

# Ending Bullying at a Price?: Why Social Conservatives Fear Legislatively Mandated LGBT Indoctrination in Schools

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## INTRODUCTION

Having gained significant notoriety across the United States and garnering support from some of the most popular politicians and celebrities of our day,<sup>1</sup> the anti-bullying movement has captivated the nation in recent years. In the wake of a number of highly publicized suicides of school-age children who were subjected to chronic harassment<sup>2</sup> from their peers,<sup>3</sup> nearly every state legislature has taken action to implement some version of anti-bullying legislation.<sup>4</sup> Despite an apparent uniform aim—to

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<sup>1</sup> The anti-bullying movement has hoards of celebrity supporters including pop stars, politicians, and even the Obama Administration. See *Meet Our Supporters*, STOMP OUT BULLYING, <http://www.stompoutbullying.org/index.php/about/our-supporters/> (last visited Oct. 10, 2013) (listing corporate, media, as well as celebrity supporters of the STOMP Out Bullying campaign); see also Valerie Jarrett, *Ending Bullying in Our Schools & Communities*, THE WHITE HOUSE (Apr. 20, 2012, 5:42 PM), <http://www.whitehouse.gov/blog/2012/04/20/ending-bullying-our-schools-communities> (describing the steps the Obama administration has taken to prevent bullying).

<sup>2</sup> “Harassment,” “intimidation,” and “bullying” will be used interchangeably throughout this paper. This is in conformity with many anti-bullying statutes that use the terms synonymously.

<sup>3</sup> See Lisa C. Connolly, Comment, *Anti-Gay Bullying in Schools—Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248, 248–49 (2012) (describing the bully-related suicides of three teens from different states within a three-week span of September 2010); Laurie Bloom, Comment, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut’s Anti-Bullying Statute*, 7 CONN. PUB. INT. L.J. 105, 105 (2007) (noting the trend of presumed bully-related incidents that ended in tragedy, like the shooting at Columbine High School and, more recently, multiple suicides of teens believed to be gay).

<sup>4</sup> See VICTORIA STUART-CASSEL ET AL., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 1, 3 (2011), available at <http://www.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf> (noting the wave of legislation sparked by the many “highly

curb bullying conduct in schools—anti-bullying laws vary widely from state to state, with no two states taking the same approach to bullying. Anti-bullying laws come in a variety of different forms. Some states merely outlaw bullying while many others provide schools additional guidance in the form of model policies.<sup>5</sup> Additionally, bullying laws span many levels of comprehensiveness, with some states issuing highly detailed bullying provisions and others merely adopting short and generalized prohibitions on bullying.<sup>6</sup>

Despite their differences, bullying laws across the nation have been attacked on similar grounds. While generally appearing to be based on meritorious principles, it is undeniable that anti-bullying legislation has been the subject of great controversy. Much of the controversy arises out of the way certain anti-bullying laws are structured. Controversially, many states have drafted their legislation to expressly protect specific enumerated groups. Frequently, these enumerated groups include “sexual orientation” and provide express protection for those who may be harassed due to their actual or perceived sexual orientation.<sup>7</sup> The express inclusion of “sexual orientation” as a protected characteristic in certain state laws has led some to

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visible suicides” of students subject to “chronic bullying” as well as the “proliferation of proposed legislation at the state and federal level . . . [and] an increase in the number of court cases filed seeking legal remedies for [bullied] students . . .”); *see also Bully Police USA*, BULLYPOLICE.ORG, <http://www.bullypolice.org/> (last visited Oct. 10, 2013) (noting that Montana is the only state without an anti-bullying law).

<sup>5</sup> See STUART-CASSEL ET AL., *supra* note 4, at 49–50 (detailing the differences among state anti-bullying policies concerning the inclusion, or not, of model policies).

<sup>6</sup> Compare MINN. STAT. ANN. § 121A.0695 (West 2013) (directing only that each school board must “adopt a written policy prohibiting intimidation and bullying of any student”), with N.J. STAT. ANN. § 18A:37-15 (West 2013) (mandating that each school district adopt a policy which, at minimum, must include: (1) a statement prohibiting harassment, intimidation, and bullying, (2) definitions of the prohibited conduct, (3) a description of expected student behavior, (4) consequences and remedial action for those who committed acts of bullying, (5) reporting procedures, (6) investigation procedures, (7) directions for how a school should respond to incidents of bullying, (8) a prohibition of retaliation against anyone reporting bullying, (9) consequences for those who falsely accuse, (10) a statement concerning publication of the policy, (11) a requirement that the policy be available on the home page of the school district’s website as well as distributed annually to parents, and (12) a requirement that the contact information for the district anti-bullying coordinator be available on the district’s home page).

<sup>7</sup> See ARK. CODE ANN. § 6-18-514 (West 2013) (defining bullying as an act that may have been motivated based on an actual or perceived “attribute” of the victim including “race, color, religion, ancestry, national origin, socioeconomic status, academic status, disability, gender, gender identity, physical appearance, health condition, or sexual orientation”); IOWA CODE ANN. § 280.28 (West 2013) (outlawing bullying that is based on victim traits or characteristics including “age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status”).

question the true purpose and spirit of anti-bullying legislation.<sup>8</sup> The fear harbored by many conservative groups is that anti-bullying laws crafted to expressly protect LGBT<sup>9</sup> students serves the subversive purpose of promoting the “gay agenda,” rather than the stated goal of preventing bullying conduct in schools.<sup>10</sup> This fear has caused a number of conservative groups to call for the repeal or limitation of anti-bullying laws.<sup>11</sup>

No one likes bullying, and there are few reasonable adults who would bring themselves to publicly promote teasing or harassment of children in schools. In fact, most who oppose anti-bullying legislation seem to overwhelmingly agree that all children should be protected from bullying no matter what.<sup>12</sup> Thus, while the opponents of anti-bullying legislation seem to at least appreciate the stated goal of the anti-bullying movement, they take issue with the express mention of characteristics of the victim, especially when those characteristics relate to sexual orientation, gender identity, and the like.<sup>13</sup> LGBT advocacy groups believe that express mention of the characteristics of the victim is necessary in anti-bullying legislation in order to afford adequate protection to students.<sup>14</sup> Opponents, however, worry that express protection for LGBT students will result in the

<sup>8</sup> See Daniel B. Weddle & Kathryn E. New, *What Did Jesus Do?: Answering Religious Conservatives Who Oppose Bullying Prevention Legislation*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 325, 325 (2011) (explaining groups like Focus on the Family and the West Virginia Family Foundation fear that an explicit mention of protection for lesbian, gay, bisexual, and transgender (LGBT) students in anti-bullying legislation is nothing more than an attempt by the state legislatures to indoctrinate children in “homosexual lifestyles”); see also STUART-CASSEL ET AL., *supra* note 4, at 29 (noting that controversy over enumeration of specific groups in anti-bullying policies “has been a key factor contributing to the failure to pass proposed bullying legislation”).

<sup>9</sup> The term “LGBT” will be used as shorthand for “lesbian, gay, bisexual, and transgender.”

<sup>10</sup> See Kim Severson, *Seeing a Gay Agenda, a Christian Group Protests an Anti-Bullying Program*, N.Y. TIMES, Oct. 15, 2012, at A15 (commenting that anti-bullying legislation is a “thinly veiled” attempt at promoting the “homosexual agenda”).

<sup>11</sup> See Katy Hall, *Christian Group Takes Issue With Anti-Bullying Laws*, HUFFINGTON POST (Apr. 5, 2012, 7:34 PM), [http://www.huffingtonpost.com/2012/04/05/anti-bullying-laws-christian-religious-freedom\\_n\\_1406757.html](http://www.huffingtonpost.com/2012/04/05/anti-bullying-laws-christian-religious-freedom_n_1406757.html) (noting that “[s]ocially conservative groups nationwide have lobbied state legislatures to strike down and limit anti-bullying measures”).

<sup>12</sup> CANDI CUSHMAN, THE PROBLEM WITH POLITICIZED BULLYING POLICIES 1 (2010), available at <http://media.citizenlink.com/truetolerance/politicizedbullyingpolicies.pdf> (noting that “a good way for schools to address this issue is with a strong prohibition against any form of bullying—for any reason, against any child . . . [s]o we should be sending the message that a bully’s actions are always wrong for any reason regardless of why they target the victim”).

<sup>13</sup> *Id.* at 1–2.

<sup>14</sup> See Connolly, *supra* note 3, at 260 (noting that “[g]ay rights organizations strongly support enumeration . . .”); see also Jason A. Wallace, Comment, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 737 (2011) (noting the prevalence of anti-gay bullying versus bullying in general).

teaching of “homosexual-themed curricula” in public schools.<sup>15</sup> Although the fear that anti-bullying laws are *merely* a ploy to promote the gay agenda is farfetched, the argument opposing the legislation as a violation of a parent’s right to direct the upbringing of their children has some merit. There is also a further related concern that participation in bullying prevention programs forces children to adopt a viewpoint with which they may disagree.

This Note will explore those constitutional concerns raised by the opponents of anti-bullying legislation. Part I of this Note will address the development of anti-bullying legislation, including a brief overview of the states’ authority to legislate in this area. Part II will then examine anti-bullying legislation as it is presently employed in the states. Part III will address the constitutional rights that are implicated by anti-bullying laws, including the parental right to direct the education and upbringing of their child as well as the right of the child to be free from a compelled viewpoint. It will also examine the development of bullying prevention and education programs, and the effect those programs may have on the constitutional rights of the parents and students. Part IV will have a more practical import, describing actual bullying prevention programs and assessing their effect on the implicated constitutional rights. Finally, Part V will propose that states give parents of elementary school children opt-out rights for lessons they find objectionable when the lessons concern matters that traditionally fall under the purview of the parental right to raise their children.

## I. THE DEVELOPMENT OF ANTI-BULLYING LEGISLATION

“[E]ducation is perhaps the most important function of state and local governments . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>16</sup>

### A. The Origin of Anti-Bullying Legislation

The history of anti-bullying legislation is a short one, but one that is, nonetheless, shrouded in powerful emotion and bitter controversy. The 1999 shooting at Columbine High School in Littleton, Colorado, is frequently cited as the first incident of school violence linked to presumed student-perpetrated

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<sup>15</sup> CUSHMAN, *supra* note 12, at 2.

<sup>16</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

bullying.<sup>17</sup> In its wake, the Columbine shooting had the unexpected effect of “ignit[ing] a wave of legislation” aimed at curbing bullying on school campuses across the nation.<sup>18</sup> Some state legislatures took almost immediate action to legislatively outlaw bullying in schools.<sup>19</sup> Other states followed soon after this initial wave. In the ensuing years, the anti-bullying movement was further fueled by societal outrage at the suicides of a number of school-age children known to have been subjected to chronic bullying in school.<sup>20</sup> Indicative of this outrage, forty-nine states presently have some form of anti-bullying legislation on their books.<sup>21</sup>

## B. The States’ Authority to Regulate

State authority over public education is a principle firmly grounded in constitutional law and one memorialized in state constitutions.<sup>22</sup> As the Supreme Court stated in *Wisconsin v. Yoder*, “[p]roviding public schools ranks at the very apex of the function of a State.”<sup>23</sup> Given the undoubted importance of education to society—in addition to the states’ expansive power to regulate schools<sup>24</sup>—it is no surprise that state and local governments have broad power to direct and control education, subject only to limitations in their respective state constitutions.<sup>25</sup> A safe learning environment for students is a necessary prerequisite to fulfillment of this “important [government] function.”<sup>26</sup> It follows, then, that state governments are also tasked with ensuring that schools are safe places for students to learn.<sup>27</sup> For nearly every state, discharging their

<sup>17</sup> See STUART-CASSEL ET AL., *supra* note 4, at 15. *But see* Greg Toppo, *10 Years Later, the Real Story Behind Columbine*, USA TODAY, Apr. 14, 2009, at 1A, available at [http://usatoday30.usatoday.com/news/nation/2009-04-13-columbine-myths\\_N.htm](http://usatoday30.usatoday.com/news/nation/2009-04-13-columbine-myths_N.htm) (noting that the Columbine shooters were not victims of bullying but possibly were bullies themselves).

<sup>18</sup> STUART-CASSEL ET AL., *supra* note 4, at 1.

<sup>19</sup> *Id.* at 16 (charting the number of state bullying laws by year and noting that by 2001 eleven states had enacted some form of bullying law).

<sup>20</sup> *Id.* at 1; *see also* Bloom, *supra* note 3, at 105 (noting the trend of bully related incidents that ended in tragedy, like the shooting at Columbine High School and, more recently, multiple suicides of teens believed to be gay).

<sup>21</sup> *See Bully Police USA*, *supra* note 4 (noting that Montana is the only state with no anti-bullying law).

<sup>22</sup> William E. Sparkman, *The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 570 (1994) (commenting that states’ authority over education is “a truism of constitutional law” and that authority is “made evident in state constitutions through education articles, and exercised with few constraints by legislatures”).

<sup>23</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

<sup>24</sup> *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) (noting that it is within the powers of the state to reasonably regulate all schools).

<sup>25</sup> *See* Sparkman, *supra* note 22, at 578.

<sup>26</sup> *See* Wallace, *supra* note 14, at 736.

<sup>27</sup> *Id.* at 735–36.

responsibility to ensure a safe learning environment for students has recently come to include the implementation of some form of anti-bullying legislation.

## II. ANTI-BULLYING LEGISLATION PRESENTLY

Because the regulation of schools is traditionally the function of state governments, there is no uniform anti-bullying law. Anti-bullying provisions vary widely by state and cover many different levels of comprehensiveness.<sup>28</sup> Some states do not even define “bullying” in their bullying statutes.<sup>29</sup> Instead, taking direction from existing civil rights legislation, certain states prohibit “harassment” rather than “bullying.”<sup>30</sup> Some states even leave the definition of bullying to be determined by the state departments of education or to local school districts.<sup>31</sup> Beyond terminology, states also differ on how much guidance to provide school districts in the form of model policies.<sup>32</sup> Furthermore, whether an incident even qualifies as an act of bullying at all is also dependent on the state law that governs. Some states qualify a single act as bullying while others require a systematic pattern of harmful behavior directed at a specific student to qualify.<sup>33</sup>

Most importantly—and perhaps most contentiously—state anti-bullying laws also vary over the inclusion of enumerated classifications of protected groups. Enumeration of specific classes in bullying legislation offers legal protection for groups of individuals who are bullied based on particular personal

28 See DENA T. SACCO ET AL., AN OVERVIEW OF STATE ANTI-BULLYING LEGISLATION AND OTHER RELATED LAWS 4 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2197961](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197961) (“The content and level of detail in the laws varies greatly . . . [with some states having] brief requirements for school districts or other relevant bodies to develop policies . . . [while] [t]he more complex laws have many provisions, each law different from the other.”).

29 See, e.g., ALA. CODE § 16-28B-3 (2013) (defining harassment).

30 See STUART-CASSEL ET AL., *supra* note 4, at 17 (“Many bullying laws enacted since 1999 were originally modeled on existing civil rights legislation that protects groups from various forms of harassment under the law. The legislative language used in crafting bullying laws often borrows directly from harassment statutes . . .”).

31 See SACCO ET AL., *supra* note 28, at 4 (noting that certain states “leave the definition of bullying to the discretion of the state department of education or similar entity,” while a few others “leave the definition of bullying entirely up to local school districts”).

32 Model policies “provide specific guidance to school districts on how to draft district bullying policies and how to implement provisions outlined in the law.” See STUART-CASSEL ET AL., *supra* note 4, at 47; see also U.S. Dep’t of Health & Human Serv., *Policies & Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/index.html> (last visited Oct. 5, 2013) (identifying Arizona, Illinois, Indiana, Kansas, Minnesota, North Dakota, Tennessee, and Texas as the only states without a model bullying policy).

33 See IOWA CODE ANN. § 280.28 (West 2013) (defining “harassment” and “bullying” to allow for a single “act” to qualify as bullying). *But see* FLA. STAT. ANN. § 1006.147(3)(a) (West 2013) (defining bullying as “systematically and chronically inflicting physical hurt or psychological distress on one or more students . . .”).

characteristics like race, gender, disability, ethnicity, or religion.<sup>34</sup> Enumeration in bullying legislation serves two distinct purposes: it can either be used to narrow the implications of the laws by restricting bullying to acts solely motivated by the enumerated characteristics or it can be used more broadly to symbolically indicate that the targeting of specific groups for bullying is unacceptable.<sup>35</sup> Some states have not dabbled in the enumeration game, choosing rather to afford “equal treatment” to all students by not specifying protected characteristics.<sup>36</sup> While many disagree over whether non-enumeration actually affords “equal treatment,”<sup>37</sup> it is clear that enumeration is a popular feature of anti-bullying legislation. In fact, twenty states have some form of enumerated class provision in their bullying laws.<sup>38</sup> Of these states, eighteen have expressly enumerated “sexual orientation” as a protected characteristic.<sup>39</sup>

Inclusion of “sexual orientation” as a protected class has created controversy amongst religious groups<sup>40</sup> and caused many to question the true purpose of anti-bullying legislation.<sup>41</sup> Despite

<sup>34</sup> See STUART-CASSEL ET AL., *supra* note 4, at 27 (commenting that enumeration “conveys explicit legal protections for certain groups or classes of individuals, or for anyone bullied based on personal characteristics, such as physical appearance or sexual orientation”).

<sup>35</sup> *Id.*

<sup>36</sup> See SACCO ET AL., *supra* note 28, at app. 13 (identifying Florida, Massachusetts, Michigan, New Hampshire, Rhode Island, and Utah as states that require “equal treatment for all students” no matter the student’s legal status).

<sup>37</sup> See Connolly, *supra* note 3, at 260–61 (citing GAY, LESBIAN & STRAIGHT EDUC. NETWORK, MODEL STATE ANTI-BULLYING & HARASSMENT LEGISLATION 4–5 (2010), available at <http://www.glsen.org/download/file/Mjk1OQ==>) (commenting that “[g]ay rights organizations strongly support enumeration” and indicating that studies show that students enrolled in schools with express enumeration feel safer and experience less bullying).

<sup>38</sup> See generally NETWORK FOR PUBLIC HEALTH LAW, ANTI-BULLYING STATUTES 50 STATE COMPILATION, available at [http://www.networkforphl.org/\\_asset/kh4yq6/50StateAntiBullyingStatutes41612FINAL.pdf](http://www.networkforphl.org/_asset/kh4yq6/50StateAntiBullyingStatutes41612FINAL.pdf); see also Connolly, *supra* note 3, at 260 (indicating that while enumeration is still a minority position, the trend appears to be toward enumeration).

<sup>39</sup> See SACCO ET AL., *supra* note 28, at 5 (noting that as of 2012, sixteen states provide express treatment of sexual orientation). However, New Mexico also prohibits bullying on the basis of sexual orientation and has not been accounted for in the survey. See N.M. ADMIN. CODE ANN. § 6.12.7.7 (West 2012). Furthermore, it appears that since the study was conducted, Maine has also elected to include sexual orientation as a protected characteristic. ME. REV. STAT. ANN. tit. 20-A § 6554 (2013).

<sup>40</sup> See Hall, *supra* note 11 (noting that in addition to Christian groups, opposition to anti-bullying legislation has also come from Orthodox Jewish groups).

<sup>41</sup> See Nathan A. Cherry, *Will Local Government Force Businesses to Violate Religious Convictions?*, ENGAGE FAMILY BLOG (Apr. 5, 2012), <http://engagefamilyminute.com/2012/04/will-local-government-force-businesses-to-violate-religious-convictions/> (commenting that he “ardently oppose[s] bullying in all forms. However, most of [the] so-called laws aim to create a special class of citizens for the LGBT community . . . . Rather than simply opposing bullying in all forms, LGBT advocates seek to elevate their groups beyond all others—creating a special class—by inserting language into ‘anti-bullying’ laws that singles out ‘sexual orientation and gender identity’”).

the existence of some evidence indicating that students who identify as LGBT are bullied at a disproportionate rate to other students,<sup>42</sup> opponents ardently challenge enumeration protecting LGBT students. The fear is that giving “sexual orientation” an enumerated status in anti-bullying laws creates special rights for LGBT students to the detriment of other students.<sup>43</sup> Furthermore, opponents use enumeration of “sexual orientation” as proof of the covert purpose of anti-bullying laws: indoctrination of young children in accordance with the homosexual agenda.<sup>44</sup>

### III. RAISING THE CONSTITUTIONALITY QUESTION

The notion that *all* anti-bullying legislation is merely a ploy to indoctrinate young children in the “homosexual lifestyle” is farfetched at best. Opponents would certainly face an uphill battle in facially challenging the constitutionality of anti-bullying legislation. In the extreme, even if the legislation actually were directed at promoting homosexuality, a questionable legislative purpose is no reason to strike down otherwise valid legislation.<sup>45</sup> Many anti-bullying legislation opponents would like to argue that anti-bullying policies violate the religious rights of those who dissent from the stated goals of the policies. However, as neutral, generally applicable legislation, anti-bullying laws would be subject to rational basis review.<sup>46</sup> A state legislature

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<sup>42</sup> See Wallace, *supra* note 14, at 736; see also R. Kent Piacenti, Comment, *Toward a Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 VA. J. SOC. POL'Y & L. 58, 61 (2011) (noting that LGBT students face bullying at a significantly higher rate than other groups of students).

<sup>43</sup> CUSHMAN, *supra* note 12, at 6 (hypothesizing that policies with enumerated characteristics such as sexual orientation “create[] a system ripe for reverse discrimination, sending the message that certain characteristics are more worthy of protection than others . . . and introduce divisiveness among different groups of students and parents”).

<sup>44</sup> See *Does anti-bullying bill encroach on religious freedom?*, DAILY HERALD (May 21, 2012, 5:02 AM), <http://www.dailyherald.com/article/20120521/news/705219961/> (noting the Illinois Family Institute’s fear that Chicago’s bullying law was a “beachhead for ‘homosexual activist organizations’ that want to indoctrinate students and teachers”); see also CUSHMAN, *supra* note 12, at 2 (commenting that anti-bullying legislation is really not about protecting kids but about “homosexual advocacy groups” seeking to obtain “the leverage they need to push homosexual advocacy messages into public schools”); Katherine Kersten, *The Real Agenda Behind Anti-Bullying Campaign*, CENTER OF THE AMERICAN EXPERIMENT (Jan. 13, 2013), <http://www.americanexperiment.org/publications/commentaries/the-real-agenda-behind-anti-bullying-campaign> (commenting that anti-bullying campaigns are less about “protecting the traditional targets of bullies” and more about “shap[ing] your 10-year-old’s attitudes and beliefs about sexuality and family structure”).

<sup>45</sup> See *United States v. O'Brien*, 391 U.S. 367, 383 (1969) (acknowledging that “[i]t is a familiar principle of constitutional law that [the] Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive”).

<sup>46</sup> Under the Supreme Court’s current Free Exercise jurisprudence, “laws shown to be neutral and generally applicable . . . trigger rational basis review.” Sean Clerget,

would then only have to articulate a reasonable belief that the legislation promotes a legitimate government purpose in an area in which the state may regulate in order to be valid. As preventing bullying conduct in schools is likely to be deemed a legitimate government interest and state legislatures clearly have authority to regulate schools, facial challenges to anti-bullying legislation will be difficult, if not impossible. However, anti-bullying opponents do raise two interesting issues about how bullying legislation, *as implemented*, implicates two important constitutional rights: (1) a parent's right to direct the upbringing and education of his or her child, and (2) the right to be free from compulsory adoption of viewpoints with which the student may disagree.

## A. The Implicated Constitutional Rights

### 1. Directing the Education and Upbringing of One's Child

Parents have a constitutionally protected right to direct the education and upbringing of their children.<sup>47</sup> This principle finds its roots in *Meyer v. Nebraska*,<sup>48</sup> where the Supreme Court overturned the conviction of a teacher under a Nebraska statute that prohibited the teaching of any language other than English to a student who had not yet completed the eighth grade.<sup>49</sup> By means of the substantive due process component of the Fourteenth Amendment, the Court recognized a liberty interest in the right of parents to direct the upbringing of their children.<sup>50</sup> The Court acknowledged that while the "liberty" guaranteed by the Fourteenth Amendment had not been exactly defined, it undoubtedly included the right to "bring up children" and "enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>51</sup> The state could

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*Timing is of the Essence: Reviving the Neutral Law of General Applicability Standard and Applying it to Restrictions Against Religious Face Coverings Worn While Testifying in Court*, 18 GEO. MASON L. REV. 1013, 1015 (2011) (citing *Emp't Div., Dep't of Human Res. Of Or. v. Smith*, 494 U.S. 872, 879 (1990)).

<sup>47</sup> See William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 177 (2000) (noting that "the Due Process Clause of the Fourteenth Amendment protects the right of parents to direct the education of their offspring").

<sup>48</sup> *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

<sup>49</sup> *Id.* at 403 (reversing the Nebraska Supreme Court's decision upholding Meyer's conviction).

<sup>50</sup> *Id.* at 400 (noting that "the right of parents to engage [the teacher] so to instruct their children . . . [is] within the liberty of the Amendment"); see also DOUGLAS W. KMIEC ET AL., *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES AND PHILOSOPHY* 1424 (3d ed. 2009) (noting that *Meyer v. Nebraska* and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* are the "foundation of the substantive due process right to direct the upbringing of children").

<sup>51</sup> *Meyer*, 262 U.S. at 399.

“go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally,” but it could not do so by infringing on parents’ “fundamental rights which must be respected.”<sup>52</sup>

The Court further expounded upon this principle in *Pierce v. Society of Sisters*,<sup>53</sup> where it struck down an Oregon compulsory education statute that effectively required all students to attend public schools.<sup>54</sup> In doing so, the Court found that the statute “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children.”<sup>55</sup> The Court further added that “[t]he child [was] not the mere creature of the state” and that “those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>56</sup>

Today, *Meyer* and *Pierce* are recognized as the seminal cases establishing the right of the parent to direct the education and upbringing of the child as a component of fundamental liberty protected by the Constitution.<sup>57</sup> The Court more recently affirmed the vitality of the *Meyer-Pierce* doctrine in *Troxel v. Granville*<sup>58</sup> by invalidating a Washington statute that gave state courts—rather than parents—discretion in determining visitation rights for third parties when the courts deemed it was in a child’s best interest.<sup>59</sup> The plurality opinion identified the parental interest in the “care, custody, and control of their children” as “perhaps the oldest of the fundamental liberty interests recognized by [the] Court”<sup>60</sup> and held that the statute unconstitutionally infringed on this fundamental liberty.<sup>61</sup> While the Court has, elsewhere, held that infringement of fundamental

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<sup>52</sup> *Id.* at 401.

<sup>53</sup> *Pierce v. Soc’y. of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

<sup>54</sup> *Id.* at 534–36 (affirming the Oregon Supreme Court’s finding that the compulsory public education statute was unconstitutional).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 535.

<sup>57</sup> See Brad J. Davidson, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States’ School-Choice Legislation*, 33 TEX. TECH L. REV. 435, 445 (2002); see also *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (describing the “fundamental interest” of the parent in guiding the education of the child as articulated previously in *Pierce* and *Meyer*). But see *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (questioning whether the right of the parent to direct the education of their child is still fundamental under the Court’s present right of privacy jurisprudence).

<sup>58</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>59</sup> *Id.* at 74 (affirming the judgment of the Washington Supreme Court that the statute unconstitutionally infringed on a parent’s right to control the exposure of his or her children to people or ideas).

<sup>60</sup> *Id.* at 65.

<sup>61</sup> *Id.* at 74.

rights demands strict judicial scrutiny,<sup>62</sup> the *Troxel* plurality ultimately failed to articulate a standard of scrutiny for infringement upon parental rights.<sup>63</sup> As *Meyer* and *Pierce* were decided before the modern strict scrutiny analysis was developed,<sup>64</sup> the *Troxel* Court had an opportunity to clarify the appropriate standard of scrutiny in parental rights cases. Instead, the *Troxel* Court shirked that responsibility in favor of ruling on the breadth of the statute in question.<sup>65</sup> Thus, commentators frequently recognize that there is no real clear standard of review for apparent infringements on the rights of parents to direct the upbringing and education of their children.<sup>66</sup> Consequently, federal circuits have split regarding the boundaries of parental rights, with some circuits adopting the traditional view of the *Meyer-Pierce* right and others finding that parental rights terminate upon the choice to send a child to a public school rather than a private school.<sup>67</sup>

While the precise boundaries of the parental right to educate and bring up a child are somewhat blurry, it appears that the Court is at least willing to consider placing parental rights in a category with other fundamental rights demanding strict scrutiny.<sup>68</sup> Notwithstanding the characterization of parental

<sup>62</sup> See, e.g., *Reno v. Flores*, 507 U.S. 292, 302 (1993) (noting that that fundamental rights may not be infringed by the government at all, regardless of the process provided, “unless the infringement is narrowly tailored to serve a compelling state interest”); see also *Griswold v. Conn.*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring) (“Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.”) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960)).

<sup>63</sup> See KMIEC ET AL., *supra* note 50, at 1434. The Court’s failure to articulate a standard of scrutiny in *Troxel* is puzzling given the importance of the fundamental rights at issue. *Id.* Having passed on a valuable opportunity for clarity, the Court in *Troxel* complicated the matter even more than it had been previously. *Id.*

<sup>64</sup> See Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270 (2007) (noting that modern strict scrutiny analysis did not develop until the 1960s).

<sup>65</sup> See KMIEC ET AL., *supra* note 50, at 1434.

<sup>66</sup> See Ross, *supra* note 47, at 185 (“[T]here is no clear standard of review that a federal court must apply in reviewing legislation that affects the rights of parents to direct the education of their children.”); see also Jennifer Adams Emerson, “Who’s In A Family?": Parental Rights and Tolerance-Promoting Curriculum in Early Elementary Education, 40 J. L. & EDUC. 701, 706 (2011) (“[T]he Supreme Court has not yet defined the precise boundaries of the parental right to control the upbringing and education of their children . . .”).

<sup>67</sup> See Emerson, *supra* note 66, at 705–06 (noting the different approaches taken by the Ninth and Third Circuits as to the boundaries of parental rights) (citing *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005) and *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000)).

<sup>68</sup> See, e.g., *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990) (equating parental rights to direct the upbringing and education of the child with freedom of speech and the press); see also *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (stating, in the context of a case concerning the parental right to direct the upbringing of a child, that strict scrutiny should be the standard for all infringements of fundamental rights).

rights as “fundamental,” these rights are not unlimited.<sup>69</sup> Sometimes, the parental right to control the education and upbringing of a child must yield to the state’s interest in preserving a safe school atmosphere for students.<sup>70</sup> Schools may, for example, enforce dress codes for the purpose of enhancing school safety over a parent’s objection that the dress code violates his right to direct the education and upbringing of his child.<sup>71</sup> The state may also outlaw private racially segregated schools without violating the parental right to direct the education and upbringing of a child.<sup>72</sup> Parents also do not have a fundamental constitutional right to dictate curriculum to the public schools that they have chosen to send their children to, despite claims of infringement of parental rights.<sup>73</sup> The state’s interest in preserving a safe school climate for students, however, is not superior to the parental interest in determining the appropriate age for children to be introduced to matters of sexuality and morality.<sup>74</sup> Parents, ultimately, have the high duty to inculcate their children with values.<sup>75</sup> The state may not assume a parental role in determining when to introduce students to concepts that “strike at the heart of parental decision-making authority on matters of the greatest importance.”<sup>76</sup>

## 2. The Right to be Free From a Compelled Viewpoint

Students have a constitutionally protected right to be free from compulsory adoption of a viewpoint with which they disagree.<sup>77</sup> The Supreme Court first announced this principle in *West Virginia Board of Education v. Barnette*<sup>78</sup> when it found that compulsory recitation of the Pledge of Allegiance in schools violated the First Amendment.<sup>79</sup> In so holding, the Court chose “individual freedom of mind in preference to officially disciplined

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<sup>69</sup> See KMIEC ET AL., *supra* note 50, at 1435.

<sup>70</sup> See Emerson, *supra* note 66, at 706.

<sup>71</sup> See *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005).

<sup>72</sup> See *Runyon v. McCrary*, 427 U.S. 160, 176–77 (1976).

<sup>73</sup> See *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995) (“[T]he rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.”).

<sup>74</sup> See Emerson, *supra* note 66, at 706.

<sup>75</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (stating that the “additional obligations” referenced by the court in *Meyer* include “the inculcation of moral standards, religious beliefs, and elements of good citizenship”).

<sup>76</sup> See Emerson, *supra* note 66, at 707 (quoting *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005)).

<sup>77</sup> See Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 331 (2008) (stating that the First Amendment protects pupils from compelled speech because compelled speech essentially entails invasion of the speaker’s freedom of mind).

<sup>78</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>79</sup> *Id.* at 642.

uniformity.”<sup>80</sup> The Court reasoned that if free expression could only be suppressed when there is a “clear and present danger,” then involuntary affirmation of an idea could be commanded only in even more serious situations, clearly not attendant in this case.<sup>81</sup> School boards have a highly discretionary function, said the Court, but as “creatures” of the government they cannot achieve permissive ends through means prohibited by the Bill of Rights.<sup>82</sup>

The Court later articulated this principle outside the context of schools in *Wooley v. Maynard*<sup>83</sup> when it held that New Hampshire could not constitutionally compel individuals to disseminate an ideological message on private property.<sup>84</sup> The state of New Hampshire enforced criminal sanctions against a member of the Jehovah’s Witnesses faith for covering up the motto “Live Free or Die” on his passenger vehicle license plate.<sup>85</sup> As a Jehovah’s Witness, the individual found the motto to be repugnant to his religious and moral beliefs and, consequently, covered the motto on his license plate, thus violating New Hampshire statutory law.<sup>86</sup> Finding for the individual, the Court held that no matter how compelling the state’s interest, the state could not violate the First Amendment by forcing the people to be couriers of the state’s message.<sup>87</sup> The Court held that the Constitution “protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.”<sup>88</sup>

As conduits of the state, it follows that school boards may not compel a student to ratify a viewpoint with which he or she does not agree. That is easier said than done, however. Schools and teachers have a great deal of influence over young students.<sup>89</sup> Given this influence, the state has the power to inculcate students with values by way of the classroom.<sup>90</sup> Schools fulfill

<sup>80</sup> *Id.* at 637.

<sup>81</sup> *Id.* at 633–34.

<sup>82</sup> *Id.* at 637 (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education, not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”).

<sup>83</sup> *Wooley v. Maynard*, 430 U.S. 705 (1977).

<sup>84</sup> *Id.* at 717.

<sup>85</sup> *Id.* at 707–08.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 717.

<sup>88</sup> *Id.* at 715.

<sup>89</sup> See Ross, *supra* note 47, at 191 (noting that “schools have a very powerful influence in shaping the values of children” and that children “spend a very significant amount of their time in the custody of the state”).

<sup>90</sup> See KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 97 (2003).

this important function by encouraging basic character qualities which most parents would find hard to disagree with, like self-control, empathy, charity, fairness, and respect for others.<sup>91</sup> It is when schools go beyond inculcation of these basic character qualities and attempt to inculcate moral values that controversy arises.<sup>92</sup> As a result, schools must be especially careful when addressing controversial topics like the traditional versus non-traditional family debate.<sup>93</sup> While it is admirable that schools attempt to tackle these complicated issues, it is difficult to do so without implicitly conveying adoption of one side of the debate over the other.<sup>94</sup> Schools, thus, may violate the Constitution by impermissibly compelling student viewpoints when they tackle these controversial issues by taking a side on the debate and then mandating participation without an opt-out right<sup>95</sup> in a program whose teachings conflict directly with the student's beliefs.

## B. Developing Training and Prevention Programs

While most anti-bullying laws seek primarily to deter bullying in schools, a significant number of states have gone further than a mere prohibition on bullying and have included provisions for school-sponsored bullying prevention and education programs.<sup>96</sup> States approach training and prevention programs differently across the nation. Some states "encourage" school districts to develop and implement programs for student training,<sup>97</sup> with others going so far as to compel the teaching of bullying prevention principles as part of a school's character education curriculum.<sup>98</sup> Regardless of the terminology used

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<sup>91</sup> *Id.* at 99.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 100.

<sup>94</sup> *See id.* ("If the arrangements in which some live are ignored, the message will be that these families are not to be considered acceptable . . .").

<sup>95</sup> *Id.* Kevin W. Saunders argues for an opt-out right for school lessons concerning the teaching of moral values that conflict with the values of the parents, because parents are still meant to be the principal teachers of values to their children. *See id.*

<sup>96</sup> *See SACCO ET AL.*, *supra* note 28, at 11 (noting that as of 2012, "[l]aws in 40 states contemplate some form of education or prevention programs for students . . .").

<sup>97</sup> *See STUART-CASSEL ET AL.*, *supra* note 4, at 34 (noting that of the states addressing training and prevention programs in 2011, there were eleven states that merely "encourage[d] schools to comply with prevention recommendations").

<sup>98</sup> *See, e.g.*, GA. CODE ANN. § 20-2-145 (West 2013) (establishing that Georgia's comprehensive character education curriculum shall focus on teaching the character traits of "respect for others . . . compassion, tolerance . . . [and also address] methods of discouraging bullying and violent acts against fellow students"); VA. CODE ANN. § 22.1-208.01 (West 2013) (requiring a character education program for Virginia schools that shall "instill in students civic virtues and personal character traits . . . including the precepts of the Golden Rule, tolerance, and courtesy . . . [and also] address the inappropriateness of bullying . . ."); *see also SACCO ET AL.*, *supra* note 28, at 11 (noting

(compulsory implementation or mere encouragement), the laws are generally silent on methods of implementation, electing rather to give school districts broad discretion in developing and implementing their bullying prevention programs.<sup>99</sup> Due to the silence on the specifics of implementation of prevention programs, school districts may choose whether to allow schools to create their own school-specific versions of prevention training or implement a pre-packaged program developed by outside groups for use in public schools.<sup>100</sup> As a result, schools have employed a variety of prevention methods, some of which have drawn a considerable amount of negative attention from the opponents of anti-bullying legislation.

#### IV. ANTI-BULLYING LEGISLATION IN PRACTICE

##### A. Crossing the Impermissibility Line: *Welcoming Schools*' Diversity Photo Puzzle

In 2008, the Human Rights Campaign piloted its *Welcoming Schools* program to combat bullying in twelve schools from five school districts in California, Massachusetts, and Minnesota.<sup>101</sup> *Welcoming Schools* is one of a variety of pre-packaged anti-bullying prevention programs available to school districts and crafted to address many forms of biased-based bullying.<sup>102</sup> One of the goals of the *Welcoming Schools* program is to encourage inclusivity and diversity in elementary schools.<sup>103</sup> *Welcoming Schools* offers a variety of lesson plans for teachers aimed at promoting sensitivity to diversity and gives school districts discretion in determining which lesson plans to use.<sup>104</sup> The program is targeted to elementary school students (kindergarten

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that as of 2012, anti-bullying laws in four states actually required schools to undertake character education to combat bullying).

<sup>99</sup> See STUART-CASSEL ET AL., *supra* note 4, at 33 (“[S]tate laws either require or encourage school districts to implement prevention programs directly, often as a component of district policy, or transfer control over prevention policy to locally established committees and task forces.”).

<sup>100</sup> See LISA JONES ET AL., IMPLEMENTING BULLYING PREVENTION PROGRAMS IN SCHOOLS: A HOW-TO GUIDE 4–5 (2012), available at <http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ImplementingBullyingPrevention.pdf> (listing different pre-packaged bullying prevention programs made for use in public schools); see also *Bully Prevention Resources*, SEATTLE PUB. SCH., <http://www.seattleschools.org/modules/cms/pages.phtml?sessionId=&pageid=217021> (last visited Oct. 31, 2013) (noting that Seattle Public Schools use the Steps to Respect, Second Step, and Olweus bullying prevention programs).

<sup>101</sup> See HUMAN RIGHTS CAMPAIGN FOUND., AN INTRODUCTION TO WELCOMING SCHOOLS 81 (2009), available at [http://www.hrc.org/files/images/general/An\\_Introduction\\_to\\_Welcoming\\_Schools.pdf](http://www.hrc.org/files/images/general/An_Introduction_to_Welcoming_Schools.pdf).

<sup>102</sup> See *id.* at 9.

<sup>103</sup> See *id.* at 82.

<sup>104</sup> *Id.* at 81.

through fifth grade) with primary focus areas of family diversity, gender stereotyping, and name-calling.<sup>105</sup> The program employs a variety of LGBT inclusive children's books<sup>106</sup> and includes lessons and readings about non-traditional families.<sup>107</sup> The Human Rights Campaign touts the pilot program's success, reporting overall "positive improvement in school diversity climate."<sup>108</sup> The program was officially adopted by the Berkeley School District in California in April 2010<sup>109</sup> and is presently implemented in seventy-four schools across the country.<sup>110</sup> Despite this claimed success, *Welcoming Schools* was not welcomed with open arms everywhere.

In Minnesota, parents successfully challenged official implementation of some of the *Welcoming Schools* lesson plans in their classrooms.<sup>111</sup> At a mere thirty-seven words, Minnesota has one of the weakest anti-bullying laws in the nation.<sup>112</sup> Despite its weakness, the statute clearly commands each school board to adopt a written policy prohibiting intimidation and bullying of any student.<sup>113</sup> The Minneapolis School District adopted such a policy directing school district administration to create a bullying prevention and education program for students, and allowing them to create character development and pro-social skills education programs to prevent and reduce the bullying policy violations.<sup>114</sup> As part of its obligation to ensure that bullying prevention education was being taught to its students, the Minneapolis school district invited *Welcoming Schools* into a few of its classrooms. Three of its elementary schools were targeted

<sup>105</sup> See *id.* at 10–11.

<sup>106</sup> See *id.* at 70.

<sup>107</sup> See *id.* at 71–73 (listing appropriate children's books about adoption, divorce, homelessness, incarcerated parents, multi-cultural families, among others).

<sup>108</sup> *Id.* at 81.

<sup>109</sup> See, Human Rights Campaign Found., *California School District Officially Adopts Human Rights Campaign's "Welcoming Schools Guide,"* WELCOMING SCHOOLS (Apr. 9, 2010), <http://www.welcomingschools.org/blog/entry/california-school-district-officially-adopts-human-rights-campaigns-welcomi>.

<sup>110</sup> See *Minnesota School District Makes National Case for Anti-LGBT Bullying Prevention*, HUMAN RIGHTS CAMPAIGN (Mar. 6, 2012), <http://www.hrc.org/press-releases/entry/minnesota-school-district-makes-national-case-for-anti-lgbt-bullying-preven>.

<sup>111</sup> See Kersten, *supra* note 44; see also CUSHMAN, *supra* note 12, at 4.

<sup>112</sup> See *Safe and Supportive Minnesota Schools Act*, OUTFRONT MINNESOTA, <https://www.outfront.org/resources/safeschools>.

<sup>113</sup> MINN. STAT. ANN. § 121A.0695 (West 2013).

<sup>114</sup> MINNEAPOLIS SCH. DIST. POLICY 5201 BULLYING AND HAZING PROHIBITION 1–3 (2008), available at [http://policy.mpls.k12.mn.us/UPcms/PolicyFiles/5201\\_Policy.pdf](http://policy.mpls.k12.mn.us/UPcms/PolicyFiles/5201_Policy.pdf). Part III of the policy details the responsibilities of each educational entity in carrying out the district's bullying prevention program. *Id.* at 3. Subsections E and F of Part III charge the district administration with the responsibility of implementing bullying prevention and education programs and permitting the district to develop character education curriculum as well. *Id.*

as pilot schools for the program,<sup>115</sup> meaning that these schools were amongst the first in the nation to utilize the *Welcoming Schools* curriculum. It did not take long for parents in the affected schools to voice concerns about the program. The parents worried that the curriculum sought to “indoctrinate” their children into abandoning traditional views on sexuality and family structure and, instead, convince the children to adopt the Human Rights Campaign’s attitudes and beliefs on these matters.<sup>116</sup> Given the role the Human Rights Campaign plays as a vocal advocate for the rights of LGBT Americans,<sup>117</sup> parents felt that the program “advanc[ed] acceptance of homosexuality, as distinct from tolerance,” rather than counseling students about bullying.<sup>118</sup>

While “indoctrination” is, perhaps, too strong a word to use in this context, the parents in this case were not necessarily off base in their distrust of the program. One of the particularly troubling aspects of the curriculum in question was the so-called “Family Diversity Photo Puzzle.”<sup>119</sup> The Family Diversity Photo Puzzle was designed for students in first through third grades.<sup>120</sup> The exercise called for students to arrange the “puzzle pieces” depicting photographs of adults and children into seven families.<sup>121</sup> By design, the students were unable to form seven traditional families with one male parent and one female parent.<sup>122</sup> Instead, the children were forced to create some families with same-sex parents.<sup>123</sup> The students were then asked how to label or name the types of families that they had created. The lesson required teachers to create their own family diversity puzzle with same-sex parents as an example to help students

<sup>115</sup> See *Hale Elementary parents fight ‘Welcoming Schools,’* MINNESOTA CHRISTIAN EXAMINER (June 2008), [http://www.minnesota.christianexaminer.com/Articles/Jun08/Art\\_Jun08\\_06.html](http://www.minnesota.christianexaminer.com/Articles/Jun08/Art_Jun08_06.html).

<sup>116</sup> See Kersten, *supra* note 44.

<sup>117</sup> See *About Us*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/the-hrc-story/about-us> (declaring the HRC to be “the largest civil rights organization working to achieve equality for lesbian, gay, bisexual and transgender Americans . . .”).

<sup>118</sup> See MINNESOTA CHRISTIAN EXAMINER, *supra* note 115.

<sup>119</sup> The “Family Diversity Photo Puzzle” is part of the *Welcoming Schools* curriculum on “Understanding and Respecting Family Diversity.” See AN INTRODUCTION TO WELCOMING SCHOOLS, *supra* note 101, at 79. While the *Welcoming Schools* campaign has made some of their lesson plans public to encourage schools to adopt the program, they have not made the Family Diversity Photo Puzzle lesson plan public. Access to the lesson plan is granted upon adoption of the program. Thus, explanation of the characteristics of the Family Diversity lesson plan for the purposes of this paper comes not from the *Welcoming Schools* website, but from articles and blogs written by observers and concerned parents.

<sup>120</sup> See CUSHMAN, *supra* note 12, at 4.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

form their own families with same-sex parents.<sup>124</sup> After the exercise, the teacher would lead a discussion about same-sex parents by questioning the students about the families they created, why they failed to create some types of families, and whether in the future they would create the types of families that they did not create the first time around.<sup>125</sup> Parents in the Minneapolis school district were displeased when their children were subjected to the program without their consent.

### 1. The Family Diversity Photo Puzzle and Parental Rights

The Family Diversity Photo Puzzle curriculum appears to violate the parental right to direct the education and upbringing of the child. If parents are really to be the ones charged with teaching their children about matters of sexuality and morality,<sup>126</sup> then the state should not be able to circumvent that parental duty by introducing these concepts to children before the parents deem appropriate. Obviously, children will learn about human sexuality in due course. Moreover, parents have no constitutional right to “restrict the flow of information in the public schools.”<sup>127</sup> Thus, parents do not have the right to prevent their children from eventually learning about these concepts in public schools.<sup>128</sup> However, introducing the concept of human sexuality and same-sex marriage to six-year-olds in public schools by means of anti-bullying prevention programs seems an impermissible infringement on parents’ rights to direct the education and upbringing of their children, especially if the parents, in their discretion, have chosen to delay this teaching.

If the “fundamental” parental right means anything, it means that parents still have the high duty and ultimate responsibility of inculcating their children in values and morals. Despite an ever-growing body of knowledge recognizing that homosexuality is not a choice,<sup>129</sup> recent events at the Supreme Court<sup>130</sup> are a clear indication that many still understand

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<sup>124</sup> See Kersten, *supra* note 44.

<sup>125</sup> *Id.*

<sup>126</sup> See Emerson, *supra* note 66, at 709.

<sup>127</sup> *Brown v. Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995).

<sup>128</sup> See Emerson, *supra* note 66, at 709 (noting the important distinction between parental claims of government preempting the parental right to teach a child as opposed to parental proscription of teaching the concept at all).

<sup>129</sup> See *Sexual Orientation and Homosexuality*, AM. PSYCHOL. ASS’N, <http://www.apa.org/helpcenter/sexual-orientation.aspx> (last visited Oct. 14, 2013) (confirming that “most people experience little or no sense of choice about their sexual orientation”).

<sup>130</sup> “Recent events” meaning the Supreme Court decisions in the Proposition 8 and DOMA same-sex marriage cases. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *United States v. Windsor*, 133 S. Ct. 2675 (2013).

homosexuality and same-sex marriage to have moral rather than scientific implications. When schools teach about moral issues they must be very cautious so as not to intrude on parental rights. As long as it is at least arguable that homosexuality is a moral issue, teaching about same-sex couples *at all* in public schools runs the risk of infringing on parental rights. Teaching children as young as five years old about these concepts runs an even greater risk of subverting parental rights.

If nothing else, the state is not giving parents enough time to introduce these concepts to children before taking away a parent's right to do so. Many parents, on both sides of the traditional family debate, would object to introducing children so young to these concepts. Some children will undoubtedly have been exposed to the concept of same-sex parents by first grade based on the circumstances of their family life or parental choice. Equally likely, however, is that some children will not have been introduced to these concepts as a function of parental choice. Stripping parents of the right to withhold this information from their children for a limited time infringes on the parental right to direct the education and upbringing of their children.

It is quite clear that many anti-bullying legislation opponents come from a place of animus towards the LGBT community. That should not, however, give the state the green light to circumvent the parental right to raise their children in a manner they wish through bullying prevention programs, especially when it is arguable that the child is unready to engage in the discussion.

## 2. Family Diversity Photo Puzzle and Compelled Viewpoint

The Family Diversity Photo Puzzle may also impermissibly force children to ratify a viewpoint with which they disagree. While parents may choose to withhold this information from their children, there are bound to be students in kindergarten through third grade whose parents have already introduced them to the concept of same-sex couples and other LGBT issues. There will also be parents who have chosen to teach their children that, for whatever reason, same-sex marriage violates their moral or religious beliefs. If children are prompted by their teachers to create the most diverse family puzzles possible and, by design, forced to create puzzle families of same-sex couples, they are being encouraged to adopt viewpoints accepting of same-sex couples. Admirable as this goal may be, for the children who have been taught to oppose same-sex marriage, it is compelling them to ratify a viewpoint with which they disagree. While the message may be perceived to be bigoted, that does not detract

from students' constitutional right to be free from compelled viewpoints. If people are still legally allowed to disagree about the morality of same-sex marriage, the state cannot force children to adopt a viewpoint on the matter that conflicts with their own beliefs, regardless of how popular or politically correct the viewpoint is. The First Amendment grants students at least that much.

## B. Constitutionally Encouraging Tolerance and Diversity

### 1. Appropriate *Welcoming Schools* Lesson Plans

There are many bullying prevention and tolerance education programs that do not unconstitutionally infringe on a parent's right to direct the education and upbringing of their children or a student's right to be free from compelled viewpoint ratification. To begin, not all of *Welcoming Schools*' lesson plans must be scrapped. Many of them actually aim at encouraging tolerance and diversity for all students without running the risk of subverting parental rights or potentially forcing children to depart from their own moral or religious beliefs. For example, one of the suggested lessons in the *Welcoming Schools* program teaches students about creating welcoming classrooms.<sup>131</sup> In the lesson, students listen to the short story called *The New Girl . . . and Me*<sup>132</sup> about a friendship between two young girls.<sup>133</sup> After listening to the story, teachers will discuss with their students what it means to make people feel welcome and unwelcome in a given situation.<sup>134</sup> Students are then encouraged to draw pictures and come up with ideas of how to make people feel welcome in their classroom.<sup>135</sup> This lesson plan seems to perfectly align itself with the stated goals of bullying prevention programs. Encouraging students to make others feel welcome goes to the core of bullying prevention as opposed to teaching students at an early age about matters of human sexuality without parental consent.

Another *Welcoming Schools* lesson plan teaches students in fourth and fifth grade about how to handle bullying when they witness it. The lesson is called "Making Decisions: Ally or

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<sup>131</sup> See HUMAN RIGHTS CAMPAIGN FOUND., WELCOMING CLASSROOM 1-3, available at [http://www.hrc.org/welcoming-schools/documents/Welcoming-Schools-Lesson\\_A\\_Welcoming\\_Classroom.pdf](http://www.hrc.org/welcoming-schools/documents/Welcoming-Schools-Lesson_A_Welcoming_Classroom.pdf).

<sup>132</sup> JACQUI ROBBINS, *THE NEW GIRL . . . AND ME* (2006).

<sup>133</sup> *Id.* at 1-2.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2.

Bystander.”<sup>136</sup> The lesson calls for students to listen to various hypothetical scenarios in which another student has been “bullied” and decide whether in the particular instance they would have been an ally or a bystander.<sup>137</sup> Students are given the option of ignoring the situation, walking away, intervening themselves, or asking an adult to intervene.<sup>138</sup> Students are then asked why they chose their particular course of action.<sup>139</sup> While the lesson does not directly tackle the sensitive issues surrounding students who are harassed due to their perceived sexual orientation, it offers students an opportunity to discuss and learn how to deal with comments like “that’s gay” and other stereotype-related teasing.<sup>140</sup> The lesson offers extra resources to teachers who can, in their discretion and based on their own school’s needs, discuss stereotyping in the context of sexual orientation, race, and culture.<sup>141</sup> The discussion is centralized around preventing bullying and what students can do when they witness it—the direct target of bullying legislation prevention programs. Sexual orientation is not discussed as an isolated characteristic like it is in the Family Diversity Puzzle. Moreover, the lesson is targeted towards children who are a little bit older and more capable of understanding differences among people.<sup>142</sup> Students are not required to take any stance on sexual orientation, race, or culture but are encouraged to help out a fellow student when they are being bullied or report it to an adult who can take action.

## 2. Mix It Up at Lunch Day

Another appropriate bullying prevention program is “Mix It Up at Lunch Day.” Mix It Up at Lunch Day is a campaign by the Teaching Tolerance organization<sup>143</sup> aimed at encouraging students to cross social boundaries and interact with other

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<sup>136</sup> See HUMAN RIGHTS CAMPAIGN FOUND., MAKING DECISIONS: ALLY OR BYSTANDER 1–6, available at [http://www.hrc.org/welcoming-schools/documents/Welcoming-Schools-Lesson\\_Ally\\_or\\_Bystander.pdf](http://www.hrc.org/welcoming-schools/documents/Welcoming-Schools-Lesson_Ally_or_Bystander.pdf).

<sup>137</sup> *Id.* at 2.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 5.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1 (noting the targeted grade levels for the lesson program are fourth through sixth).

<sup>143</sup> See *About Us*, TEACHING TOLERANCE, <http://www.tolerance.org/about>. Teaching Tolerance is a program founded by the Southern Poverty Law Center “dedicated to reducing prejudice, improving intergroup relations and supporting equitable school experiences for our nation’s children.” *Id.* The program provides educational materials to schools about teaching tolerance in the classroom. *Id.*

students that they normally would not.<sup>144</sup> As the cafeteria is the place that student boundaries are most clearly drawn, Mix It Up at Lunch Day allows schools to bring students together in the hopes that biases and other misconceptions will fall away.<sup>145</sup> The event is held once a year at more than 2,500 participating schools in order to break up social cliques and, hopefully, deter bullying.<sup>146</sup> Students across the nation are seated at lunch with groups of students outside their normal social groups and provided with questions to ask each other in order to break the ice and spark conversation.<sup>147</sup>

Despite having the admirable goals of breaking down social barriers and encouraging tolerance of others, Mix It Up at Lunch Day was accused by the American Family Association (AFA) of being “a thinly veiled attempt to push the homosexual agenda into public schools.”<sup>148</sup> In an effort to keep Mix It Up At Lunch Day out of schools, the AFA called on parents across the country to threaten to keep their students at home on the day of the event.<sup>149</sup> Obediently, many parents made the threats and over 200 schools responded by cancelling the event.<sup>150</sup>

Cancelling the event, however, should not have been the response. Mix It Up at Lunch Day is an event that epitomizes the true spirit of the anti-bullying movement. There is no “homosexual agenda” being pushed and any claim otherwise is ludicrous. Sexual orientation is never even mentioned at the events.<sup>151</sup> Rather, the program aims at curbing bullying by teaching students that everyone has a story and that we are not

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<sup>144</sup> See *What is Mix It Up at Lunch Day?*, TEACHING TOLERANCE, <http://www.tolerance.org/mix-it-up/what-is-mix>.

<sup>145</sup> *Id.*

<sup>146</sup> See ‘*Mix It Up At Lunch Day*’ Prompts American Family Association To Urge Boycott, Protest ‘Promotion Of Homosexual Lifestyle,’ HUFFINGTON POST (Oct. 15, 2012, 2:44 PM), [http://www.huffingtonpost.com/2012/10/15/evangelical-group-urges-p\\_n\\_1967785.html](http://www.huffingtonpost.com/2012/10/15/evangelical-group-urges-p_n_1967785.html).

<sup>147</sup> See *Mix it Up at Lunch Day Successful Nationwide*, TEACHING TOLERANCE (Nov. 1, 2012), <http://www.tolerance.org/blog/mix-it-lunch-day-successful-nationwide>. Students are assigned seats in the cafeteria based on whatever differentiation mechanism the school chose. *Id.* One school assigned seating based on the shirt color the students wore to school that day. *Id.* Another assigned seating based on numbered candies that it handed out to the students. *Id.* One school had a Halloween themed Mix It Up day. *Id.* Another school swapped teachers from different grade levels to show students the benefits of getting out of their comfort zone. *Id.*

<sup>148</sup> See Rheana Murray, *Christian group slams anti-bullying effort ‘Mix It Up at Lunch’ for promoting homosexuality in schools*, N.Y. DAILY NEWS (Oct. 16, 2012, 8:52 AM), <http://www.nydailynews.com/news/national/christian-group-slams-anti-bullying-effort-article-1.1184500#ixzz2QrrySOGP>.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (noting also that, although 200 schools cancelled the event, another 180 signed up for it).

<sup>151</sup> *Id.*

all that different from each other. In fact, the Mix It Up at Lunch Day program no longer makes any mention of differentiating characteristics among students but lets schools choose for themselves which social problems to tackle.<sup>152</sup> Mix It Up at Lunch Day is not the kind of bullying prevention program to be feared. It neither infringes on parental rights nor requires students to ratify a compelled viewpoint. Rather, Mix It Up at Lunch Day promotes nothing more than something all parents should be able to agree on: tolerance and compassion for all children. Schools should not have responded to parent complaints by cancelling Mix It Up at Lunch Day. Those schools have set a dangerous precedent, giving disgruntled parents the idea that they can dictate school programs and prevent schools from teaching even the most proper forms of tolerance education. That said, even though anti-bullying legislation opponents do have legitimate complaints, if they continue to vocalize the opinion that *every* bullying prevention program is some ploy to promote the “homosexual agenda” and indoctrinate children, they will lose much credibility.

#### V. PROPOSAL

There is no doubt that many anti-bullying legislation opponents come from a place of animus towards the LGBT community. That, however, is not an excuse to ignore the infringement on constitutional rights caused by some bullying prevention programs. After all, many people on either side of the debate might agree that there is something inherently bothersome about allowing advocacy groups to dictate curriculum in public schools. There is no bright line rule when it comes to school curriculum and parental rights. Society is changing and schools must recognize society’s fluidity and change with it. But perhaps it is enough, for now, that schools teach children to treat one another with dignity and respect no matter what. Unless society is willing to relinquish to the state a parent’s right to raise their children in the way the parent sees fit, schools should not be able to engage children in conversations about LGBT issues at such an early age. Parents must, at the very least, be given an adequate opportunity to have the discussion with their children before the school intervenes. Schools actively discussing LGBT issues with first graders have not given parents enough time to have the pertinent conversations at all.

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<sup>152</sup> *Id.* (quoting Director of Teaching Tolerance, Maureen Costello, saying “We don’t tell schools what to do on ‘Mix It Up’ day . . . We suggest activities, none of which have to do with sexual orientations. We used to focus on divisions of race and social class, but now we encourage schools to focus on what their own school issues are.”).

While setting an age threshold at which schools may entertain these discussions with students is rather arbitrary, perhaps an arbitrary age limit will at least dispel many of the complaints from bullying legislation opponents. Parents cannot prevent schools from eventually teaching their children about these matters, but they should be able to prolong it.<sup>153</sup> Thus, parents of elementary school students between kindergarten and third grade should be given an opt-out right for those lessons the parent finds morally objectionable when those lessons concern matters that typically fall under the purview of the parental right to raise their child. Children in these grades are typically between five and nine years old. At this age, parents should still be the ultimate teachers and inculcators of morals and values. If the lessons are so violative of the parents' moral beliefs that they may fairly be deemed morally objectionable to the parent, they should be able to opt their students of a certain age out of those lessons.

There must be some limitations to this opt-out right, however. Parents should not be able to argue that a lesson is "morally objectionable" just because the lesson merely mentions homosexuality or promotes tolerance of LGBT students. Tolerance is the aim and, at some point, the school must acknowledge that it is okay to be different if it wishes to prevent students from bullying others *because* they are different.<sup>154</sup> The nature of the lesson plan and the age of the students must be taken into consideration when evaluating whether parents should be given an opt-out right for particular lesson plans. Simply acknowledging the existence of same-sex couples cannot be the "morally objectionable" reason for requesting an opt-out. Same-sex couples exist regardless of whether objecting parents approve of the unions. Acknowledging their existence does not convey any moral belief either way to students. Moreover, ignoring the existence of same-sex couples may convey bias,

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<sup>153</sup> See Emerson, *supra* note 66, at 709 (noting the fundamental difference between parents preventing the teaching of a concept in its entirety as opposed to preventing schools from preempting the right of parents to direct the upbringing of their children).

<sup>154</sup> See Katherine Stewart, *What's behind the anti-anti-bullying backlash*, THE GUARDIAN (Apr. 3, 2012, 1:21 PM) <http://www.guardian.co.uk/commentisfree/cifamerica/2012/apr/03/behind-anti-anti-bullying-backlash> (commenting that "[m]any people will undoubtedly conclude that these efforts by the anti-anti-bully lobby are lacking in Christian charity or common sense. But their proponents do have a point that we should carefully consider. To be sure, the notion that the anti-bullying initiatives are driven by 'the homosexual agenda' . . . is preposterous. But the sense that anti-bullying initiatives involve teaching children 'acceptance' of LGBT peers, to use the word of the Concerned Women of America, is not. If you want the school to tell students to stop harassing kids . . . *because they are gay*, you have to let them know, at some point, that the school thinks it's OK to be gay.").

intolerance, and ignorance. However, when children at the age of six are receiving active encouragement from teachers and the parent has a legitimate moral objection to the teaching, the parental right to direct the upbringing of their child may furnish a justification for an opt-out right until the child attains a certain age.

The age of the child, then, is another obvious limitation on any opt-out right under anti-bullying legislation education programs. As children age, they become more capable of understanding human differences and generally have been influenced by other factors outside of parental control. Every child in the classroom will reach the age of maturity at different points, so a definitive age limit applicable to all students is obviously arbitrary. The focus on the child's age, however, is not for the child's sake but for the sake of dispelling legitimate arguments from bullying legislation opponents. It seems that by the fourth grade, the parental justification for withholding discussions about LGBT issues with students dissipates. Parents have, hopefully, been furnished with adequate time to tackle the sensitive issues before the school intervenes. Students by fourth grade are also, hopefully, more capable of understanding the lessons and making their own decisions about what they learn.

#### CONCLUSION

Anti-bullying legislation opponents have proffered some legitimate arguments that anti-bullying programs may impermissibly infringe on parental rights and the rights of children to be free from compelled viewpoints. While the majority of bullying education programs seem to pass constitutional muster, certain lessons undertaken in compliance with anti-bullying statutes have infringed on constitutional rights. Although there have been some colorable claims against bullying education programs, those proffering the claims would do well to refrain from classifying all anti-bullying programs as mere ploys to "indoctrinate children in the homosexual agenda." Yes, certain programs have definitely gone too far. But gross overstatements like those made by opponents to anti-bullying legislation are inaccurate and do more harm to the cause than good. Today's anti-bullying legislation opponents have an inherently bad image simply because of the cause they rally behind. Who could possibly oppose anti-bullying legislation? Their bad image is massively amplified by the fact that some seriously poor conduits convey their message. As demonstrated, there are some perfectly legitimate arguments proffered by opponents about parental rights and viewpoint compulsion. What those legitimate

arguments are lacking is an intelligent and reasoned means of conveyance. Our democracy thrives because of the existence of vocal dissenters. It is a shame that those dissenters harm the validity of their message simply because of the means they have chosen to convey it. Demonization of the anti-bullying movement as an indoctrination ploy is a not the way to promote a relatively reasonable end. All parents should be able to agree that bullying is wrong and be able to come to a compromise about legitimate means to prevent it without mischaracterizing the entire anti-bullying movement as a covert operation to destroy America's youth.

Despite the fact that the messages of disgruntled parents have been conveyed poorly, schools would still do well to take heed of them. If schools continue to implement programs that infringe on constitutional rights, those infringements will undoubtedly be exposed by those looking to topple bullying legislation for any reason. Anti-bullying legislation opponents are very powerful and have a strong following. They have already been highly successful in mobilizing parents to action. Parents were successful in the Minneapolis school district in getting some of the *Welcoming Schools* programs tossed out. Parents were also successful last year in halting Mix It Up At Lunch Day at over 200 schools nationwide. A Christian group in Arizona was successful at preventing implementation of a stronger bullying bill because the bill would have "focused on gay kids" despite the fact that "homosexuality" and "sexual orientation" were nowhere mentioned in the bill.<sup>155</sup> The "homosexual agenda" fear is a powerful tool that anti-bullying legislation opponents are not afraid to use. Thus, schools must make some accommodations if they wish to retain their bullying education programs.

That is not to say that schools should completely refrain from engaging students in conversations about sensitive subjects. Given the amount of time students spend at school each day, schools are in the unique role of being able to teach the basics as well as implicitly instill morals in students. School is a place to learn and grow and that growth should not be thwarted because of fear over moral indoctrination. However, if schools want to continue to employ anti-bullying programs in their districts, they

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<sup>155</sup> See Matthew Hendley, *A Homophobic Group Killed Arizona's Anti-Bullying Law*, PHOENIX NEW TIMES (May 31, 2012), <http://www.phoenixnewtimes.com/2012-05-31/news/a-homophobic-group-killed-arizona-s-anti-bullying-law/> (noting how the "biblical" group Center for Arizona Policy (CAP) has been massively successful at killing legislation). The article also quotes Cathi Herrod, speaking for the CAP, who claims that "Not only are [bullying bills] a thinly veiled attempt to allow political groups into our schools, they also divert the focus of our school system off the fundamentals . . . . Class time should be for reading, writing, and arithmetic." *Id.*

must find a way to compromise with parents who do not wish for their children to be taught about LGBT issues and have a constitutional right to prevent that teaching. When a parent and the school disagree over whether the child should be introduced to concepts striking at the heart of the parental role, the fundamental right of the parent should trump the school's interest in educating the child on that matter for a period of time. The right slowly dissipates, as the child gets older and more capable of developing his or her own sense of morality and values. At least for the time being, schools should allow parents who have sincere moral objections to the teachings to opt their very young children out of lessons concerning LGBT issues until their children reach the fourth grade. Striking this compromise with parents will hopefully deter anti-bullying legislation opponents from demonizing the entire cause. If bullying education programs do not find a way to satisfy the legitimate constitutional claims of parents, these programs may not survive in the classroom.

