the firm holding that devotional prayer, even if not tied to a particular religion or sect, violates the

[40] *Id.* at 874.
[41] *Id.* at 879.
[42] *See* two cases that came before the Supreme Court this year: *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). For example, in *Fulton*, the Court found that because the City's policy allowed for individual exemptions yet did not intend on granting an exception to the religious organization, the law involved was not generally applicable and thus *Smith* does not apply.

Establishment Clause.[43] Moreover, it did not matter that students could remain silent during the prayer or even excuse themselves from the room; since the prayer furthered a set of beliefs, it violated the Establishment Clause.[44] However, although these decisions curtailed religious influence for many larger, "mainstream" religions of this time, they also created more religious freedom for those of minority faiths.[45] Viewed in this way, schools were required to become more neutral in catering to all students, whether they belonged to a large or small religion, or to no religion at all. Nevertheless, while situations involving prayer appear to be clear-cut cases, other teachings and activities call for a deeper analysis.

c. Evolution and Religious Theories of Science

After Charles Darwin published the monumental *On the Origin of Species* in 1859, contentions began to erupt between this new idea of evolution and Biblical beliefs that God created the universe and mankind. Although Darwin published his work in England, he quickly gained traction in the United States. The 1870s displayed American Evangelists beginning to attack "Darwinism" for its plain contradictions with Biblical scripture, as theories of evolution as well as theories of human origin began to flourish following Darwin's *The Descent of Man* publication in 1871.[46] Largely in response to Darwinism, nineteenth century America saw the development of the Fundamentalist movement born out of the Evangelical Protestants.[47] To combat the spread of Darwinism, Fundamentalists began "promot[ing] statutes prohibiting the teaching of evolution in public schools."[48] For a span of about forty years until the 1960s, biology textbooks avoided

[43] *Engel v. Vitale*, 370 U.S. 421 (1962).
[44] *Id.* at 430. *See also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Lee v. Weisman*, 505 U.S. 577 (1992).
[45] For example, the plaintiffs in *Schempp* were practicing Unitarians that believed the school's particular reading of the Bible at the start of each day conflicted with their own reading of the text. *Schempp*, 374 U.S. at 206.
[46] David Masci, *Evolution: A Timeline*, PEW RESEARCH CENTER, (last updated February 3, 2014) https://www.pewforum.org/2009/02/04/evolution-a-timeline/.
[47] *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1258 (E.D. Ark. 1982).
[48] *Id.* at 1259.

mentioning Darwin or his theories, and conservatives succeeded in endorsing anti-evolution thought.[49]

However, the 1960s saw a change not only in traditional values but also in scientific advancement, which encouraged schools to "modernize" their science curriculums.[50] Biology classrooms saw a dramatic overhaul in curriculums, mainly in response to the 1957 launch of the Sputnik satellite by the Soviet Union.[51] In an effort to remain competitive with the Soviet Union, "the National Science Foundation funded several programs" to renovate science in the classroom.[52] Working alongside scientists and teachers, different organizations created new textbooks which heavily focused on introducing the theory of evolution.[53] In fact, by the 1980s, the Court noted that "fifty percent of American school children currently use [the new] books directly and the curriculum is incorporated indirectly in virtually all biology texts."[54] In response to all of the secular shifts away from traditional creation teachings, Fundamentalist groups coined the phrases "creation science" and "scientific creationism" in the mid-1960s, which sought to promote the belief that scientific data supports the Biblical book of Genesis.[55] The following monumental cases display how the Court responded to this contention in public schools.

The case of *Epperson v. Arkansas* became a landmark decision on evolution in public schools. There, a young tenth grade biology teacher employed by the Little Rock school system was presented with a new biology textbook that contained a chapter on evolution, specifically that "man [originated] from a lower form of animal."[56] However, Arkansas law made it "unlawful for a teacher in any state-supported school or university 'to teach the theory or doctrine that mankind

[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Epperson v. Arkansas*, 393 U.S. 97 (1968).

ascended or descended from a lower order of animals,' or 'to adopt or use in any such institution a textbook that teaches' this theory."[57] Those who violated this law would be charged with a misdemeanor and dismissed from their teaching position.[58] As a result, the teacher brought suit in face of this dilemma of either teaching the condemned chapter but risking her job per state law, or not teaching the chapter, but getting in trouble by the school administration. She sought to have the state statute void so that she could freely teach from the new textbook without facing dismissal or criminal charges.[59] While the chancery court found the statute to be in violation of the First Amendment, which applies to the states by the Fourteenth Amendment, the Arkansas Supreme Court reversed, holding that the state has power to dictate public school curriculums.[60]

The case made its way to the United States Supreme Court, in which the statute was found to be in violation of the Religion Clauses. The Court reasoned,

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.[61]

Interestingly, the Court went into a discussion of *Meyer*, not for its holding that parents have the right to dictate the upbringing of their children based on what they learn in school, but rather for the proposition that the Due Process Clause guarantees the right to "acquire useful knowledge."[62] Yet, even after discussing *Meyer*, the Court went on to state that this present case only needs to be analyzed under the Religion Clauses, and under *Engel* and *Schempp*, Arkansas bans the teaching of a scientific theory solely for "reasons that violate the First Amendment."[63] Therefore, because

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[57] *Id.* at 99.
[58] *Id.*
[59] *Id.* at 100.
[60] *Id.* at 100-101.
[61] *Id.* at 103-104. The Court further stated, "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."
[62] *Id.* at 105.
[63] *Id.* at 107. The Court further stated, "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence."

the law could not be found neutral with respect to religion, the Court reversed the holding of the Arkansas Supreme Court.

Louisiana took a different approach when handling evolution in its public schools which the Court opined on in the 1987 case of *Edwards v. Aguillard*. There, the state had a "Creationism Act" which "forb[a]de the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.'"[64] Notably, the state did not enforce either theory, however if one theory was taught, the other had to be taught as well.[65] Yet, even this seemingly fair approach in handling both theories still caused tension among some parents and teachers. While Louisiana state officials argued that the Act served to "protect a legitimate secular interest, namely, academic freedom," those in opposition argued that it violated the Establishment Clause.[66] Both the district and appellate courts agreed with the opponents, in believing the Act essentially served as a means to promote the religious belief of creationism because evolution could not be taught on its own.[67]

When the case came to the Supreme Court, the Majority applied the *Lemon* test, which came from the 1971 landmark case of *Lemon v. Kurtzman*, to determine whether a violation of the Establishment Clause occurred. In order to avoid a violation, a three prong test must be met: "First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion."[68] Notably, the Court stressed the importance of ensuring no Establishment Clause violations occur in public schools due to the

[64] *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987).
[65] *Id.*
[66] *Id.* at 582.
[67] The appellate court believed the "Louisiana Legislature's actual intent was 'to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief.'"
[68] *Id.* at 583 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971)).

impressionability of children.[69] In applying the test to this case, the state officials could not even satisfy the first prong because the Court found the secular purpose to be insincere.[70] In other words, because teachers were not confined to only teach evolution, but could rather teach about any scientific theory anyway, the Act did not further any secular interest. While one may argue that the Act gave both creation science and evolution equal classroom time, furthering the former could not be considered a secular purpose. The Court reasoned:

> The Creationism Act is designed either to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught or to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught.[71]

Whether the Court correctly deciphered the true intent of all the Louisiana legislators may never be fully known, but this case displays that even if the state intended to remain neutral in requiring that if one creation theory was taught, the other had to be taught as well, the Court still believed that a violation of the Establishment Clause occurred. Therefore, as I will argue in Section IV, the best way to remain truly neutral with regards to these two controversial teachings is to simply avoid teaching either of them. Instead, public school science teachers can focus on teaching students all of the other uncontentious lessons within this subject that will add to their knowledge without infringing on their First Amendment rights.[72]

Not long after the *Edwards* decision, Louisiana again found itself in federal court for violating the Establishment Clause when dealing with evolution in its public schools. In *Freiler v.*

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[69] *Id.* The Court stressed that not only are children impressionable in elementary and secondary levels, but their attendance is mandated. Thus, "'[i]n no activity of the State is it more vital to keep out divisive forces than in its schools . . . .'" (citing *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.)).

[70] *Id.* at 587.

[71] *Id.* at 593.

[72] Some scholars have openly acknowledged the connection between evolution and anti-religious viewpoints and propose that the *Lemon* and endorsement tests should be revised in order to freely teach evolution. *See* Casey Luskin, *Darwin's Poisoned Tree: Atheistic Advocacy and the Constitutionality of Teaching Evolution in Public Schools*, 21 TRINITY L. REV. 130, 132 (2015).

Tangipahoa Parish Board of Education, the school board mandated a disclaimer to be read each time a classroom discussed evolution.[73] The mandate also encouraged students to "think critically before forming an opinion" and noted the privilege of "maintain[ing] beliefs taught by parents on this very important matter of the origin of life and matter."[74] Importantly, the resolution passing the mandate warned that "the Scientific Theory of Evolution [] should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation *or any other concept*."[75] Although perhaps less neutral than the law in *Edwards*, the Board of Education argued that this mandate did not just intend to protect Biblical teachings but also other theories that conflict with evolution.

In determining whether a violation of the Establishment Clause occurred, the Court not only analyzed the case under the *Lemon* test discussed above, but also under the two other tests used in this realm: the endorsement test and the coercion test. The endorsement test, as the name suggests, "seeks to determine whether the government endorses religion by means of the challenged action."[76] "The government unconstitutionally endorses religion when it 'conveys a message that religion is "favored," "preferred," or "promoted" over other beliefs.'"[77] The coercion test, also aptly named, "analyzes school-sponsored religious activity in terms of the coercive effect that the activity has on students."[78] The court looked to another Fifth Circuit decision to note that school sponsored activity violates the Establishment Clause when "(1) the government directs (2)

[73] *Freiler v. Tangipahoa Par. Bd. of Educ*., 185 F.3d 337, 341 (5th Cir. 1999). The Resolution passing the mandate read in part: "Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation, the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory."
[74] *Id.*
[75] *Id.* (emphasis added)
[76] *Id.* at 343.
[77] *Id.*
[78] *Id. See also Lee v. Weisman* 505 U.S. 577 (1992) (holding that the nonsectarian, general prayer given by a rabbi during a middle school graduation compelled and persuaded the students to participate in a religious exercise even if they chose to remain silent).

a formal religious exercise (3) in such a way as to oblige the participation of objectors."[79] While there can be much overlap among these three tests, not all usually apply to a specific situation. For instance, here, the court noted that because no pressure occurred to participate in a religious exercise, the coercion test should not be applied.[80] Instead, it applied both the *Lemon* test and the endorsement test to the facts of this case.

In applying the first prong of the *Lemon* test, the court explained that "a sincere secular purpose for the contested state action must exist; *even if that secular purpose is but one in a sea of religious purposes*."[81] According to the school board, the disclaimer served three purposes: "(1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and (3) to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution."[82] In finding only the latter two purposes sincere, the court went on to analyze whether those purposes were "permissible secular objectives."[83] The court found the disclaimer valid under the first prong of *Lemon* by relying on the understanding that the Supreme Court required as little as one secular purpose for satisfaction. From here, the court moved on to the second prong, which it noted functions like the endorsement test.[84] At this point, the disclaimer violated the Establishment Clause because it advanced religion by protecting the Biblical version of creation.[85] More specifically, the court interpreted the mandate's language of "exercise[ing] critical thinking . . .

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[79] *Id.* (citing *Jones v. Clear Creek Independent School District*, 977 F.2d 963, 970 (5th Cir. 1992)).
[80] *Id.* at 344.
[81] *Id.* (emphasis added). The majority in *Edwards* did not explain the first prong in this way, but in his dissent, Justice Scalia attacked the holding partially on this ground in stating, "Our cases have also confirmed that when the *Lemon* Court referred to 'a secular . . . purpose,' it meant '*a* secular purpose.' The author of *Lemon*, writing for the Court, has said that invalidation under the purpose prong is appropriate when 'there [is] no question that the statute or activity was motivated wholly by religious considerations.'" *Edwards*, 482 U.S. at 614 (Scalia, J., dissenting) (citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)).
[82] *Id.*
[83] *Id.* at 345.
[84] *Id.* at 346.
[85] *Id.*

together with the explicit reference to the 'Biblical version of Creation' . . . urges students to think about religious theories of 'the origin of life and matter' as an *alternative* to evolution, the State-mandated curriculum."[86] Thus, Louisiana was found to be in violation of the First Amendment yet again.

After the *Edwards* decision in 1987, conservatives coined a new phrase to bolster scientific legitimacy in their religious creation theory: intelligent design.[87] In 1989, a Christian organization published the new science textbook, *Of Pandas and People*, which discussed an intelligent designer who arranged parts of the universe.[88] While this concept of intelligent design existed in different forms over the years, the textbook did not take the official position that attributed God as the designer.[89] Nonetheless, experts argued that no other alternative to God has been proposed and the argument of intelligent design itself has been described as a religious argument. Courts soon began to face intelligent design as a new wrinkle to the evolution and creation science debate. The glaring question asked whether intelligent design served as an alternative scientific theory to evolution, or whether it constituted creationism in a new form.

Kitzmiller v. Dover Area School District involved a Delaware school board which passed a resolution mandating a certain disclaimer to be made, similar to the disclaimer in *Freiler*. The resolution required that "[s]tudents will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught."[90] Moreover, teachers were required to read a statement to ninth grade biology students that essentially expressed that evolution was a theory and therefore not a fact, and that "intelligent design is an explanation of the origin of life that differs from Darwin's view."[91]

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[86] *Id.* at 347.
[87] *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 718 (M.D. Pa. 2005).
[88] *Id.* at 718.
[89] *Id.*
[90] *Id.* at 757.
[91] *Id.* at 725.

Like in *Freiler,* the board in *Kitzmiller* advised students to "keep an open mind" with respect to these concepts, and the subject of the Origins of Life should be left for students to discuss with their families.[92] The court found that the language of these statements to have violated the Establishment Clause under both the *Lemon* test and endorsement test.[93] In so finding, it sought to determine "whether an 'objective observer' in the position of a student of the relevant age would 'perceive official school support' for the religious activity in question."[94] In looking at how the phrase "intelligent design" came about as well as considering how the concept has been described by experts in this space, the court found overwhelming evidence to classify intelligent design as a religious argument in which the school attempted to endorse. Not only has intelligent design been described as a religious concept due to its focus on a supernatural designer,[95] but also because the word "creation" systematically changed to "intelligent design" right after the *Edwards* decision in 1987.[96] Thus, the court concluded that "intelligent design is creationism re-labeled."[97]

However, the court in *Kitzmiller* did not end its opinion there. It felt compelled to further analyze whether intelligent design is a science at all, in hopes of "prevent[ing] the obvious waste of judicial and other resources which would be occasioned by a subsequent trial involving the precise question before us."[98] The court articulated that "[intelligent design] takes a natural phenomenon and, instead of accepting or seeking a natural explanation, argues that the explanation is supernatural."[99] Moreover, it also looked to several scientific associations as well as professors in the field, all coming to the conclusion that intelligent design cannot be considered a science because it is "not testable by the methods of science," through studies and peer review.[100] After

[92] *Id.* at 726.
[93] *Id.* at 763.
[94] *Id.* at 715.
[95] *Id.* at 720.
[96] *Id.* at 722.
[97] *Id.*
[98] *Id.* at 735.
[99] *Id.* at 736.
[100] *Id.* at 737.

that lengthy discussion, the court went on to say that it "express[es] no opinion on the ultimate veracity of [intelligent design] as a supernatural explanation," but intelligent design "is grounded in theology, not science."[101]

Notably, the United States Supreme Court has not spoken on the issue of intelligent design. Since *Kitzmiller*, some states have introduced laws that allow teachers to openly critique evolution in science classes, by justifying the promotion of academic freedom.[102] In doing so, teachers discuss the strengths and weaknesses of evolution, as well as discuss the scientific evidence for creationism.[103] While some propose that public schools should teach creation science to supplement teachings of evolution,[104] others continue to find that regardless of a disclaimer encouraging critical thinking, any alternative theory criticizing evolution is religiously motivated in violation of the Establishment Clause.

SECTION III: ACCOMMODATIONS IN CURRICULUM TO ALLOW PARENTS TO DICTATE UPBRINGING

Largely due to the fundamental notion that parents have the right to their children's upbringing, parents have sought for accommodations during times when they felt their school boards have infringed on that right. Often times, accommodations can be viewed as the compromise between the religious objections of parents in having their children exposed to certain material and the goals of schools to emphasize a curriculum they choose to teach their students.

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[101] *Id.* at 745.
[102] Leslie C. Griffin, *Law and Religion* 680 (Robert C. Clark et al.) 4th ed. (2017).
[103] *Id.* Louisiana became the first state in this endeavor, in passing the Academic Freedom Act in 2008. Tennessee passed a similar bill in 2012, and other states since then have made efforts to pass laws of this sort. While both the Louisiana and Tennessee laws claim to encourage students' critical thinking skills, they extend these skills not only in discussing evolution, but also subjects such as origins of life, global warming, and human cloning.
[104] *See* Mark Hilliard, *The Evolution and Misrepresentation of the Establishment Clause: Is Teaching Intelligent Design in Public Schools a Governmental Endorsement of Religion Prohibited by the First Amendment*, 32 DAYTON L. REV. 145, 165-66 (2006) (arguing that informing students on intelligent design does not violate the Establishment Clause but rather promotes healthy discussion on different theories because evolution is still only one theory). *But see* Sarah Lyall, *Anglican Leader Says the Schools Shouldn't Teach Creationism*, N.Y. TIMES, March 22, 2006, at A3 (English Archbishop believes that American schools should refrain from treating the Biblical account of creation as "a theory alongside other theories").

When schools allow for accommodations, both parties can have their concerns met. However, the problem arises when school boards choose not to honor parents' requests for accommodations for lessons they feel contradict the beliefs they raise their children with. When accommodations are not honored, not only do the families feel their Free Exercise claims have been disrespected, but they are also left to make the difficult choice of either surrendering to the school's insistence in teaching the controversial lesson, or having to find an alternative means of educating their children.

a. General Accommodations

The 1950s saw an early case of public school accommodations, however, not for the purpose of avoiding a certain lesson, but rather for receiving religious education. In *Zorach v. Clauson*, the Court had to address whether a New York City program that allowed public schools to release children for religious instruction during school hours violated the First Amendment.[105] To avoid any entanglement between church and state, students who participated in this program left midday for religious instruction, thus no devotional teachings or exercises took place on school grounds.[106] Moreover, the religious institutions paid for all of the costs involved, thus no public funds were ever used.[107] Yet, even in trying to maintain strict separation, the plaintiffs who brought this action consisted of New York City taxpayers and residents who argued that the schools endorsed religious instruction through their cooperation in this program, and the release time of the religious students halted regular classroom activities to the detriment of all the other students.[108] The Court affirmed the decision below, in holding the schools did not violate the Establishment Clause because they "d[id] no more than accommodate their schedules to a program

[105] *Zorach v. Clauson*, 343 U.S. 306, 308 (1952).
[106] *Id. Contrast with Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (holding that religious instruction in public school classrooms for Jewish, Catholic, and Protestant faiths violated the Establishment Clause).
[107] *Id.*
[108] *Id.* at 309.

of outside religious instruction."[109] To hold otherwise, the Court reasoned, would mean holding the Constitution requires "that the government show a callous indifference to religious groups."[110]

However, when some circuit courts faced the question of whether accommodations should be made for parents opposing certain curriculums years later, they declined to extend that same reasoning. In *Mozert v. Hawkins County Bd. of Education*, the Sixth Circuit Court of Appeals had to determine whether a school board violated the plaintiffs' Free Exercise rights through mandating a particular reading program. There, students from "born again Christian" families either participated in an alternative reading program or were simply excused when their classes read from, what some parents considered, a controversial assigned reader.[111] According to the objecting parents, the reader included teachings of evolution, mental telepathy, magic, and false views of death.[112] However, shortly afterwards, the school board unanimously voted to eliminate any alternative arrangements, and instead required every public school student to attend the reading classes.[113] While the district court found for the plaintiffs, the court of appeals reversed, finding that "there was no proof that any plaintiff student was ever called upon to say or do anything that required the student to affirm or deny a religious belief or to engage or refrain from engaging in any act either required or forbidden by the student's religious convictions."[114] Furthermore, the court attempted to distinguish this case from *Yoder*, in reasoning that in the latter, the parents sought to remove their children from all modern society, while here, the parents send their children to public schools in order to equip them for modern society.[115] As a result, the court approached the concerned parents with a "take it or leave it approach," meaning that if they did not like the

[109] *Id.* at 315.
[110] *Id.* at 314.
[111] *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1060 (6th Cir. 1987).
[112] *Id.* at 1062.
[113] *Id.* at 1060.
[114] *Id.* at 1064.
[115] *Id.* at 1067.

reading material in the public schools, they could send their children to private schools or simply homeschool them.[116]

b. Specific Opt-Outs

In more recent years, parents have requested accommodations and opt-outs when their children's schools give lessons on traditionally known areas of controversy, such as sex education and the LGBT movement.[117] As with the request for general accommodations, courts addressing opt-outs in these more specific situations have also been unwilling to find any First Amendment violations.[118] Specifically, the First Circuit has opined on two notable cases in these areas, in which other courts have commonly cited.

In the 1995 case of *Brown v. Hot, Sexy & Safer Prods.*, the plaintiffs, consisting of both the students and their parents, sued multiple defendants from the students' school as well as the named defendant corporation because of an explicit mandatory school assembly presented by the corporation.[119] While the assembly was allegedly supposed to be a presentation on AIDS, it turned out to be a performance of sexually provocative skits and messages, all involving members of the

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[116] *Id.*

[117] When it comes to evolution vs. creation science, the debate continues to live. For example, between 2015-2016, eleven anti-evolution bills were introduced. In this sense, these state legislatures have handled this controversial area more so by allowing students and teachers to speak freely on creation science than by providing the students with the option to opt-out of lessons on evolution. *See* Gordon E. Hall & Shirley A. Woika, *The Fight to Keep Evolution Out of Schools: The Law and Classroom Instruction*, 80 AM. BIOL. TCHR 235 (2018).

[118] However, opt-outs may exist as part of the legislative scheme, if built into the state laws. For example, as of October 2020, thirty-six states allow parents to opt-out of sex education in public schools. *State Policies on Sex Education in Schools*, NATIONAL CONFERENCE OF STATE LEGISLATURES (October 1, 2020), https://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx. In the context of LGBT teachings, opt-outs vary throughout the states. For instance, the NJ laws discussed in Section I specifically do not allow for parental opt-outs. *See* Hannan Adely, *Can parents opt out of New Jersey's LGBTQ curriculum law?*, NORTHJERSEY.COM (June 26, 2019), https://www.northjersey.com/story/news/education/2019/06/26/teaching-lgbtq-in-schools-can-nj-parents-opt-out/1549151001/. Even before the Supreme Court fully legalized same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584 (2015), some had foreshadowed the effects same-sex marriage acceptance would have on public school curriculums, and have called for states to extend their recognition of parental sensitivity in this area just as they commonly have for sex education. *See* Symposium Section: *Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children Out of Curricular Discussions about Sexual Orientation and Same-Sex Marriage?*, 2011 BYU Educ. & L. J. 423 (2011) [hereinafter *Same-Sex Marriage Symposium*].

[119] *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 529 (1st Cir. 1995).

high school audience.[120] According to the plaintiffs, the school failed to notify parents of the nature of the program and failed to allow parents to excuse their children from attending the assembly.[121]

The court referred to *Meyer*, *Pierce*, and *Yoder* in holding *against* the Plaintiffs. In distinguishing *Meyer* and *Pierce*, it held that while the former cases "involve[] the state proscribing parents from educating their children, [this case] involve[d] parents prescribing what the state shall teach their children."[122] Moreover, the court also reasoned that unlike in *Yoder* where the compulsory attendance policy violated the Amish way of life, the one-time assembly here, by contrast, could not be seen as also violating the Plaintiffs' way of life.[123] Thus, the Plaintiffs could not claim their Free Exercise rights had been infringed.[124]

Just over ten years later, the First Circuit opined on a case brought by parents of minor children who claimed their school failed to allow the children to opt-out from reading books promoting LGBT families. In *Parker v. Hurley*, two sets of parents sued their school board for rejecting their requests to exempt a kindergartener and a second grader from reading books contrary to their religious values.[125] The first set of parents claimed their child's school presented him with books portraying same-sex families while both in kindergarten and in the first grade.[126] Meanwhile, the second set of parents objected to their child's second grade teacher reading "a book that depicts and celebrates a gay marriage."[127] Notably, the parents did not object to these

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[120] *Id.* The Plaintiffs brought eleven claims of inappropriate sexual behavior initiated by the Defendant corporation, which the Opinion lists in detail. They allege the school physician who also served on the Parent Teacher Organization "viewed a promotional videotape of segments of [Defendant's] past performances and then recommended the Program to the school administration."
[121] *Id.* at 530.
[122] *Id.* at 534.
[123] *Id.* at 539.
[124] When the reasoning in *Brown* spread across other federal appellate courts, some opposing parents turned to their legislators to introduce laws that establish the parental right to dictate childhood education. *See* Todd A. DeMitchell & Joseph J. Onosko, *A Parent's Child and the State's Future Citizen: Judicial and Legislative Responses to the Tension over the Right to Direct an Education*, 22 S. CAL. INTERDISC. L.J. 591, 623 (2013) (explaining how legislators proposed the Parental Rights and Responsibilities Act of 1995 and explicitly mentioning *Meyer* and *Pierce* while also specifically citing *Brown* as an example of a court "failure" and "assault" on parental rights).
[125] *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008).
[126] *Id.*
[127] *Id.*

books as part of the school's effort to promote nondiscrimination; rather, they objected to the school refusing to give prior notice or allow for an exemption.[128] Even more so, "[t]he parents assert[ed] it is ironic, and unconstitutional under the Free Exercise Clause, for a public school system to show such intolerance towards their own religious beliefs in the name of tolerance."[129]

The court held that the plaintiffs did not display an infringement on their constitutional rights, even though it "accept[ed] as true plaintiffs' assertion that their sincerely held religious beliefs were deeply offended."[130] Like the prior cases distinguishing *Yoder*, the court stated that here, "the plaintiffs have chosen to place their children in public schools."[131] Moreover, while the court did not go into a discussion of the Establishment Clause cases involving certain books in public schools such as *Schempp*, it reasoned that in this case, "[r]equiring a student to read a particular book is generally not coercive of free exercise rights."[132] Since *Parker* and *Brown*, subsequent federal courts have cited to these cases to further the notion that controversial teachings in the classroom do not pose a threat to plaintiffs' First Amendment rights.[133]

However, after the recent Free Exercise cases such as *Fulton* and *Tandon*, mentioned in Section II, the Court may be more willing to conclude that curriculums such as those in *Parker* and *Brown* amount to coercion as opposed to just "exposure" to ideas. A necessary prerequisite for bringing a successful Free Exercise claim is a showing of coercion.[134] *Smith*-era cases such as

[128] *Id.* With both parents, the school principal refused to give them prior notice for class books that went against their religious beliefs. The parents met with the principal multiple times to voice their concern, but he refused to acknowledge their request.
[129] *Id.* at 94.
[130] *Id.* at 99.
[131] *Id.* at 100.
[132] *Id.* at 106.
[133] *Brown* and *Parker* are known as two seminal cases in a line of federal appellate decisions that reject parental claims of the constitutional right to direct their children's education. Four cases that were decided between these two Massachusetts decisions took place in Pennsylvania, Connecticut, California and New Jersey. *See Same-Sex Marriage Symposium*, *supra* note 117, at 24. Recently, this rejection of a constitutional right to dictate education has been extended outside the sexual education realm. For example, *see Wood v. Arnold*, 915 F.3d 308 (4th Cir. 2019) (holding that a student's participation in a class assignment requiring her to declare statements of Islamic faith did not violate her constitutional rights because she was not actually required to accept the meaning of those words).
[134] *Schempp*, 374 U.S. at 223.

Parker heavily stressed that the plaintiffs did not show coercion on the part of the government because occasional exposure to religiously offensive concepts does not burden the parents nor student.[135] According to the court, these were generally applicable curriculums, which in *Parker* and *Brown*, were not even formalized nor constantly imposed on the students.[136] However, with the Supreme Court appearing to make its way back to strict scrutiny, coupled with new laws mandating these controversial curriculums, as discussed in Section I, families might become more likely to succeed when bringing Free Exercise claims.

SECTION IV: VOUCHERS AS A UNIQUE APPROACH TO ACCOMMODATIONS

As the preceding cases have shown, courts have been less willing to create opt-outs in recent years for students who wish to be excused or otherwise accommodated for lessons that violate their beliefs.[137] Many courts cite to *Yoder*, not to accommodate other families but rather to set the high threshold of what it takes to claim a violation under the First Amendment. These courts have said more than once that because the plaintiffs choose to live in modern society, any issue they have with their public schools can be remedied by finding an alternative method of schooling. As a result, some parents have now asked for vouchers in order to afford alternate schooling.

a. Notable Supreme Court Voucher Cases

In recent decades, school voucher programs have been introduced not as a means for students to avoid controversial school curriculums, but rather for low income students to have a way to attend better schools that they otherwise would not be able to afford. Yet, even when the goal of the voucher program is to provide a quality education to students who have ill-equipped public schools, some have still sued claiming the private schools taking part in the program attempt to violate the Establishment Clause.

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[135] *Parker*, 514 F.3d at 105.
[136] *Id.* at 106.
[137] *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1060 (6th Cir. 1987); *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 529 (1st Cir. 1995); *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008).

Zelman v. Simmons-Harris became a landmark case on school vouchers in the early twenty-first century. In the 1990s, the Cleveland public school district was called a "crisis that is perhaps unprecedented in the history of American education."[138] As a result, a voucher program emerged, which provided funds for families to either send their children to a different school of their choice or to instead receive tutorial aid if they chose to remain in their public school.[139] However, taxpayers argued the program advanced religion since a majority of the participating schools were religiously affiliated.[140] The Supreme Court disagreed, holding that the program was one of "true private choice," because any type of school could participate in an effort to better educate Ohio students.[141] Thus, the Court found no Establishment Clause violation and reversed the decision below.[142]

Just last year, the Court faced another case on school vouchers in *Espinoza v. Mont. Dep't of Revenue*. There, the plaintiffs brought suit arguing they could not use a scholarship from a Montana tuition assistance program towards a religious school.[143] In fact, the Montana Supreme Court struck down the entire program, "rel[ying] on the 'no-aid' provision of the State Constitution, which prohibits any aid to a school controlled by a 'church, sect, or denomination.'"[144] Citing *Zelman*, the Court found no Establishment Clause violation because "the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools."[145] Moreover, the Court further held that the plaintiffs' Free Exercise rights had been violated because the state

[138] *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (*quoting* the Cleveland City School District Performance Audit 2-1 (Mar. 1996)).
[139] *Id.* at 645.
[140] *Id.* at 648.
[141] *Id.* at 653, 655.
[142] *Id.* at 663.
[143] *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2251 (2020).
[144] *Id.*
[145] *Id.* at 2254.

discriminated against the religious schools solely based on their religious status.[146] Notably, the Court cited *Pierce* and *Yoder* in arguing that the no-aid provision infringed on the parental right of directing their children's upbringing in choosing what school they attend.[147] Thus, the Court reversed the decision below.[148]

The *Zelman* decision stands for the notion that religious schools can be included in broad voucher programs because as long as both religious and non-religious schools are included, the program "is neutral in all respects toward religion," thus making the program of "true private choice."[149] Relying on *Zelman*, the Court in *Espinoza* went a step further in holding that if families are permitted to use awarded scholarships towards private secular schools, then the religious status of other private schools cannot bar families from using those scholarships there as well. While the Montana Department of Revenue attempted to distinguish this case from *Zelman* in arguing that the concern was how the funds would be used in the religious schools as opposed to simply the religious status of those schools, the Court disagreed and found that this case involved discrimination solely on the basis of status.[150] However, the Court currently has an appeal pending before it in the case of *Carson v. Makin*, in which it will now have to address the question of "whether a state may nevertheless exclude families and schools based on the religious *use* to which a student's aid might be put at a school."[151] If the Court continues the progression it began in *Zelman*, families may be able to assert that even if a school will provide religious instruction, sending one's child there is still a matter of private choice, in which the government cannot bar the use of aid. If the Court rules in favor of the plaintiffs, it would further expand *Espinoza's* holding from religious status to religious use. However, until *Carson* is decided, families may at

[146] *Id.* at 2255.
[147] *Id.* at 2261.
[148] *Id.* at 2263.
[149] *Zelman*, 536 U.S. at 653.
[150] *Espinoza*, 140 S. Ct. at 2255.
[151] *Carson v. Makin*, 2021 U.S. S. Ct. Briefs Lexis 251 (emphasis added).

least use government aid towards schools of religious status without fear of any Establishment Clause violations.

b. Recent Voucher Initiatives and Other Suggested Accommodations

Today, not only are voucher programs seen as a possible solution to failing public schools, but some also believe they are a means of dealing with mandated, controversial curriculums. In New Jersey, some lawmakers proposed NJ A2407 in response to NJ S1569, discussed earlier in this paper. NJ A2407, also known as the "Protecting Parental Involvement in Curriculum Act," sought to allow students to opt-out of lessons that involve "sex, sexuality, sexual orientation, gender identity or expression, conscience, ethics, morality, or religion."[152] In the event the school refuses to permit students to opt-out, the bill sponsors asked the state to provide "seventy-five percent of what was being taxed to support the [] child in the school system as a voucher to send the child to a school of [the parents'] choice."[153] Although there have been over ten thousand signatures from New Jersey parents who supported this effort,[154] the bill failed just ten days after it was introduced.[155] While the Act sought to provide a compromise between the schools which choose to teach what they want and the parents who prefer to excuse their children without affecting others, a member of Garden State Alliance involved in the LGBT curriculum stated that the Act would allow "[a] white supremacist who is a denier of the Holocaust [to] pull their child out of Holocaust studies."[156] It is unclear what concerned New Jersey families can do

[152] Bill Track 50, NJ A2407, https://www.billtrack50.com/BillDetail/1192536.
[153] Erin Vogt, *NJ Lawmaker Proposes Religious Exemptions for School Lessons*, NEW JERSEY 101.5 (February 13, 2020), https://nj1015.com/nj-lawmaker-proposes-religious-exemptions-for-school-lessons/.
[154] Family Alliance Policy of New Jersey, *Voucher Bill Allows Opt-Out of Forced LGBT-Curriculum* (February 20, 2020), https://familypolicyalliance.com/issues/2020/02/20/voucher-bill-allows-opt-out-of-forced-lgbt-curriculum/.
[155] Bill Track 50, NJ A2407.
[156] Adam Clark, *N.J. should pay for kids to switch schools over 'harmful' curriculum, lawmaker says*, NJ.COM (February 15, 2020), https://www.nj.com/education/2020/02/nj-should-pay-for-kids-to-switch-schools-over-harmful-curriculum-lawmaker-says.html.

from here, but other states have proposed similar bills to combat controversial curriculums throughout this past year.[157]

In our ever changing and polarized society, attempting to provide a curriculum that suits all students may seem like a difficult task. However, these cases have shown that what the courts consider controversial usually involve lessons on evolution and creation science, LGBT teachings, and explicit sexual education. Thus, in making sure school boards do not open the floodgates to suits by parents for anything they find controversial, the idea of "controversial curriculums" can practically be limited to these three major topics. These topics involve fundamental ideas across different religions and even to those without religion. In other words, beliefs across these topics should be left to parents and guardians and not to school administrators, because the go to the very heart of parental rights to child upbringing.

Ideally, public schools should refrain from treading controversial territory and avoid these subjects. Just as schools cannot communicate religious teachings in a devotional way without violating the Establishment Clause, schools should also not be able to teach anti-religious teachings lest they violate the Free Exercise Clause. Stated differently, just as states cannot coerce by endorsing religion, they also cannot coerce by opposing religion. Families are claiming that their children's schools are burdening their individual Free Exercise rights, and based on the direction the Supreme Court appears to be heading, strict scrutiny will return as the operative standard in which governments will find difficulty in proving that they are advancing their interests in the least restrictive means possible.

[157] For example, *see* Montana SB99, enacted on April 30, 2021 and seeks to allow parents of K-12 children to opt out of sex education and bans abortion providers from providing information to students; Florida HB545, enacted on June 9, 2021 and requires public schools to obtain written consent from parents before teaching about reproductive health or STDs; and Wisconsin AB562, introduced on September 15, 2021 and proposes to allow students to opt-out of gender identity and sexual orientation lessons.

However, if the schools do not choose to maintain this neutrality in their curriculums, opt-outs would be the next best solution. In that case, each time a particular class or lesson involves a controversial subject matter, students should be allowed an accommodation that would not negatively impact their grade or attendance. Nonetheless, even the solution of opt-outs may prove to be less helpful now, because in a state like New Jersey, LGBT teachings are to be implemented across all subject areas and woven into the overall curriculum. Thus, it would be infeasible to have students constantly opt-out of classes, and even having to do so for unexpected subjects like math. Thus, if states adamantly want to go about teaching curriculums in this way, the only realistic solution for concerned families becomes the voucher program.

Especially in states like New Jersey where much of property taxes fund public schools, families should not have to resort to homeschooling their children. Instead, a voucher program becomes the solution where public schools can teach what they choose but students who choose to avoid certain curriculums can still receive a quality education with the tax money they already pay.[158] Like in *Zelman* and *Espinoza*, a voucher program should not only include religious schools, but also secular schools as well. Moreover, the goal of these alternative schools should not be to necessarily teach religion, but rather to teach a curriculum that is not *against* religion. In fact, if the Court decides to equalize public schools with both secular and religious private schools through a voucher program of this sort, parents would overall have more freedom in school choice. In other words, vouchers would not necessarily only be utilized for controversial curriculums, but also when parents may generally find their child's public school unequipped to foster full academic success—whether that may be due to the disadvantaged or failing nature of the school, the lack of

[158] The idea of sending students to different districts so that they have access to schools is not a new concept, but rather has been a remedy when districts have a shortage of schools. For example, *Carson v. Makin*, mentioned above, involves multiple Maine school districts that do not operate their own public secondary schools, which is why the state pays for students to attend nearby private schools. The specific question awaiting adjudication before the Supreme Court is whether that program can include religiously affiliated private schools that will provide religious instruction to the students. *See Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020).

catering to specific disabilities, or other possible reasons.[159] However, if the goal of public schools is to educate our students for a modern world, adhering to that focus on knowledge and not lifestyle or debated beliefs is truly the way to welcome every type of student.

CONCLUSION

In conclusion, the Supreme Court has spoken extensively on the separation of church and state, especially in the context of public schools. Devotional teachings, prayer, and creation theories have all been found unconstitutional in violation of the Establishment Clause, because they express the State endorsing a particular belief, to the detriment of those students with alternative beliefs. In the same way these practices have been struck down, all fundamental teachings that endorse a belief contrary to multiple religions should be found unconstitutional as well. Public schools should be inclusive institutions for all students across all backgrounds, but administrators should focus on building educational knowledge, not proposing fundamental beliefs meant for parents. In so doing, schools should refrain from endorsing controversial viewpoints in the name of true equality, but if they refuse, the State should respect and support families who seek alternate means of education through voucher programs. In adhering to the idea that "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion,"[160] our governments will respect the true goal of the First Amendment Religion Clauses.

[159] *See* Aaron Tang, *School Vouchers, Special Education, and the Supreme Court*, 167 U. PA. L. REV. 337, 342 (2019) (arguing that based on widespread support of the Court's recent decision granting the parents of an autistic child reimbursement for private school tuition, school vouchers generally "warrant more fair-minded consideration" among liberals for the same reason of ensuring all children thrive with school choice).
[160] *Epperson*, 393 U.S. at 271.