

## THE LAWMAKING FAMILY

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*Increasingly there are conflicts over families trying to “opt out” of various legal structures, especially public school education. Examples of opting-out conflicts include a father seeking to exempt his son from health education classes; a mother seeking to exempt her daughter from mandatory education about the perils of female sexuality; and a vegetarian student wishing to opt out of in-class frog dissection. The Article shows that, perhaps paradoxically, the right to direct the upbringing of children was more robust before it was constitutionalized by the Supreme Court in Meyer v. Nebraska (1923) and Pierce v. Society of Sisters (1925). In fact, the position of U.S. courts on opting-out conflicts has shifted dramatically over the twentieth century. In the early twentieth century, parents mostly prevailed in such conflicts. Today, the state typically prevails. Contemporary conflicts often involve public-school management of health, sexuality, and liberal development of students through surveys, nudges, and mandatory readings. When these techniques infringe on familial liberty, lawmakers lack conceptual tools to respond. A new understanding of familial liberty is needed.*

*This Article offers that understanding. The approach here is based on the idea of family laws. Family laws are legal systems that families create or adopt to govern their day-to-day lives. These rules exist independently of state laws, and can be religious, such as Amish or Buddhist family laws, or secular, such as feminist or vegetarian family laws. The Article identifies three basic characteristics of family laws: They are (1) general and articulable; (2) grounded in religion, ethics, or morality; and (3) perceived as binding by members of a particular family. The Article argues that, with some limiting principles, lawmaking families should possess a liberty to opt out of programs and policies that conflict with a family law. Through an examination of three different types of family*

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*laws—religious, feminist, and vegetarian—the Article demonstrates how the proposed approach would empower existing lawmaking families. Almost a century has passed since the Supreme Court declared the liberty of parents to educate their children in Meyer v. Nebraska. It is time to breathe new life into this moribund liberty by empowering the Lawmaking Family.*

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## INTRODUCTION

In January of 2012, the New Hampshire legislature passed a bill that grants families the right to exempt a child for any reason from any program offered by a public school.<sup>1</sup> With this legislation, New Hampshire joined other state legislatures in recognizing a familial right that this Article calls “the liberty to opt out.”<sup>2</sup> Examples of opting-out conflicts include a father seeking to exempt his son from health education classes because he wants to educate him regarding health matters at home;<sup>3</sup> a mother seeking to exempt her daughter from mandatory education about the perils of female sexuality with which she morally disagrees;<sup>4</sup> a vegetarian parent wishing to avoid exposing her children to teachings about the nutritional benefits of eating animals;<sup>5</sup> and a Native-American father seeking to exempt his son from a mandatory short-hair policy for boys because it violates his tradition.<sup>6</sup> These diverse and sharply felt conflicts exemplify the jurisprudence of opting out.

The current legal framework for disputes over opting out stems from lower court interpretations of *Meyer v. Nebraska*,<sup>7</sup> *Pierce v. Society of Sisters*,<sup>8</sup> and *Wisconsin v. Yoder*.<sup>9</sup> In these cases the Court recognized and enforced the liberty of parents to direct the upbringing of their children. This Article shows, however, that despite this constitutional right, families in the past four decades have typically failed when trying to opt out of programs and policies of public education. The judicial deference to schools, as reflected by the adoption and application of the “coercion standard,” signals the decline of the familial liberty to opt out. Courts have ruled in favor of parents in opting-out disputes only where a program or

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1. *Veto override gives parents more control over what their kids are taught*, UNIONLEADER.COM (Jan. 4, 2012, 2:05 PM), <http://www.unionleader.com/article/20120104/NEWS/04/120109976/0/news05>. New Hampshire’s state legislature overrode the governor’s veto to pass the bill, H.B. 542, 2011 Gen. Ct., 162d Sess. (N.H. 2012).

2. See *infra* Part II.B.

3. *Leebaert v. Harrington*, 332 F.3d 134, 138 (2d Cir. 2003) (stating that “[r]equiring students to attend health education classes serves a legitimate state interest and is reasonably related to that interest.”).

4. *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (holding that the District Attorney of Wyoming County, Pennsylvania violated a mother’s fundamental right to raise her child without undue state interference).

5. See *infra* Part III.C.3.

6. *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010) (holding that a child succeeded in his free exercise claim under the Texas Religious Freedom Restoration Act because his belief was substantially burdened by the district’s grooming policy).

7. 262 U.S. 390 (1923).

8. 268 U.S. 510 (1925).

9. 406 U.S. 205 (1972).

policy was so coercive that the family's "entire way of life" was threatened.<sup>10</sup>

Should families possess broad opting-out powers, such as those recently enacted in New Hampshire, or narrow ones, as courts in the past four decades have consistently held? This Article proposes a middle way. The proposed alternative centers on what I call "family laws." We know that laws made by courts and legislators shape families, but a reverse phenomenon is often overlooked: families also make laws.<sup>11</sup> Family laws are legal systems that families create or adopt to govern their day-to-day lives.<sup>12</sup> They exist independently of state laws, and can be religious, such as Amish or Buddhist family laws, or secular, such as feminist or vegetarian family laws.

While the right of insular communities to sustain separate ways of life has received judicial and scholarly attention,<sup>13</sup> the idea that the smaller unit of the family also possesses lawmaking capacities, has not. Moreover, the focus on insular communities may be misleading. Some families, especially religious ones, do adopt laws within insular communities.<sup>14</sup> But other families may create and adopt family laws independent of such communities. For example, a family may adopt a feminist family law that requires equal child-care duties by parents, or a vegetarian family law that prohibits killing animals. Those feminist and vegetarian family laws can emerge outside of any identifiable community. They nonetheless deserve legal protections. This Article proposes that when a family law is at stake, a dissenting family should enjoy a liberty to opt out of mandatory educational programs or policies that conflict with the established family

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10. *Id.* at 216; *see also* *Arnold v. Bd. of Educ.*, 880 F.2d 305 (11th Cir. 1989); *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000); *A.A.*, 611 F.3d 248; *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

11. In fact, Plato had speculated that lawmaking originated in families who legislated for themselves. PLATO, *THE LAWS*, Book III (680b), at 79 (Penguin 2004). "The Athenian" quotes the words of the poet Homer:

'No laws, no councils for debate have they:  
They live on the tips of lofty mountains  
In hollow cases; each man lays down the law  
To wife and children, with no regard for neighbor.'

*Id.*

12. For further discussion of family laws as legal systems, *see infra* Part III.A.

13. *See Pierce*, 268 U.S. 510 (holding that a statute that required every parent or guardian of a child between eight and sixteen years to send the child to public school violated the Due Process Clause of the Fourteenth Amendment); *Yoder*, 406 U.S. 205 (holding that compelling Amish children to attend public school after eight years of education violates their parents' free exercise rights); Robert M. Cover, *The Supreme Court, 1982 Term: Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

14. *See, e.g., Yoder*, 406 U.S. 205.

law. The liberty to opt out should be broad but not absolute; the Article outlines some of its limiting principles.<sup>15</sup>

The remainder of this Article has three Parts. Part I introduces the core dilemma. Most children are at the same time affiliated both with families, of which they are current members, and with the state, of which they are future adult citizens. This Part examines how liberal theories have treated conflicts involving this dual identity of children. While some theorists have prioritized the child's identity as a citizen of the liberal state, others have argued for stronger parental authority and for a more meaningful parental right to direct the upbringing of children.

Part II examines the liberty to opt out of public education before and after the Supreme Court cases of *Meyer* and *Pierce*.<sup>16</sup> This Part shows that, perhaps paradoxically, the right to direct the upbringing of children was more robust *before* it was constitutionalized. In the era before *Meyer* and *Pierce*, judicial treatment of opting-out disputes had three main features. First, courts framed the opting-out conflict as an attempt by teachers to dictate the curriculum. Second, opting-out claims were usually successful, and this was true regardless of whether those claims were grounded in religion. Third, courts viewed public schools primarily as service providers, rather than as governmental entities authorized to manage health and liberal education. By contrast, since the Supreme Court constitutionalized the right to direct the upbringing of children in *Meyer* and *Pierce*, that right has eroded. Since then, the liberty to opt out has changed along all three dimensions that characterized the earlier doctrine. First, courts now frame the conflict as an attempt by *parents* to dictate the curriculum. Second, religion is very significant for the success of an opting-out claim, to the extent that secular justifications are readily dismissed. Third, courts now view public schools not as mere service providers, but as authoritative entities charged with governing the health and values of the population.

Part III proposes a new approach to resolve opting-out disputes. This approach is based on a three-part test to assess whether a "family law" is in place. A family law should be: (1) general and articulable; (2) grounded in religion, ethics, or morality; and (3) perceived as binding by members of a particular family. This Part argues that the existence of a family law should trigger a liberty to opt out of aspects of public school education, but that this liberty is subject to some limiting principles. Finally, the

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15. See *infra* Part III.B.

16. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce*, 268 U.S. 510.

Article applies the new proposal to past and future opting-out conflicts involving three types of family laws: religious, feminist, and vegetarian.

## I. THE CONFLICTING AFFILIATIONS OF CHILDREN

Antigone had to choose. She could bury her beloved brother who had betrayed their country, or she could obey the command of the king to leave the traitor's flesh to rot.<sup>17</sup> Most children are simultaneously future adult citizens of the state and members of a family.<sup>18</sup> At times these two paths merge in harmony. This Article is about the times when they do not. Such times have captured the imagination of dramatists, philosophers, political scientists, and jurists. Antigone and Hamlet are mythic representations of this concept of dual identity.<sup>19</sup> Much like Antigone, Hamlet was commanded, albeit by a ghost, to remember his father's death, a duty that conflicted with his duty as a citizen to obey the new king. Antigone and Hamlet remembered and lamented the loss of a beloved family member. And they both ended their lives performing their perceived family obligations. Hamlet killed the uncle who had killed his father; Antigone buried her dead brother. They both died shortly after.

This Part shows that in scholarly debates regarding such conflicts between the two primary affiliations of children, two main positions have crystalized. Some scholars have favored the identity of the child as a future citizen of the liberal state. Others have favored the child's familial identity. By examining each scholarly approach in turn, this Part establishes the important dichotomy between what I call the "Supremacy of the State" and the "Supremacy of the Family." This dichotomy, as Part II will show, remains with us until this day.

### A. *The Supremacy of the State*

The underlying assumption of those who view the state as supreme in conflicts involving the dual identity of children is that in the context of inculcating values, children are primarily citizens of the state and only

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17. See SOPHOCLES, *ANTIGONE*, in *THREE THEBAN PLAYS* (Penguin Classics 2000); see also JUDITH BUTLER, *ANTIGONE'S CLAIM* (Columbia University Press 2000).

18. See, e.g., ALEXANDRE KOJÈVE, *OUTLINE OF A PHENOMENOLOGY OF RIGHT* 425–26 (2007); BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 154 (1981); AMY GUTMANN, *DEMOCRATIC EDUCATION* (Princeton University Press 1987); see also Vivian E. Hamilton, *Immature Citizens and the State*, 2010 *BYU L. REV.* 1055, 1058 (arguing that "the state at best squanders opportunities to more effectively advance its ends with respect to immature citizens; and at worst, fails to meet its most basic obligations to them").

19. WILLIAM SHAKESPEARE, *HAMLET: THE TEXTS OF 1603 AND 1623* (Ann Thompson & Neil Taylor eds., Arden Shakespeare 2006); SOPHOCLES, *supra* note 17.

secondarily family members. Under this view, the liberal state is entitled, and indeed obligated, to transmit certain values to children. Scholarship advocating this approach is found in both socialist and liberal traditions, although the two obviously disagree as to which values the state ought to instill in children.<sup>20</sup> This Article examines scholars associated with the liberal tradition.

Some liberal theorists have asserted that there are certain fundamental liberal values that children as citizens of the state must learn. Amy Gutmann's *Democratic Education* is a representative text on this point.<sup>21</sup> Gutmann argues that *all* children, regardless of the wishes of parents, should develop the skills to make their own decisions about "the good life," and that, accordingly, all children must receive an education that would develop critical deliberation skills.<sup>22</sup> Even private schools, according to Gutmann, should be required to teach democratic values. States should also be compelled by the federal government to implement core values even against the will of the political majority.<sup>23</sup>

Relatedly, Bruce Ackerman has maintained that lawmakers should prioritize the autonomy of children.<sup>24</sup> According to Ackerman, children must acquire the power to make their own decisions.<sup>25</sup> Ackerman thus supports a legal rule that would mandate exposing children to various conceptions of "the good."<sup>26</sup> Under his proposed regime, parents could express their own values when raising children, but would be required to send children to a "liberal school" that would ensure exposure to many conceptions of "the good."<sup>27</sup> No one, according to Ackerman, should be allowed to indoctrinate "an uncritical acceptance of any conception of the good life."<sup>28</sup>

Mary Anne Case has articulated a comparable approach with an emphasis on another key liberal value: gender equality. Case argues that "the equality of the sexes, and the instantiation of that equality in the repudiation of 'fixed notions concerning the roles and abilities of males and females,' are fundamental commitments on which all levels of

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20. KOJÈVE, *supra* note 18.

21. GUTMANN, *supra* note 18.

22. *Id.*

23. *Id.*

24. ACKERMAN, *supra* note 18.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 44.

government in the United States must follow through.”<sup>29</sup> Like Gutmann, Case proposes that the commitment to liberal education must not be limited to public education, and that “[n]ot only in public schools and government funded educational programs, but in state-licensed private schools and home schooling, [states] must ensure that girls and boys receive equal opportunity.”<sup>30</sup> Case further argues that mandatory readings in school that challenge sex stereotyping should be viewed by courts as “constitutionally required to provide to both male and female students equal protection on grounds of sex.”<sup>31</sup> All state-sponsored educational institutions, according to Case, are “required to refrain from promoting a message of inequality between men and women.”<sup>32</sup>

Two significant threads unite the texts of Gutmann, Ackerman, and Case. First, all three scholars identify a liberal value that public and private educators must transmit or apply to children. For Gutmann and Ackerman that value is individual autonomy, with the educational goal of facilitating a child’s independent decisions about “the good life.”<sup>33</sup> For Case, the value is gender equality, with the educational goal of promoting gender equality and eradicating sex stereotyping. Second, all three scholars agree that when the problem of dual identity arises and a child’s identity as a family-member conflicts with his or her identity as a future citizen, the latter should prevail. What is important for the purpose of this Article is that Gutmann, Ackerman, and Case agree that a parent’s wish to opt out of education about gender equality (Case) or autonomy (Ackerman, Gutmann) deserves no protection by state or federal courts. In times of conflict of dual-affiliation, under this view, the state is supreme.

### *B. The Supremacy of the Family*

Others have disagreed, arguing that for the purpose of inculcating values, children are primarily family members and only secondarily citizens of the state. Consequently, under this view, the state should not be

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29. Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2 UTAH L. REV. 381, 382 (2009). See also James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1326 (1996) (“[A] compelling legal argument against religious exemptions to child welfare and education laws is that they discriminate among groups of children, in the conferral of important state benefits, on an arbitrary and improper basis—namely, the religious beliefs of other persons.”).

30. Case, *supra* note 29, at 382.

31. *Id.* at 393.

32. *Id.*

33. As this Article points out, a child’s “autonomy” for liberal thinkers tends to mean departure from familial norms, more so than from the norms of the liberal state.

entitled to transmit values to children against the will of the parents. Such approaches may appear either within liberal reasoning or as an external critique of liberalism. For example, Stephen Gilles has argued from within liberalism for greater rights for religious families when the interests of parents conflict with those of the liberal state.<sup>34</sup> According to Gilles, “[t]here are compelling reasons to give parents not only the right to transmit their values to their children, but also the right to reject schooling that promotes values contrary to their own.”<sup>35</sup> Gilles argues that it is illegitimate for the state to promote some conceptions of “the good” over others through mandatory school programs.<sup>36</sup> This argument for parental authority does not reject liberalism as a theory, but is based instead on liberal values such as tolerance and pluralism towards dissenting parents and families.<sup>37</sup>

In contrast, Stephen Carter’s approach to the question of liberal education seems to come from outside liberal ideology. Liberal education, according to Carter, is simply the means that today’s “group in power” uses to indoctrinate the children “of the other side.”<sup>38</sup> Values such as autonomy and gender equality represent the values of “the group in power.” The point is that, no matter which social group is “dominant” at any given time, using state institutions to inculcate the children of “the other side” is problematic.<sup>39</sup> According to Carter, today’s liberal education can be just as totalitarian as it was when Protestant nativists in the nineteenth century were using public education to create a uniform way of thinking.<sup>40</sup>

In sum, scholarly views on the dual identity of children can be roughly divided into two positions: while some scholars have maintained that the child’s identity as a future citizen of the liberal state should prevail over the child’s identity as a family member (the “Supremacy of the State”

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34. Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 938 (1996) (observing that “parental educational rights are both ill defined and vulnerable to unduly deferential judicial review of state educational regulation”).

35. *Id.*

36. *Id.* at 938–39.

37. *Id.* at 940.

38. Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1223–24 (1997) (“The purpose is clothed in the gentle language of preparing young people to be adult citizens of the republic, but the clothing should not distract us from the argument underneath: good adults are, by definition, those who think the way the dominant group does . . .”).

39. *Id.* at 1224 (“[T]his truth is the same whether the dominant group is nativist Protestants in the nineteenth century, progressive intellectuals at the beginning of the twentieth, anti-Communist populists in the middle of this century, or theorists of liberalism today.”).

40. *Id.*

view), others have asserted that the child's identity as a family member should prevail (the "Supremacy of the Family" view).<sup>41</sup> We will now see how these two positions have played out in the jurisprudence of opting out.

## II. A SHIFT IN SUPREMACY: FROM THE FAMILY TO THE STATE

The position of U.S. courts on opting-out conflicts has shifted dramatically over the twentieth century. In the early twentieth century, parents mostly prevailed in such conflicts, whereas today public schools typically prevail. The following chart maps the central features of this transition.

FIGURE 1: THE SHIFTING JURISPRUDENCE OF OPTING OUT

	HOW COURTS FRAME THE DISPUTE	THE SCOPE OF THE FAMILY LIBERTY TO OPT OUT	HOW COURTS CHARACTERIZE THE ROLE OF THE STATE
<i>COMMON-LAW ERA</i> (BEFORE <i>MEYER</i> AND <i>PIERCE</i> )	Can the teacher intervene in the family?	Broad and open to nonreligious claims	Service Provider
<i>CONSTITUTIONAL ERA</i> (AFTER <i>MEYER</i> AND <i>PIERCE</i> )	Can the family prescribe the public school curriculum?	Narrow and focused on religion	Governance

This Part examines the historical progression from family supremacy to state supremacy in opting-out disputes.

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41. Maxine Eichner has argued that neither the state nor parents should prevail in such conflicts. See Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1340 (2006) ("Instead, a vigorous liberal democracy must develop a framework for education that gives all of these interests some accommodation.").

A. *The Common-Law Era: The Supremacy of the Family*

Under our form of government, and at common law, the home is considered the keystone of the governmental structure. In this empire parents rule supreme during the minority of their children.

—*School Board Dist. No. 18 v. Thompson* (1909)<sup>42</sup>

In an opting-out dispute decided by the Supreme Court of Oklahoma in 1909, the court described the home as a “keystone of the governmental structure.”<sup>43</sup> This represents the prevalent position of common law courts at the time: when schools and parents disagreed in matters of education, the family was deemed supreme. A similar idea is manifested in Roscoe Pound’s 1916 article *Individual Interests in the Domestic Relations*. Pound writes:

Parents may and do claim not merely the society of their children, as ministering a social pleasure, but the custody and control of them, especially while they are of tender years, and the power to dictate their training, prescribe their education and form their religious opinions. All these things are claimed, as it were, as a part of the parent’s personality.<sup>44</sup>

Pound’s narrative captures the spirit of the era. Parents had the “power to dictate” the training of children, as well as to “prescribe their education and form their religious opinions.”<sup>45</sup> This authority, as Pound writes, was understood as an essential part of the “parent’s personality.”<sup>46</sup> In the common-law era, children were still understood primarily as family members.

Three main characteristics appear in these early opting-out disputes. First, courts consistently understood the main issue in opting-out disputes to be whether a teacher or a school could prescribe the education of children, rather than whether the parents could dictate the curriculum.

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42. Sch. Bd. Dist. No. 18 v. Thompson, 103 P. 578, 581 (Okla. 1909).

43. *Id.*

44. Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 181 (1916).

45. *Id.*

46. Pound clarified that the interest of parents in children was by no means absolute. In “modern times,” he writes, courts balance the interests of the family—now understood as a “social institution”—with those of the state in securing and educating “well-bred citizens for the future.” *Id.*

Second, the success of a parental claim did not depend on its religious grounding. Third, courts generally perceived public schools as service providers rather than as governing agencies managing large student populations. I discuss each characteristic in turn.

*1. Main Principle: No State Intervention in the Family*

The first key characteristic of the common-law era relates to the framing of the conflict by courts. Common-law courts in the late nineteenth and early twentieth centuries decided several opting-out disputes involving topics such as dancing, cooking, housekeeping, book-keeping, and geography. In contrast with contemporary courts who, as we will see, view opting-out challenges as parental attempts to interfere with the public school curriculum, these early courts interestingly understood the issue to be just the opposite: whether a school or a teacher could prescribe the education of a child.

Consider a few examples. In *Morrow v. Wood*,<sup>47</sup> a twelve-year-old child was punished for failing to attend geography lessons.<sup>48</sup> The child's father had instructed him not to study geography so that he could focus on reading, writing, and arithmetic.<sup>49</sup> The court emphasized that it was a "fatal error" to think that "the authority of the teacher is paramount and controlling, and that she had the right to enforce obedience to her commands by corporal punishment."<sup>50</sup> The court articulated the proper balance between the parents and the teacher:

We do not think [the teacher] had any such right or authority, and we can see no necessity for clothing the teacher with any such arbitrary power. We do not really understand that there is any recognized principle of law, nor do we think there is any rule of morals or social usage, *which gives the teacher an absolute right to prescribe and dictate what studies a child shall pursue, regardless of the wishes or views of the parent*, and, as incident to this, gives the right to enforce obedience even as against the orders of the parent.<sup>51</sup>

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47. 35 Wis. 59 (1874).

48. *Id.* at 62.

49. *Id.*

50. *Id.* at 63–64.

51. *Id.* at 64 (emphasis added). The court further clarified that the father only "wished to exercise some control over the education of his son, and it is impossible to say that the choice of studies which he made was unreasonable or inconsistent with the welfare and best interest of his offspring." *Id.* at 66.

This idea that a teacher cannot “prescribe” the curriculum appears in many other early opting-out disputes. In *Hardwick v. Board of School Trustees*,<sup>52</sup> for example, parents sought to excuse their children from required dancing lessons.<sup>53</sup> The parents argued that dancing was “offensive to [their] conscientious scruples and contrary to [their] religious beliefs and principles.”<sup>54</sup> The court held that children could not “be compelled . . . to participate in the dancing exercises”<sup>55</sup> as long as the survival of the state did not depend on this activity.<sup>56</sup> In *Rulison v. Post*,<sup>57</sup> in the context of bookkeeping,<sup>58</sup> the Illinois Supreme Court held that a school has “no power to prescribe the academic or collegiate course, nor the high school system, [and therefore] would have no power to compel pupils to pursue such a course under penalty of expulsion.”<sup>59</sup> And in *School Board Dist. No. 18 v. Thompson*,<sup>60</sup> a court held that a school wrongfully required students to participate in singing classes.<sup>61</sup> The parents’ attempt to opt out of singing classes was characterized as a “reasonable selection.”<sup>62</sup> The court explained that at common law, “the parent, and especially the father, was vested with supreme control over the child, including its education, and, except where modified by statute, that authority still exists in the parent.”<sup>63</sup>

One of the main justifications for the supremacy of the family in these early cases was the “spirit of our free institutions.”<sup>64</sup> As the *Rulison* court

52. 205 P. 48 (Cal. Ct. App. 1921).

53. *Id.* at 49–50.

54. *Id.* at 49.

55. *Id.* at 52.

56. *Id.* at 55 (discussing the importance of showing patriotism by saluting the flag and the government’s legitimate interest in requiring such an exhibition of patriotism).

57. 79 Ill. 567 (1875).

58. *Id.* A sixteen-year old student was expelled from school after she followed the will of her parents and refused to study bookkeeping.

59. *Id.* at 572. The school therefore “could not lawfully expel [the student] from the benefits and privileges of the school, for a refusal to comply with this requirement, and when they did so with force, it constituted a trespass.” *Id.* at 574.

60. 103 P. 578 (Okla. 1909).

61. *Thompson*, 103 P. at 582 (“The parent . . . has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers.”).

62. *Id.*; see also *State ex rel. Kelley v. Ferguson*, 144 N.W. 1039, 1041 (Neb. 1914) (affirming a father’s “right . . . to make a reasonable selection from the prescribed studies for his child to pursue”).

63. *Thompson*, 103 P. at 579; see also *State ex rel. Bowe v. Bd. of Educ. of City of Fond Du Lac*, 23 N.W. 102, 103 (1885) (holding that a “rule or regulation requiring the pupil to bring up wood for use in the school-room was one which the board had no right to make and enforce”).

64. *Rulison*, 79 Ill. at 573.

emphasized in 1875, this spirit of freedom is absent in “despotic governments” where the state controls the education of children:

Parents and guardians are under the responsibility of preparing children intrusted to their care and nurture, for the discharge of their duties in after life. Law-givers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions.<sup>65</sup>

This articulation of freedom, almost half a century before its constitutional affirmation in *Meyer* and *Pierce*, reflects a principle of non-intervention by the state in matters of education. Family authority in matters of education trumped the state’s interest in educating its citizens. Likewise, when a father wished that his twelve-year-old daughter not waste her time in cooking classes in *State ex rel. Kelley v. Ferguson*,<sup>66</sup> the Nebraska Supreme Court rejected the school’s claim for authority.<sup>67</sup> The court expressed some sympathy for inculcating ideals of citizenship by schools<sup>68</sup> but underscored the risk of governmental paternalism:

All this [education about the values of citizenship] is commendable and must receive the sanction of every good citizen. But, in this age of agitation, such as the world has never known before, we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home.<sup>69</sup>

The “American home” was considered a sacred realm where, despite good intentions for the public welfare, “governmental paternalism” could not reach.<sup>70</sup> As we will see, today courts embrace a different mode of liberal governance in which familial freedom to educate is often trumped by

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65. *Id.*

66. 144 N.W. 1039 (Neb. 1914) (explaining that the father reasoned that “the time consumed by said class was almost a half day, thereby causing [her] to fall behind in her other studies for lack of time.”).

67. *Id.* at 1040.

68. *Id.* at 1043–44. The school district had argued that “industrial training is essential to the welfare of the public, and it is the function of the state to require courses to be given affording industrial training.” *Id.* at 1040.

69. *Id.* at 1044.

70. *See also* *State ex rel. Sheibley v. Sch. Dist. No. 1*, 48 N.W. 393 (Neb. 1891) (holding that a father who objected to a child’s grammar studies was a better proxy for determining the happiness of his fifteen year old child).

state-mandated education about civic values and the health of future citizens.

## 2. *The Broad Scope of Protected Familial Interests*

Another surprising characteristic of the early opting-out cases is that parents could opt out on nearly any ground. So long as the parent had a “reasonable” justification, a decision to opt out from any school activity was generally respected. Unlike recent opting-out disputes, religion played little or no role in most of the early opting-out cases. In *Morrow*, for example, a father’s opposition to his son’s geography studies had nothing to do with religion.<sup>71</sup> The father considered the study of geography “less necessary for his boy at that time than some other branches.”<sup>72</sup> He wished his son to devote all his time to “orthography, reading, writing and arithmetic,” and the court endorsed this preference because it was not “unreasonable or inconsistent with the welfare and best interest of his offspring.”<sup>73</sup> Similarly, in *State ex rel. Sheibley*,<sup>74</sup> a father’s objection to his daughter’s grammar lessons was validated by the court. The only reason he provided was that it “was not taught in said school as he had been instructed when he went to school.”<sup>75</sup> And in *State ex rel. Bowe v. City of Fond Du Lac*,<sup>76</sup> a court considered a father justified for instructing his child, due to the child’s poor health, to violate a school requirement that each child carry a piece of wood to class for maintaining the classroom fire.<sup>77</sup>

Especially telling on this point is *Ferguson*, in which a father sought to exempt his daughter from cooking classes. The court complimented the father for objecting to cooking classes and opined that “we do not think a case could be presented where a selection made by a parent would more

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71. *Morrow v. Wood*, 35 Wis. 59 (1874).

72. *Id.* at 65 (internal quotation marks omitted).

73. *Id.* at 65–66 (internal quotation marks omitted).

74. 48 N.W. 393 (Neb. 1891).

75. *Id.* at 394 (internal quotation marks omitted). *See also* *Trustees of Schools v. Van Allen*, 87 Ill. 303 (1877) (similarly holding that high school was not authorized to deny admissions of a student who had passed examination in all studies, except grammar, which his father did not desire him to study). In *Thompson*, it is not clear why the parents objected to singing classes—but no religious claims were discussed by the court.

76. 23 N.W. 102 (1885).

77. *Id.* at 104 (“[T]he rule or regulation requiring pupils to bring up wood for use in the school-room was one which the board had no right to make and enforce. But if we are wrong in this view, the relation shows a most satisfactory excuse on the part of the boy for failing to conform to it.”).

clearly be a reasonable selection than the one attempted to be made in this case.”<sup>78</sup> The court explained why the father’s justification was compelling:

[A]t the time the disagreement arose the daughter was studying music, which required not less than two hours a day. If the relator desired to have his daughter study music, he had the unquestionable right to have her do so, and if he thought that the taking of lessons in music, in addition to the studies she was taking in school, as above set out, was all she was able to carry, then, if he had a right to make a selection at all, it must be conceded that it was reasonable for him to select the lesson in domestic science, which took substantially one-tenth of her entire school time, as the lesson to be dropped, in order that she might continue her music.<sup>79</sup>

The father’s preference here was not motivated by religion, morality, or social convention—any of which might have led him to encourage the daughter’s cooking classes. Instead, the father preferred an unusual educational path out of his “desire[] to have his daughter study music.”<sup>80</sup> The court found this preference commendable. So we see that so long as parents provided some reasoning for keeping a child out of a class, courts recognized their authority to do so.

In one case where religious faith was the ground for an opting-out request, the court held for the parents by generously interpreting “religion” to include any moral conviction of the parents. The court in *Hardwick v. Board of School Trustees*<sup>81</sup> held that objecting parents need not prove that they belonged to any specific religious group. Choosing a course of education for a child “is as much a question of morals, which may concern the consciences of those who are not affiliated with any particular religious sect as well as of those who are active members of religious organizations opposed to that form of amusement or exercise.”<sup>82</sup> The court validated the parents’ objection although they did not belong to a recognizable church.

In stark opposition to more recent opting-out cases, common-law era courts encouraged parental picking and choosing from the public-school curriculum. So long as parents did not attempt to impose their individual preferences on *other children*, any reasonable justification as to how a child could benefit from parental restructuring of the curriculum was

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78. State *ex rel.* Kelley v. Ferguson, 144 N.W. 1039, 1041 (Neb. 1914).

79. *Id.*

80. *Id.*

81. 205 P. 49 (Cal. Dist. Ct. App. 1921).

82. *Id.* at 53.

welcomed and endorsed by courts. Religious liberty was only one among a variety of reasons parents could offer. This reflects a perception of the child as primarily a member of the family, and of the supremacy of the family.

### 3. *Conclusion: The Service-Providing State*

The State has provided the means, and brought them within the reach of all, to acquire the benefits of a common school education, but leaves it to parents and guardians to determine the extent to which they will render it available to the children under their charge.

—*Rulison v. Post* (1875)<sup>83</sup>

We have so far examined two aspects of the early opting-out cases. First, courts perceived the main legal issue in opting-out disputes to be whether teachers could “prescribe” the curriculum and disregard the “reasonable selection” of parents. Second, courts recognized a broad decision-making power of parents that was not limited to religious claims. The third salient characteristic of the common-law era is that courts cast the public school as a service provider to families. In case after case, judges reminded public school officials that their mandate is limited to managing the schools and providing services to families, and that they are not authorized to manage individual students.

*Rulison* demonstrates this point. In deciding that a sixteen-year-old could not be required to participate in bookkeeping classes despite the contrary wish of her parents, the court explains:

[i]n the performance of their duty in carrying the law into effect, the directors may prescribe proper rules and regulations for the government of the schools of their district, and enforce them. They may, no doubt, classify the scholars, regulate their studies and their department, the hours to be taught, besides the performance of other duties necessary to promote the success and secure the well-being of such schools.<sup>84</sup>

The duty of school officials, as the court clarifies here, is to govern and ensure the well-being of *the school itself*. The emphasis here is on the institution, not the individual students, as the province of school

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83. *Rulison v. Post*, 79 Ill. 567, 573 (1875).

84. *Id.* at 570–71.

governance. The student attends school as an exercise of an individual right and not as the duty of a citizen:

[A]ll such rules and regulations must be reasonable, and calculated to promote the objects of the law—the conferring of such an education upon all, free of charge. The law having conferred upon each child of proper age the right to be taught the enumerated branches, any rule or regulation which, by its enforcement, would tend to hinder or deprive the child of this right can not be sustained. All rules must be adapted to the promotion and accomplishment of this great and paramount object of the law.<sup>85</sup>

The object of the law, according to the *Rulison* court, is to confer the right to be educated upon a child. Accordingly, the school’s right to expel or suspend a student can be exercised “only for disobedient, refractory or incorrigibly bad conduct,”<sup>86</sup> because:

It is by the commission of one of these acts, alone, that the pupil can forfeit his right to the privileges of the school; and this forfeiture can only be enforced, and the right lost, after all other reasonable means have failed. Nor is the suspension or expulsion designed merely as a punishment of the child, but principally as a means of preserving order and the proper government of the school.<sup>87</sup>

The only legitimate reason to expel or suspend a child, according to this court, is to preserve the order and government *of the school*. The child in-and-of-herself was not the legitimate object of governance. Governing children was the domain of the family. Similar reasoning appears in *Ferguson*:

[I]f the [father] desired that his little girl should take music lessons from a private instructor and devote an hour or two a day to that study, in lieu of the modern lesson of cooking in the public school, we are unable to see how excusing her from that lesson could have interfered with the discipline of the school.<sup>88</sup>

So long as the “discipline of the school” was not injured by the student’s opting out of cooking class, school officials could not mandate her participation in those classes against the wishes of her father. Similarly, in *Sheibley*, the court explained that “[t]here is no good reason why the

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85. *Id.* at 571.

86. *Id.*

87. *Id.*

88. *State ex rel. Kelley v. Ferguson*, 144 N.W. 1039, 1044 (Neb. 1914).

failure of one or more pupils to study one or more prescribed branches should result disastrously to the proper discipline, efficiency, and well-being of the school.”<sup>89</sup>

Schools in the common-law era were viewed as service providers whose authority stems from the delegation of parents. Thus, as long as all students have access to the service provided by the state, some can opt out of the full range of services. The Oklahoma Supreme Court quotes Blackstone for further support of this position:

[The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then in *loco parentis*, and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed.<sup>90</sup>

The school, according to Blackstone, derives its authority from the delegation of the father. Accordingly,

it is idle to say the parent, by sending his child to school, impliedly clothes the teacher with that power, in a case where the parent expressly reserves the right to himself, and refuses to submit to the judgment of the teacher the question as to what studies his boy should pursue.<sup>91</sup>

The school, under this theory, could act only within the scope of its delegation, and that scope was determined solely by the father.<sup>92</sup> This, we will later see, is the opposite of contemporary opting-out cases where management, health, and education of the general population are inherent to public-school education.

In sum, three key components typify opting-out disputes in the common-law era. First, courts framed the opting-out conflict as an intrusion into the parental domain of education. Second, the right to opt out was not limited to religious claims—any reasonable parental interest could be validated by courts. Third, courts viewed public schools as

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89. *State ex rel. Sheibley*, 48 N.W. 393, 395 (Neb. 1891) (adding that “so long as the failure of the students thus excepted to study all the branches of the prescribed course does not prejudice the equal rights of other students, there is no cause for complaint.”).

90. *Sch. Bd. Dist. No. 18 v. Thompson*, 103 P. 578, 581 (Okla. 1909) (quoting Blackstone) (internal quotation marks omitted).

91. *Id.*

92. I will later return to the issue of how lawmaking authority is allocated in various lawmaking families. *See infra* Part III.

service providers vested only with the power to maintain order and discipline of the school—but not with the authority to manage individual students. The constitutional era, while formally recognizing the parents' role in decision-making, began a period that slowly eroded the supremacy of the family.

*B. The Constitutional Era: The Supremacy of the State*

In *Meyer v. Nebraska*,<sup>93</sup> decided in 1923, a school-teacher was prosecuted in the state of Nebraska for teaching German to a ten-year-old in violation of a statute that prohibited the teaching of “any subject to any person in any language other than the English language.”<sup>94</sup> The Court struck down the statute, reasoning that the teacher’s right to teach German “and the *right of parents to engage him* so to instruct their children . . . are within the liberty of the [Fourteenth] [A]mendment.”<sup>95</sup> The *Meyer* Court thus located a parental liberty interest in the Due Process Clause.

Two years later, in *Pierce v. Society of Sisters*,<sup>96</sup> the Court further elaborated the meaning of this new constitutional right.<sup>97</sup> This time, the plaintiff, which provided Roman Catholic religious instruction and moral training, challenged a law that required every parent or guardian of a child between eight and sixteen years to send the child to public school. The Court struck down the law, announcing that:

[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The 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.<sup>98</sup>

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93. 262 U.S. 390 (1923).

94. *Id.* at 397.

95. *Id.* at 400 (emphasis added). The Court famously declared:

[L]iberty . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.* at 399.

96. 268 U.S. 510 (1925).

97. *Id.*

98. *Id.* at 535.

With these famous words, the *Pierce* Court declared the liberty interest of parents to include the right to choose private education over public education. More broadly, the Court clarified that the state cannot legitimately attempt to “standardize its children” because the child is not the “mere creature of the state.” *Meyer* and *Pierce* are considered landmark victories of individual rights against state coercion.<sup>99</sup> Although they do not mention the constitutional right to privacy, they are considered its origins.<sup>100</sup>

*Meyer* and *Pierce* were decided against the backdrop of what the Court viewed as totalitarianism. The *Meyer* Court differentiated constitutional democracies from Plato’s totalitarian vision of society.<sup>101</sup> The Court emphasized that totalitarian ideas are “wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.”<sup>102</sup> The explicit message here is that liberal democracies protect parents from policies that attempt to shape children in a uniform way. Parents possess a liberty interest in the education of children.

As Jed Rubenfeld has shown, in *Meyer* and *Pierce* “the state had gone much further in the effort . . . to ‘coerce uniformity.’”<sup>103</sup> The meaning of the legislative ban on foreign languages in *Meyer* was “partially to ban ‘foreign thinking’ and ‘foreign ideas’ from [students’] consciousness.”<sup>104</sup> The Court thus responded to “[t]he threat of the state using the public schools to inculcate one acceptable way of thinking—‘our’ way, as opposed to ‘foreign’ ways.”<sup>105</sup> In *Pierce*, the threat of totalitarianism was even more immediate because the state had prohibited all private

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99. But see Barbara Bennett Woodhouse, “Who Owns the Child?”: *Meyer* and *Pierce* and the *Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) (arguing that *Meyer* and *Pierce* “were animated . . . by another set of values—a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent’s private property rights in his children and their labor”).

100. See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 743 (1989).

101. *Meyer*, 262 U.S. at 401–02 (“Plato suggested a law which should provide: ‘That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent . . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.’”).

102. *Id.* at 402.

103. Rubenfeld, *supra* note 100, at 786; see also Alice Ristorph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1265 (2010) (“*Meyer* may be read to adopt the kind of antitotalitarian argument for institutional and ideological diversity.”).

104. Rubenfeld, *supra* note 100, at 786–87.

105. *Id.* at 787.

education.<sup>106</sup> The anti-totalitarian underpinning of the liberty interest announced in *Meyer* and *Pierce* is crucial to understanding contemporary opting-out disputes.

With these cases, the Supreme Court appeared to announce a broad liberty interest for parents. But over the course of what I call the “Constitutional Era,” lower courts interpreted this principle in ways that narrowed its applications.

As illustrated in Figure 1 above,<sup>107</sup> there are three key components to the opting-out disputes of the constitutional era. First, in contrast with the common-law era, courts today typically understand the main issue to be whether a parent can prescribe the school curriculum. Second, in contemporary opting-out disputes, parental requests that are not based on religious liberty are generally less successful. Third, unlike the early cases where courts viewed public schools as service providers, today courts view public schools as autonomous entities in charge of governing student populations and producing future generations of citizens.

### 1. Main Principle: No Family Intervention in the State

Public education in the United States has undergone a process of secularization in the twentieth century.<sup>108</sup> It is therefore unsurprising that many opting-out disputes in the past four decades have involved religious objections to mandatory programs and policies. The most well-known of these challenges is *Wisconsin v. Yoder*.<sup>109</sup> In *Yoder*, parents who practiced the Amish and Mennonite religions were convicted of violating the state’s compulsory public-school attendance law.<sup>110</sup> The parents sought to opt out of public education, arguing that mandatory public-school education past the eighth grade violated their religious beliefs and threatened their entire religious way of life.<sup>111</sup> The Court accepted the state’s educational

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106. *Id.*; see also Carter, *supra* note 38 (arguing that *Meyer* and *Pierce* represent an implicit argument about social contract: parents can freely educate their children about religion because they have never delegated that right to the state).

107. See *supra* Part II.A.

108. See, e.g., KENT GREENAWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* (Princeton University Press, 2005); Marc O. DeGirolami, *The Problem of Religious Learning*, 49 B.C. L. REV. 1213, 1217 (2008) (“[B]y the mid-twentieth century, the conviction that Protestant Christianity was the exclusive wellspring of rectitude had quite properly been by and large repudiated, at least by the Supreme Court. And yet a robust civic and moral education remained one of the public schools’ *raison d’être*.”); DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974).

109. 406 U.S. 205 (1972).

110. *Id.*

111. *Id.* at 221.

goals,<sup>112</sup> but held that the Amish values of reliability, self-reliance, and dedication to work can indeed prepare schoolchildren for productive adult citizenship.<sup>113</sup>

*Yoder* is in the tradition of the Supreme Court's broad articulation of the right to opt out, but, like *Meyer* and *Pierce*, *Yoder* has been narrowly construed by later courts. Parents and families who have attempted to rely on this case have mostly failed. Since *Yoder*, parents have sought to opt out in two primary educational areas: (1) health and sexuality, and (2) social values. In a majority of these cases, familial opting-out challenges under the First and the Fourteenth Amendments, both religious and nonreligious, have been unsuccessful.

*a. Health and Sexuality*

Struggles to exempt a child from classes or programs involving health or sexuality have been characterized by courts as attempts to prescribe the public-school curriculum. For example, in *Brown v. Hot, Sexy & Safer Productions*,<sup>114</sup> the parents of high-school students complained when their children attended a mandatory school-wide HIV-awareness program.<sup>115</sup> The First Circuit held that parents cannot "dictate the curriculum" in public schools,<sup>116</sup> and that the right to direct the upbringing of children is violated only by "foreclosing the opportunity of individuals and groups to choose a different path of education."<sup>117</sup> The court distinguished mandatory HIV education from the claims at issue in *Meyer* and *Pierce*:

We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first

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112. *Id.*

113. *Id.* at 224–25 ("There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith . . .").

114. 68 F.3d 525 (1st Cir. 1995).

115. *Id.* at 529. The parents invoked "their privacy right to direct the upbringing of their children and educate them in accord with their own views," and their children claimed that the sexually explicit nature of the event humiliated and intimidated them. *Id.* at 529, 532.

116. *Id.* at 533 ("The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program . . . . We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.").

117. *Id.*

instance involves the state *proscribing* parents from educating their children, while the second involves parents *prescribing* what the state shall teach their children.<sup>118</sup>

The logic here is crucial. The court holds that the state cannot “proscribe” parents from educating their children, and parents cannot “prescribe” what the state “shall teach their children.” The court explains:

If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school’s choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the 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>119</sup>

The court wishes to avoid schools having to “cater the curriculum” to each student whose parents disagree. But it is important that the parents in this case *did not seek* to dictate or cater the school curriculum for other children: they only sought to exempt their own children from parts of the curriculum. They were attempting what this Article calls an “opt out.” Nonetheless, the recurring theme in many such cases is that opposing parents seek “to restrict the flow of information in the public schools” and “to dictate the curriculum.”<sup>120</sup>

This is a fascinating reversal of the opting-out cases: in the early cases, schools that did not accommodate parental opting-out requests were criticized by courts for prescribing the curriculum. Now the roles have flipped. The protective sword of *Meyer* and *Pierce* has turned on parents. This reversal is also apparent in *Leebaert v. Harrington*,<sup>121</sup> where a father sought to excuse a child in the seventh grade from mandatory health-education classes.<sup>122</sup> The school refused and a lawsuit followed.<sup>123</sup> The Second Circuit held for the school,<sup>124</sup> following the First Circuit’s position that parents do not have “a fundamental constitutional right to dictate the

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118. *Id.* at 533–34 (emphasis added).

119. *Id.* at 534.

120. *Id.*

121. 332 F.3d 134 (2d Cir. 2003).

122. *Id.* at 137 (noting the father argued that, “being sufficiently educated in health, sex, and behavioral issues, [I] feel it is more appropriate that as they enter adolescence I handle this facet of my children’s personal growth at home.”).

123. *Id.*

124. *Id.* at 145.

curriculum at the public school to which they have chosen to send their children.”<sup>125</sup> The court explains:

*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught . . . . [R]ecognition of such a fundamental right—requiring a public school to establish that a course of instruction objected to by a parent was narrowly tailored to meet a compelling state interest before the school could employ it with respect to the parent’s child—would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children.<sup>126</sup>

In contrast with the common-law era cases, the court vests the school with decision-making power regarding the “overall educational needs of the community and its children.”<sup>127</sup> *Leebaert* and *Hot, Sexy & Safer Productions* exemplify the current narrow interpretation of *Meyer, Pierce*, and *Yoder*.

Parents have also failed in several efforts to opt out of health-related surveys. In *Fields v. Palmdale*,<sup>128</sup> elementary school children participated in a survey that included topics such as the frequency of “thinking about having sex” and “about touching other peoples’ private parts.”<sup>129</sup> The Ninth Circuit framed the issue as “whether the parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children,”<sup>130</sup> and held that they do not.<sup>131</sup> Parents may not prescribe the curriculum,<sup>132</sup> and “[s]chools cannot be expected to accommodate the personal, moral or religious concerns of every parent.”<sup>133</sup> A public school can provide students “with whatever

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125. *Id.* at 141 (quoting *Hot, Sexy & Safer Prods.*, 68 F.3d at 533–34) (internal citations omitted) (internal quotation marks omitted).

126. *Id.* at 141.

127. *Id.*

128. 427 F.3d 1197 (9th Cir. 2005).

129. *Id.* at 1200.

130. *Id.* at 1203.

131. *Id.* (“[N]o court has ever held that parents have a specific fundamental right ‘to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs.’”).

132. *Id.* at 1205–06 (“*Meyer, Pierce*, and their progeny ‘evinced the principle that the state cannot prevent parents from choosing a specific educational program,’ but they do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense.”).

133. *Id.* at 1206.

information it wishes to provide, sexual or otherwise, when and as [it] determines that it is appropriate to do so.”<sup>134</sup> The Ninth Circuit concluded that “the right to limit what public schools or other state actors may tell their children regarding sexual matters, is not encompassed within the *Meyer-Pierce* right to control their children’s upbringing and education.”<sup>135</sup> Similarly, in *C.N. v. Ridgewood Board of Education*,<sup>136</sup> parents challenged their children’s participation in a survey involving issues such as drug and alcohol use, sexual activity, suicide, and personal associations. The court held that a survey, even if involuntary, is not unconstitutional because it did not “strike at the heart of parental decision-making.”<sup>137</sup>

Parents have also repeatedly failed in challenges to school-sponsored birth-control programs. For example, *Parents United for Better Schools v. Philadelphia Board of Education*<sup>138</sup> involved a condom-distribution program that addressed the concern that “adolescent pregnancy, sexually transmitted diseases, and HIV infection are epidemic among school age youth.”<sup>139</sup> Parents in this case had the choice to opt their child out of the program,<sup>140</sup> but students whose parents did not actively do so were supplied with condoms. The parents claimed that the policy violated their right to direct the upbringing of their children.<sup>141</sup> But students today are primarily understood to be citizens of the state, and the goal of the school is to make them happier and healthier. The Third Circuit concluded that “the policy neither coerces parental or student participation nor offends the rights of parents to direct the care and custody of their children.”<sup>142</sup>

There was no opt-out provision in the condom-distribution program challenged by the parents in *Curtis v. School Committee of Falmouth*.<sup>143</sup> The court concluded that the condom-distribution program was “in all

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134. *Id.*

135. *Id.* at 1207.

136. 430 F.3d 159 (3d Cir. 2005).

137. *Id.* at 184–85 (“While the Supreme Court has extended constitutional protection to parental decisions regarding certain matters, our review of these cases prompts us to conclude that the decision whether to permit a middle or high school student to participate in a survey of this type is not a matter of comparable gravity.”) (citation omitted).

138. 148 F.3d 260 (3d Cir. 1998).

139. *Id.* at 262 (internal quotation marks omitted).

140. *Id.* at 264.

141. *Id.* at 274. The school board’s policy stated that “[t]he Board of Education firmly believes that successful pursuit of the mission of promoting a healthy lifestyle for all adolescents depends upon the cooperation of a broad spectrum of the Philadelphia community, including schools, families, religious institutions, health care providers, social service agencies, businesses, government, and media.” *Id.* at 263 (quoting Policy Number 123, “Adolescent Sexuality”).

142. *Id.* at 262.

143. 652 N.E.2d 580 (Mass. 1995).

respects voluntary and in no way intrudes into the realm of constitutionally protected rights [and that] no threshold demonstration of a coercive burden has been made.”<sup>144</sup> The court clarified that “[t]he type of interference necessary to support a claim based on an alleged violation of parental liberty appears to be that which causes a coercive or compulsory effect on the claimants’ rights.”<sup>145</sup> Condom-distribution programs are viewed as voluntary since the program does not actually require the students to obtain condoms.<sup>146</sup> Thus, although religious or moral sensibilities of parents may be offended, the coercion standard is not met because “parents are free to instruct their children not to participate.”<sup>147</sup>

By the end of the twentieth century, the perception of children flipped. Through the lens of this reversal in courts’ responses to opting-out disputes, it seems that minors are now viewed primarily as future citizens and secondarily as family members. Parents have very limited opting-out powers. Teaching students about HIV, mandating health surveys, and distributing contraceptives are all within the current mandate of public-school education.

#### *b. Social Values*

Two types of opting-out conflicts involve what we might call “social values.” First, school dress codes and grooming policies, which are often justified by schools as minimizing socioeconomic gaps and reducing drop-out rates, have been challenged by parents.<sup>148</sup> Second, teaching liberal values such as gender equality and same-sex marriage in the public-school setting has been the source of intense conflicts between schools and dissenting parents.

#### *i. Opting Out of Dress Codes and Grooming*

Parents have unsuccessfully attempted to exempt children from dress codes and grooming policies. Such was the case in the Fifth Circuit’s

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144. *Id.* at 583.

145. *Id.* at 585.

146. *Id.* at 586 (“The students are not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use. In other words, the students are free to decline to participate in the program.”).

147. *Id.*; *see also* *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980) (upholding a clinic’s programs, in a case brought by the parents of a sixteen year-old female who received contraceptives from a public family planning clinic).

148. *See, e.g.*, *Littlefield v. Forney*, 268 F.3d 275 (5th Cir. 2001).

decision in *Littlefield v. Forney*,<sup>149</sup> where parents challenged a district-wide mandatory uniform policy that had an opt-out provision only for families “with ‘bona fide’ religious or philosophical objections to the wearing of a uniform.”<sup>150</sup> Parents claimed that the narrowness of the provision violated their fundamental right to control the upbringing and education of their children.<sup>151</sup> The court validated the uniform policy because it furthers “the legitimate goals of improving student safety, decreasing socioeconomic tensions, increasing attendance, and reducing drop-out rates.”<sup>152</sup> Similarly, in *Blau v. Fort Thomas Public School District*,<sup>153</sup> a father and his daughter challenged a middle school dress code.<sup>154</sup> The father claimed that the code violates his right to control the dress of his child, and his daughter explained that she wanted to wear clothes that “look nice on [her], that she feel[s] good in, and that express her individuality.”<sup>155</sup> The Sixth Circuit reiterated the idea that parents cannot prescribe the public school curriculum:

While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how a public school teaches their child*. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally “committed to the control of state and local authorities.”<sup>156</sup>

This language is especially helpful for understanding the current role of public schools. The parents’ right to direct the upbringing of children, according to the Sixth Circuit, ends when parents decide to send their child to public school. Thus, efforts of parents to opt out of dress codes and grooming policies usually fail as an intervention in the prerogative of public schools.<sup>157</sup>

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149. *Id.*

150. *Id.* at 281.

151. *Id.* at 282.

152. *Id.* at 291.

153. 401 F.3d 381 (6th Cir. 2005).

154. *Id.* at 385 (The dress code was designed to “create unity, strengthen school spirit and pride, and focus . . . attention upon learning and away from distractions.”).

155. *Id.* (alterations in original).

156. *Id.* at 395–96 (emphasis added).

157. *See id.*

There are exceptions, however. In a telling contrast with *Blau*, the Fifth Circuit recently held for parents in a religious challenge to a dress code in *A.A. v. Needville Independent School District*.<sup>158</sup> A Native American family challenged a sex-based grooming policy that required boys to wear their hair short.<sup>159</sup> The boy and his parents wanted the boy to wear his hair in two long braids.<sup>160</sup> The Fifth Circuit granted the family's opting-out request because the child "demonstrated a sincere religious belief in wearing his hair uncovered—*visibly* long."<sup>161</sup> The court dismissed the school's hygienic and safety concerns,<sup>162</sup> and reminded the school district that elementary school, "even in its most authoritarian form, is neither a military operation nor an incarceration facility."<sup>163</sup> The court conceded that the identity of boys as future citizens justifies a strict grooming code, but noted that there are *exceptional cases* in which a child's identity as a member of a religious community will prevail. The family succeeded in its free exercise claims under state law.<sup>164</sup>

Not all successful parental challenges involve religious grounds. Another case regarding teen sexuality and gender expression was decided recently by the Third Circuit in *Miller v. Mitchell*.<sup>165</sup> Here, a district attorney presented teens suspected of "sexting" with the choice either to attend an educational program on gender and sexual expression or to face felony child pornography charges.<sup>166</sup> One of the goals of the educational program was to educate girls about the dangers of female promiscuity.<sup>167</sup> The mother of one of the teens objected and sought to opt out of this program, claiming that it "contradict[s] the [feminist] beliefs she wishes to

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158. 611 F.3d 248 (5th Cir. 2010).

159. *Id.* at 253.

160. *Id.* at 254.

161. *Id.* at 262 (emphasis in original). The court decided the case on state free exercise grounds only, under a strict scrutiny test. *Id.* at 272.

162. *Id.* at 268–69 ("[T]he District does not dispute that A.A.'s hair is kept clean, nor does it explain why its 'one braid down the back' exemption would foster hygiene as compared to two braids . . . . To the extent A.A.'s long hair poses a cognizable safety concern, it is of course far from those associated with a knife of any size or shape.").

163. *Id.* at 271.

164. *See id.* at 272. The court did not address the constitutional claims because the holding under Texas law provided a non-constitutional basis sufficient to support its decision.

165. 598 F.3d 139 (3d Cir. 2010).

166. *Id.* at 144.

167. *Id.* ("The education program was divided into a Female Group and Male Group. The 'Female Group' syllabus lists among its objectives that the participants 'gain an understanding of what it means to be a girl in today's society, both advantages and disadvantages.' In the first session, students are assigned to write 'a report explaining why you are here,' '[w]hat you did,' '[w]hy it was wrong,' '[d]id you create a victim? If so, who?,' and how their actions "affect[ed] the victim[,], [t]he school[,], and] the community.'" (alterations in original).

instill in her daughter.”<sup>168</sup> She particularly objected to the education program’s lessons about the moral wrongfulness of her daughter’s actions.<sup>169</sup> The court agreed that the district attorney “impermissibly usurped and violated [the mother’s] fundamental right to raise her child without undue state interference.”<sup>170</sup> One explanation for this exceptional decision is that the educational program was initiated and administered by a district attorney. Because criminal prosecutors are not typically authorized to educate the public, the district attorney’s actions were viewed by the Third Circuit as impermissibly coercive.

These two exceptional parental victories involved school attempts to normalize teen gender expression. In both cases the circuit courts informed public officials that they had overstepped their authority. Such cases represent the kind of recognition and validation of religious and secular family laws proposed and discussed in Part III.

*ii. Opting Out of Liberal Education*

Mandatory education about liberal values has generated intense conflict between schools and parents. In the well-known case of *Mozert v. Hawkins County Board of Education*,<sup>171</sup> students were required to use a set of reading textbooks designed to help them “develop positive values” and “learn to become good citizens in their school, community, and society.”<sup>172</sup> Students who refused to read the required books were suspended.<sup>173</sup> Several parents sued, claiming that the readings involved materials that contradicted their religious convictions.<sup>174</sup> One father objected to “[gender] role reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes.”<sup>175</sup> Another complained about

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168. *Id.* at 150.

169. *Id.*

170. *Id.* at 151 (“An essential component of Jane Doe’s right to raise her daughter—the ‘responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship,’—was interfered with by the District Attorney’s actions. While it may have been constitutionally permissible for the District Attorney to offer this education voluntarily . . . he was not free to coerce attendance by threatening prosecution.”) (citation omitted).

171. 827 F.2d 1058 (6th Cir. 1987) (reversing the district court’s decision that the reading requirement violated the constitutional rights of the objecting parents and students).

172. *Id.* at 1060. The readings were executed under a requirement of a Tennessee statute to include “character education” in the curricula. TENN. CODE ANN. § 49-6-1007 (2009).

173. *Mozert*, 827 F.2d at 1060.

174. The plaintiffs did not belong to a particular church or denomination, but they considered themselves to be born again Christians. The sides agreed that their beliefs were sincere “and that certain passages in the reading texts offend[ed] those beliefs.” *Id.* at 1061.

175. *Id.* at 1062.

“passages that encourage children to make moral judgments about whether it is right or wrong to kill animals.”<sup>176</sup> The *Mozert* court denied the opt-out requests, and underscored the key role of public schools in preparing children for adult citizenship.<sup>177</sup> The court held that the readings are not coercive,<sup>178</sup> and that “the evil prohibited by the Free Exercise Clause [is] . . . governmental compulsion either to do or refrain from doing an act forbidden or required by one’s religion, or to affirm or disavow a belief forbidden or required by one’s religion.”<sup>179</sup>

The First Circuit reached a similar result in *Parker v. Hurley*,<sup>180</sup> a case involving readings about families that are not based on heterosexual marriages.<sup>181</sup> Some parents sought to opt out of those readings,<sup>182</sup> alleging that they “indoctrinate young children into the concept that homosexuality and homosexual relationships or marriage are moral and acceptable behavior.”<sup>183</sup> But the court again asserted that parents cannot prescribe the public school curriculum.<sup>184</sup> As in *Mozert*, the *Parker* court validated the supremacy of the state by clarifying that it is legitimate for the state to “attempt to inculcate values by instruction,”<sup>185</sup> and that it is the role of public educators to prepare students for citizenship.<sup>186</sup>

In sum, a conceptual shift in the opting-out jurisprudence of courts has occurred. In the common-law era, the family was considered supreme and could therefore opt out of undesired aspects of public school education. In

176. *Id.*

177. *Id.* at 1060, 1071 (“critical reading is an essential skill which . . . children must develop in order to . . . function as effective participants in modern society . . . . Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits and manners of civility.”).

178. *Id.* at 1065–66.

179. *Id.* at 1066 (concluding that no compulsion existed in this case).

180. 514 F.3d 87 (1st Cir. 2008).

181. *Id.* The following books were contested by the parents: ROBERT SKUTCH & LAURA NIENHAUS, *WHO’S IN A FAMILY?* (Tricycle Press 1997) (describing various kinds of families, including same-sex families); NANCY GARDEN, *MOLLY’S FAMILY* (Farrar, Straus & Giroux 2004) (teaching about different kinds of families); LINDA DE HAAN & STERN NIJLAND, *KING AND KING* 92–93 (2003) (telling the story of a prince who is ordered to find a princess, but eventually falls in love with and marries a prince).

182. The parents invoked the right to privacy, the right to raise their children, and the free exercise of religion. They also argued that defendants’ conduct violated MASS GEN. LAWS ch. 71, § 32A, a statute which requires that parents be given notice and an opportunity to exempt their children from curriculum which “primarily involves human sexual education or human sexuality issues.” *Parker*, 514 F.3d at 92.

183. *Id.* (internal quotation marks omitted).

184. *Id.* at 103.

185. *Id.* at 105.

186. *Id.* at 95 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681–85 (1986)). Therefore, in Massachusetts, “it is entirely rational for . . . schools to educate their students regarding that recognition [of same sex marriages].” *Id.*

the constitutional era, by contrast, the law has flipped. Despite some exceptions discussed above,<sup>187</sup> in conflicts involving health education, sex education, dress codes, grooming, and education about social values, courts have generally denied familial opting-out requests.

## 2. *The Narrow Scope of Protected Familial Interests*

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . .

—*Wisconsin v. Yoder* (1972)<sup>188</sup>

One of the indications of the supremacy of the state in the constitutional era is the significant narrowing of the scope of protected parental interests. In contrast with the common-law era where we saw a broad range of protected familial interests, an important distinction crystallized in the constitutional era: secular and religious justifications of dissenting families are now treated differently. Courts time and time again have clarified that secular convictions of parents deserve less constitutional protection than do religious ones.<sup>189</sup> So whereas the success of *both* religious and secular claims has significantly declined in the constitutional era, secular objections have fared worse.

Opting-out disputes that are grounded in religion usually involve a combination of Free Exercise and Due Process claims.<sup>190</sup> In such cases, courts have construed *Yoder* quite narrowly, placing considerable weight on the Court's finding that the "entire way of life" of religious families was threatened by Wisconsin's education policy.<sup>191</sup> In *Mozert*, the Sixth Circuit dismissed opting-out requests from mandatory readings by

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187. See *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 268–69 (5th Cir. 2010); *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

188. 406 U.S. 205, 215 (1972).

189. *Cf. id.* at 216 ("Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.").

190. Courts have also dismissed several attempts to raise the level of scrutiny based on the hybrid nature of Fourteenth and First Amendment claims. See Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209 (2005); but see *Herndon v. Chapel Hill-Carrboro Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (adopting the hybrid theory and dismissing a secular claim based on the rational basis test).

191. *Yoder*, 406 U.S. at 216.

distinguishing the plaintiff parents from the parents in *Yoder*.<sup>192</sup> The court explained that whereas in *Yoder* the parents faced a “very real threat [of] undermining the Amish community and religious practice as they exist today,”<sup>193</sup> here “[n]o such threat exists.”<sup>194</sup> Likewise, in *Hot, Sexy & Safer Productions*, the First Circuit found that a “one-time compulsory attendance at the [HIV education] Program” did not threaten the dissenting families’ “entire way of life.”<sup>195</sup> In *Leebaert*, the Second Circuit also distinguished a father’s request to opt out of health education from the claims of the parents in *Yoder*:

[B]ecause of the comparative breadth of the plaintiffs’ claim in *Yoder*, we do not think that [the plaintiff’s] free exercise claim is governed by that decision: He has not alleged that *his community’s entire way of life* is threatened by [his child’s] participation in the mandatory health curriculum. [He] does not assert that there is an irreconcilable *Yoder*-like clash between the essence of [his] religious culture and the mandatory health curriculum that he challenges.<sup>196</sup>

Similarly, in *Parker*, the court held that plaintiffs’ entire “way of life” was not significantly endangered when their children were exposed to same-sex relationships through reading in public school.<sup>197</sup> The failure of these attempts to opt out reflects the high threshold to which courts have held plaintiffs, even those with religious claims, in the last four decades.

Secular claims are usually brought solely on Due Process grounds, and have fared even worse than religious claims. Indeed, as highlighted above, almost all secular opting-out challenges after *Yoder* have been dismissed by courts.<sup>198</sup> In *Herndon v. Chapel Hill-Carrboro Board of Education*,<sup>199</sup> for example, the Fourth Circuit upheld a high-school’s requirement to

192. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987) (reasoning that *Yoder* “rested on such a singular set of facts that we do not believe [the decision] can be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden.”).

193. *Id.* (quoting *Yoder*, 406 U.S. at 218) (internal quotation marks omitted).

194. *Id.*

195. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995).

196. *Leebaert v. Harrington*, 332 F.3d 134, 144–45 (2d Cir. 2003) (emphasis added) (“[Plaintiff] asserts that the mandatory health curriculum conflicts with his belief that ‘drugs and tobacco are [not] proper subjects that I want my son’s school to teach’ and his view that ‘sex before marriage is . . . something I do not want my sons to be involved in.’ [Plaintiff’s] ‘free exercise claim is [thus] qualitatively distinguishable from that alleged in *Yoder*.’”) (alterations in original) (citation omitted).

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

198. *See supra* Part II.B.1.

199. 89 F.3d 174 (4th Cir. 1996).

perform community service. The court held that a community service requirement “does not intrude on the students’ freedom from involuntary servitude, their right to privacy, or their parents’ right to direct their upbringing and education,”<sup>200</sup> and reasoned that “[e]xcept when the parents’ interest includes a religious element . . . the Court has declared with equal consistency that *reasonable* regulation by the state is permissible.”<sup>201</sup> Other courts have dismissed secular claims without explicitly invoking the hierarchy between religious and secular claims. In *Blau*, for example, the Sixth Circuit easily dismissed a father’s attempt to exempt his daughter from a school dress code when it inhibited her “ability to wear clothing that she likes.”<sup>202</sup> Even in the exceptional case where the Third Circuit upheld a parent’s secular-feminist case, the court’s reasoning reflects that the perceived coerciveness of the program was in large part connected to it being offered as an alternative to criminal prosecution.<sup>203</sup>

Part III criticizes this hierarchy between secular and religious “ways of life” and offers a new way to articulate familial liberties.

### 3. *Conclusion: The Governing State*

The role and purpose of the American public school system were well described by two historians, who stated: “[P]ublic education must prepare pupils for citizenship in the Republic . . . .”

—*Bethel School District v. Fraser* (1986)<sup>204</sup>

Interest in the mental health of . . . students falls well within the state’s authority as *parens patriae* [and] . . . may legitimately play a role in the care and nurture of children entrusted to [it] for schooling.

—*Fields v. Palmdale* (2005)<sup>205</sup>

200. *Id.* at 181.

201. *Id.* at 179 (emphasis in text).

202. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 386 (6th Cir. 2005). The court ultimately held that “issues of public education are generally ‘committed to the control of state and local authorities.’” *Id.* at 396.

203. *See Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

204. 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)) (alterations in original).

205. 427 F.3d 1197, 1210 (9th Cir. 2005).

Public schools today prepare students for citizenship by inculcating liberal values and by managing their mental, physical, and sexual health.<sup>206</sup> This Part demonstrates how mandated dress codes,<sup>207</sup> liberal education,<sup>208</sup> diversity,<sup>209</sup> and community service<sup>210</sup> have been upheld and commended by courts as crucial to shaping future citizens of the state. Courts have also found that techniques such as mandatory health surveys,<sup>211</sup> health education classes,<sup>212</sup> HIV education programs,<sup>213</sup> and voluntary condom-distribution programs are necessary for the health of the population.<sup>214</sup> Such techniques are understood by courts as non-coercive.<sup>215</sup>

Melissa Murray and Alice Ristroph have critiqued “the use of state power to encourage or discourage particular visions of the family.”<sup>216</sup> The authors rely on principles of anti-totalitarianism to make a strong case for “disestablishing the family.”<sup>217</sup> By this they mean that the government should refrain from encouraging certain family forms while discouraging others. Murray and Ristroph center their discussion on a range of constitutional challenges to state regulation of families decided by the Supreme Court.<sup>218</sup> Interestingly, in opting-out disputes after *Yoder*, an indirect and less apparent form of governing the family emerges: the state shapes the values and health of its future citizens by mandating health, sexuality, and liberal education in public schools.<sup>219</sup>

206. See *Bethel*, 478 U.S. at 681 (observing that public schools “inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

207. *Littlefield v. Forney*, 268 F.3d 275 (5th Cir. 2001); *Blau*, 401 F.3d 381.

208. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987).

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

210. *Herndon v. Chapel Hill-Carrboro Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996).

211. *Fields v. Palmdale*, 427 F.3d 1197, 1210 (9th Cir. 2005); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005).

212. *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

213. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995).

214. *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995); see also RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH & HAPPINESS* 1–3 (2009) (discussing the ordering of items on school cafeteria lines).

215. Thaler and Sunstein have called some of these techniques “nudging,” which they define as “any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.” THALER & SUNSTEIN, *supra* note 214, at 6.

216. Ristroph & Murray, *supra* note 103, at 1241.

217. *Id.*

218. Their examples include *Stanley v. Illinois*, 405 U.S. 645 (1992); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Troxel v. Granville*, 530 U.S. 57 (2000); *Reynolds v. United States*, 132 S. Ct. 975 (2012); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

219. See also MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION* 105 (2009) (“What can

Monitoring, improving, surveying, and nudging do not appear to today's courts as coercive.<sup>220</sup> The narrow interpretation of the coercion standard by courts has led to one-sided judicial outcomes favoring schools in opting-out disputes.<sup>221</sup> The heavy-handed idea of coercion that courts use as a baseline is forceful state regulation, such as prohibiting the study of a language or mandating public school attendance. Courts typically defer to public schools unless "the governmental action is mandatory and provides no outlet for the parents."<sup>222</sup> That is, where the state is "requiring or prohibiting" an activity.<sup>223</sup> This is the legacy of the anti-totalitarian frame of *Meyer* and *Pierce*. Today's dissenting families often fail to meet this formidable standard.<sup>224</sup> Thus a new understanding of familial liberty is needed. Part III offers this understanding through a framework that I call "family laws," which responds to recent legislative developments in the wake of the courts' retrenchment.

### C. Legislative Discontent

State legislatures have begun to show signs of dissatisfaction with this judicial trend. Most recently, in January of 2012, the New Hampshire legislature passed a bill that allows parents "to request an alternative school curriculum for any subject to which they register an objection."<sup>225</sup> This legislation immediately sparked a national debate about the role of public schools and the extent to which families should be able to shape their children's curriculum.<sup>226</sup>

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the end of government be? Certainly not to govern, but to improve the condition of the population, to increase its wealth, its longevity and its health. And the instruments that government will use to obtain these ends are, in a way, immanent to the field of population; it will be by acting directly on the population itself through campaigns, or, indirectly, by, for example, techniques that, without people being aware of it, stimulate the birth rate, or direct the flow of the population to this or that activity.").

220. Cf. THALER & SUNSTEIN, *supra* note 214, at 6 (defining a "nudge" as "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives").

221. See Gilles, *supra* note 34 (arguing that the standard is deferential); see also Heather M. Good, Comment, "The Forgotten Child of Our Constitution": *The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641 (2005).

222. *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995).

223. *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980).

224. *But see Arnold v. Bd. of Ed.*, 880 F.2d 305 (11th Cir. 1989); *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000).

225. John Celock, *New Hampshire Lawmakers Pass Law Allowing Parental Objections to Curriculum*, HUFFINGTON POST (Jan. 4, 2012, 6:15 PM), [http://www.huffingtonpost.com/2012/01/04/new-hampshire-legislature-curriculum-objection-law\\_n\\_1184476.html](http://www.huffingtonpost.com/2012/01/04/new-hampshire-legislature-curriculum-objection-law_n_1184476.html). See also H.B. 542, 2011 Gen. Ct., 162d Sess. (N.H. 2012). The bill was passed as part of a veto override.

226. See, e.g., Celock, *supra* note 225; see also Room for Debate, *Should Parents Control What Kids Learn at School?*, N.Y. TIMES (Jan. 24, 2012), <http://www.nytimes.com/roomfordebate/2012/01/24/should-parents-control-what-kids-learn-at-school>.

But the New Hampshire legislation is not a peculiar outlier. Several other states have enacted similar legislation offering more robust protection of familial liberties. A Minnesota statute, for example, sets up a “parental curriculum review” that enables a “parent, guardian, or adult student [who] objects to the content, to make reasonable arrangements with school personnel for alternative instruction.”<sup>227</sup> This legislation also clarifies that schools will not bear the cost of such alternative instruction.<sup>228</sup> Likewise, a Nebraska statute requires all public school districts in the state to develop and adopt policies that would “involve parents in the schools and [state] what parents’ rights shall be relating to access to the schools, testing information, and curriculum matters.”<sup>229</sup> In particular, the policy must include the circumstances under which “parents may ask that their children be excused from testing, classroom instruction, and other school experiences the parents may find objectionable.”<sup>230</sup> Still other states have created narrower opting-out regimes that target only part of the curriculum, such as health education or “family life instruction.”<sup>231</sup>

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227. MINN. STAT. § 120B.20 (2010) (“Each school district shall have a procedure for a parent, guardian, or an adult student, 18 years of age or older, to review the content of the instructional materials to be provided to a minor child or to an adult student and, if the parent, guardian, or adult student objects to the content, to make reasonable arrangements with school personnel for alternative instruction. Alternative instruction may be provided by the parent, guardian, or adult student if the alternative instruction, if any, offered by the school board does not meet the concerns of the parent, guardian, or adult student.”); *see also* TEX. EDUC. CODE ANN. § 26.010 (West 2006) (Exemption From Instruction) (“A parent is entitled to remove the parent’s child temporarily from a class or other school activity that conflicts with the parent’s religious or moral beliefs if the parent presents or delivers to the teacher of the parent’s child a written statement authorizing the removal of the child from the class or other school activity. A parent is not entitled to remove the parent’s child from a class or other school activity to avoid a test or to prevent the child from taking a subject for an entire semester.”).

228. § 120B.20 (“The school board is not required to pay for the costs of alternative instruction provided by a parent, guardian, or adult student. School personnel may not impose an academic or other penalty upon a student merely for arranging alternative instruction under this section. School personnel may evaluate and assess the quality of the student’s work.”).

229. NEB. REV. STAT. § 79-531 (2008) (Parental involvement; public school district; adopt policy).

230. NEB. REV. STAT. § 79-532 (2008) (Parental involvement; policy; contents).

231. *See* S.C. CODE ANN. § 59-32-50 (West 2004) (“Pursuant to policies and guidelines adopted by the local school board, public school principals shall develop a method of notifying parents of students in the relevant grades of the content of the instructional materials concerning reproductive health, family life, pregnancy prevention, and of their option to exempt their child from this instruction, and sexually transmitted diseases if instruction in the diseases is presented as a separate component . . . . No student must be penalized as a result of an exemption. School districts shall use procedures to ensure that students exempted from the program by their parents or guardians are not embarrassed by the exemption.”); *see also* ALA. CODE § 16-41-6 (2001) (Religious conflicts) (“Any child whose parent presents to the school principal a signed statement that the teaching of disease, its symptoms, development and treatment and the use of instructional aids and materials of such subjects conflict with the religious teachings of his church shall be exempt from such instruction, and no child so exempt shall be penalized by reason of such exemption.”); CONN. GEN. STAT. ANN. § 10-16e (West

Interestingly, these laws reinstate the former relationship between public schools and families struck by courts in the common-law era: the family is once again deemed supreme in opting-out disputes.<sup>232</sup> Families are vested with broad discretion in matters of education and can opt out of the public school curriculum for many reasons. By effectively circumventing holdings such as *Leebaert*,<sup>233</sup> *Mozert*,<sup>234</sup> *Fields*,<sup>235</sup> and *Parker*,<sup>236</sup> these statutes signal public dissatisfaction with the treatment of familial liberties in federal courts.

Are these legislative schemes desirable? Does the state have *any* legitimate interest in mandating certain health and liberal instruction of its future adult citizens? Part III presents an alternative proposal that offers a middle way between the absolute liberties that some state legislatures have vested in parents, and the near absence of such liberties in the opting-out jurisprudence of the last four decades. The proposal turns on what I call the “Lawmaking Family.”

### III. EMPOWERING THE LAWMAKING FAMILY

The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important . . . ; they are, however, but a small part of the normative universe that ought to claim our attention.

—Robert Cover<sup>237</sup>

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2010) (“[N]o student shall be required . . . to participate in any . . . family life program which may be offered within such public schools.”); N.J. STAT. ANN. § 18A:35-4.7 (West 1999) (“Any child whose parent or guardian presents to the school principal a signed statement that any part of the instructions in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom.”); TENN. CODE ANN. § 49-6-1303 (2009) (“(a) Upon receipt of a written statement from a student’s parent or guardian to the effect that the parent or guardian has personally examined the appropriate grade level instructional materials or has conferred directly with the student’s instructor, school counselor or principal and that the parent or guardian finds objectionable any or all portions of family life instruction, the student shall be excused from such portion or portions of family life instruction.”); VT. STAT. ANN. tit. 16, § 134 (2004) (“Any pupil whose parent shall present to the school principal a signed statement that the teaching of disease, its symptoms, development and treatment, conflicts with the parents’ religious convictions shall be exempt from such instruction, and no child so exempt shall be penalized by reason of that exemption.”).

232. See *supra* Part II.A.

233. 332 F.3d 134 (2d Cir. 2003).

234. 827 F.2d 1058 (6th Cir. 1987).

235. 427 F.3d 1197 (9th Cir. 2005).

236. 514 F.3d 87, 97 (1st Cir. 2008).

237. Cover, *supra* note 13, at 4.

It is time for a more nuanced discussion of familial liberty. Ideas about liberty and coercion in *Meyer* and *Pierce* are anachronistic today. School governance has changed. Express prohibitions, such as those challenged in *Meyer* and *Pierce*, rarely arise in contemporary disputes. New techniques of governance include managing the health, sexuality, and liberal development of students through surveys, nudges, and mandatory readings. This Part offers schools, legislators, and courts a new framework to limit these techniques. This framework is based on a concept of “family laws.”

A. *What are “Family Laws”?*

We have seen that scholars and courts have so far understood opting-out conflicts as questions of authority or supremacy, and that this has led to binary legal outcomes. In the common-law era, courts viewed the family as supreme, and the teacher was understood to be primarily a service provider. By contrast, in the past four decades, courts have viewed the state as legitimately governing the health and values of its future citizens. But what if instead of asking *who* should have greater authority, we ask *what is at stake* for the dissenting family?

Consider the following example. A vegetarian family seeks to exempt a child from a nutrition class in which the killing of animals is treated uncritically. We do not yet know the reason for the family’s request. The family could be trying to avoid exposure to materials that violate a vegetarian norm of non-violence towards animals. But the family could also be seeking to exempt the child because the child has a hard time waking up for early morning classes or because the family does not like the teacher’s teaching style or because the child thinks it’s icky to dissect a frog. Should it matter if the family’s request to opt out of the mandatory nutrition class is based on a familial norm, a child’s habits, a mere preference, or something else? Under some of the new legislative opting-out proposals, it would not matter; this Part argues that it should.

Our religious, ethical, and moral convictions are central to our existence and our understanding of who we are, in ways that preferences and habits are not. This Article offers a theory that would help schools, courts, and legislators systematize and empower these zones of familial lawmaking in the context of opting-out disputes.

Jurists and legal philosophers have been deciphering concepts of “law” and “legality” for decades.<sup>238</sup> But laws and legalities generated by formal state institutions are only “a small part of the normative universe that ought to claim our attention.”<sup>239</sup> There are many kinds of familial norms, but not all of them are included in what I call “family laws.”<sup>240</sup> A family norm should be treated as a family law if it is: (1) general and articulable; (2) grounded in religion, ethics, or morality; and (3) perceived as binding by members of a particular family.<sup>241</sup> When these three conditions are satisfied, a family law is in place. I will explain each part of the test in turn.

### *1. General and Articulate Norms*

To qualify as a family law, a norm should be specific enough to prescribe or prohibit action and general enough to be applicable in future situations.<sup>242</sup> A standard such as “be nice to others” is probably too vague to be considered a family law because it does not convey enough specificity about what actions must be undertaken to comply. Likewise, a rule that by its own terms applies only occasionally, such as “we sometimes recycle because we care about the environment,” is not general enough to constitute a family law.

Family laws may regulate a variety of activities and behaviors. They could regulate, for instance, how family members contract, or how they fulfill duties of love and care towards each other. Family laws could also guarantee equality among family members. Consider, for example, a rule that permits family members to enter into agreements with other family members regarding household duties (“I will clean the dishes now if you change the baby’s diaper later”), but prohibits such agreements if they involve monetary exchange (“I will pay you five dollars if you change the baby’s diaper”); or a tort-like rule that requires family members to warn

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238. Legal Positivists historically separated the concept of law from morality and defined law as an enforceable command by a sovereign who can rule others but is not ruled by them. *See, e.g.*, JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1998). H.L.A. Hart refined Austin’s theory with a theory of primary and secondary rules, arguing that the rule of recognition is a primary rule that helps identify law. H.L.A. HART, *THE CONCEPT OF LAW* 97 (1961). *See also* SCOTT J. SHAPIRO, *LEGALITY* (2011) (proposing a theory of law as plans).

239. Cover, *supra* note 13, at 4 (arguing that insular communities create and interpret laws that deserve state protection, and identifying three characteristics of the laws of insular communities: (1) commitment; (2) objectification; and (3) dedication).

240. For a discussion of non-state actors as lawmakers, see Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577 (2000) (exploring how Indian tribal judges constitute their tribe’s unique culture in the domain of family dispute resolution).

241. For a discussion of the issue of dissent within the family, see *infra* Part III.B.1.

242. HART, *supra* note 238, at 200–13.

other family members about potential dangers no matter how remote or unlikely to occur; or an antidiscrimination rule that prohibits all gender stereotyping in the family. Of course, the point is not that the existence of an articulable family norm should result in the enforcement of idiosyncratic contract and tort rules by courts, but rather that families create and live by legal norms *regardless of their enforceability* by formal institutions of law. Families sometimes inhabit a legal universe that is not coextensive with that of the state. In opting-out disputes, families are often asking that they not be forced to participate in programs or activities that violate their family laws.

## 2. *Grounded in Religion, Ethics, or Morality*

The second characteristic of a family law is that it is grounded in ethical, moral, or religious principles.<sup>243</sup> As described in Part II, religious “ways of life” currently receive greater protection than secular ones.<sup>244</sup> Thus, a parent who today offers a secular justification for opting-out of a program or policy, as in *Blau*<sup>245</sup> (opposing a dress code on secular grounds) and *Herndon*<sup>246</sup> (opposing mandatory community service), stands a lesser chance of success than a parent who offers a *religious* justification for opting out, as in *Needville*<sup>247</sup> (successfully opposing a grooming policy on religious grounds) and *Arnold*<sup>248</sup> (successfully opposing school intervention in teen pregnancy on religious grounds).

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243. Whereas my proposal does not discriminate among family laws that are ethical, moral or religious, courts in the past have had to decide whether “secular” ethical or moral commitments should be treated on par with religious commitments for specific purposes. For example, in the context of a draft exemption for conscientious objectors in the Vietnam War, the Court broadly defined the term “religion,” to include ethical and moral motives that do not stem from any founded religion. *See United States v. Seeger*, 380 U.S. 163, 176 (1965) (defining the term “religious” under the Universal Military Training and Service Act, 50 U.S.C.S. § 456(j) to include “A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.”); *But see Kalka v. Hawk*, 215 F.3d 90, 98 (D.C. Cir. 2000) (observing in the case of a federal prisoner whose request to form humanist groups within the prison chapel was denied, that “traditional notions of religion surely would not include humanism. ‘The term “religion” has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.’” (internal citation omitted). I thank Nancy Knauer for pointing me to this line of cases.

244. On the relationship between religious and non-religious conscience, see generally Nathan S. Chapman, *Disentangling Conscience and Religion*, 2012 ILL. L. REV. (forthcoming).

245. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005).

246. *Herndon v. Chapel Hill-Carrboro Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996).

247. *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

248. *Arnold v. Bd. of Educ.*, 880 F.2d 305 (11th Cir. 1989).

One of the novelties of this alternative scheme is that when a family norm is general and articulable, it should not matter whether it is religious or secular. This is because what religious values mean to some families, secular values may mean to others. The state grants legal protection to religious values because of their significance to families, not because they are inherently true (that, state law has no tools to assess). Non-religious ethical or moral systems deserve similar respect. In constitutional terms, it should not matter whether a family law is invoked under the Free Exercise Clause (as in *Yoder*) or the Due Process Clause (as in *Meyer* and *Pierce*).<sup>249</sup> A religious family prohibition could require, for example, that “no family member eat on *Yom Kippur*,” whereas a secular prohibition could require that “no family member eat or wear animal products.” A religious obligation could require that “all family members pray five times a day,” and a secular obligation could require that “all family members must recycle plastic containers to protect mother earth.” Both types of prohibitions and obligations can qualify as family laws, if they meet the criteria set out here.

A family preference or habit is distinguishable from a family law. A family may gravitate toward Blues over Bach; Earl Gray over espresso; *Winnie the Pooh* over *Alice in Wonderland*; Thai food over Italian food; or as in *Blau*, “nice clothes” over a school uniform.<sup>250</sup> Such preferences and habits should not be treated as family laws for the purpose of opting-out disputes. Individuals and family members suffer a special kind of injury when religious, moral, or ethical convictions are disregarded by the state. This harm is distinguishable from harms that are caused when a mere preference or habit is disregarded, and is thus worthy of the special attention of lawmakers proposed here.

### 3. *Perceived by Family Members as Binding*

The final characteristic of a family law is that it should be understood by family members as binding.<sup>251</sup> It is not enough that family members follow a certain rule. They must do so because they feel bound by it, such that a family member who breaches a family law can be viewed as blameworthy or lawless.<sup>252</sup> In *Yoder*, as Robert Cover points out, if the Amish families had followed the Amish principles only because it was

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249. *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

250. *Blau*, 401 F.3d at 386.

251. *But see* discussion of dissenting family members *infra* Part III.B.1.

252. *See* Cover, *supra* note 13, at 45.

enjoyable to do so, they would not have disobeyed any principle if they had abandoned the Amish way of life, and thus “they could not hold someone blameworthy—lawless—were he to give in.”<sup>253</sup> Likewise, in *A.A.*<sup>254</sup> the Fifth Circuit granted a Native American family an exemption from a grooming policy because the child and the family demonstrated a sincere religious belief in wearing the boy’s hair uncovered and visibly long.<sup>255</sup> If the Native American plaintiff in *A.A.* had followed the haircutting principles typical among Native Americans only because it was pleasurable or aesthetically pleasing to do so, he would probably not have prevailed in court and those principles would not constitute a family law as the term is used here.

The same principle should apply when the family law at stake is based on secular ethics or morality.<sup>256</sup> Consider, for instance, the plaintiff-mother in *Miller*<sup>257</sup> who refused to expose her teenage daughter to a program filled with gender-stereotyping messages about promiscuous female sexuality.<sup>258</sup> To establish a family law here, the mother would have to show not only that her opposition to gender stereotyping stems from an ethical commitment to a set of feminist principles, but also that by sending her daughter to such a learning environment she would in fact compromise her family law of gender equality. That is, that doing so would make her feel lawless or blameworthy.

Or consider a secular thank-you-note-writing family. Thank-you notes are obviously extremely unlikely to trigger opting-out disputes,<sup>259</sup> but the example is nonetheless conceptually helpful. Assume that a family rule that requires the writing of thank-you notes is based on an ethical commitment to express gratitude and familial love. Such a rule would be considered a family law under the proposed approach if the family members also viewed themselves as bound by the rule. In other words, if

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253. *Id.*

254. *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

255. *Id.* at 272 (deciding the case on state free exercise grounds).

256. Obviously, secular family laws cannot be the basis of First Amendment free exercise challenges, but they can be brought under the Due Process Clause, as was the case in *Meyer, Pierce*, and many other challenges examined above. *See supra* note 249.

257. *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

258. *Id.* (holding that the district attorney violated a mother’s fundamental right to raise her child without undue state interference).

259. It is interesting to imagine, however, an opting-out dispute involving a parent who wanted to opt her child out of a class discussion of anthropological critiques of gift exchange. *See, e.g.*, MARCEL MAUSS, *THE GIFT* (2000) (arguing that gifts in most cultures give rise to reciprocal exchange); ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1993).

thank-you-note rule violators are considered lawless or blameworthy, a family law may exist under the proposed approach.

Family laws are importantly distinguishable from “social norms.” Social norms are rules of behavior that individuals follow independent of any formal legal obligation or official sanction for non-compliance.<sup>260</sup> Thus, under the framework offered here, social norms should be classified as habits or mere preferences and not as family laws. Clare Huntington has recently argued that “[social] norms particularly shape the relationships and intimate decisions that fall within the ambit of family law.”<sup>261</sup> Huntington nicely demonstrates that the state can potentially influence various “familial social norms” such as a visibly pregnant woman’s decision to refrain from ordering a glass of wine in a restaurant, a parent’s decision to discipline a child in public, or the decision of a closeted person to bring her female partner to the office holiday party.<sup>262</sup> Family laws and social norms may sometimes overlap, but the key difference is that the commitment to family laws is generally greater and perceived by family members as more binding than the choice whether or not to follow a social norm.

In sum, a family law is in place if a dissenting family can establish that a given familial norm is (1) general and articulable; (2) grounded in religion, ethics, or morality; and (3) perceived as binding by members of a particular family.

### *B. Limiting Principles*

There are three important qualifications to the liberty to opt out proposed here. First, dissenting family members should be entitled to an independent decision-making process, regardless of the opting-out requests of parents. Second, violent family laws should not trigger the liberty to opt out. Third, the liberty to opt out is negative by nature, and thus does not cover more intrusive remedies. I will briefly discuss each qualification.

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260. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining social norms as “informal social regularities that individuals feel obligated to follow”); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (defining social norms as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done”).

261. Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1105 (2010); see also Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

262. Huntington, *supra* note 261, at 1105.

### 1. *Familial Dissent*

In articulating a liberty for the jurisgenerative activities of families, there is an important complicating factor: the internal dissenters who may challenge family laws and the status quo from within. Empowering lawmaking families without recognizing these inside warriors of change—or just uncommitted bystanders—may have undesirable, or even devastating, effects. As Madhavi Sunder has argued, “[I]legally enforced cultural boundaries could, conceivably, accord powerful members of cultural groups the ability to suppress *any rumblings* for change in a culture, particularly by censoring or excluding those members who challenge power relationships within a culture and threaten the status quo.”<sup>263</sup> Sunder criticizes the fact that “law remains steadfastly committed to the old-world view of cultural diversity as existing across cultures, but not within them.”<sup>264</sup> Similar concerns certainly apply in the smaller social units of lawmaking families.<sup>265</sup>

The liberty to opt out should be conditioned on alignment between the student and his or her family. As we saw in Part II, students and parents often bring joint claims against schools, and are often (or at least appear to be) of one mind. But there will be times when a student does not wish to opt out of a school activity or program, and the parent or guardian does, or vice versa. Imagine, for example, a child who wants to participate in frog dissection classes despite parental objections. Or a child who wishes to opt out of frog dissection classes, despite parental wishes for the child to participate in such classes.<sup>266</sup> In such cases of individual dissent, the student’s autonomy (*auto-nomy*, literally self-legislating) should prevail.<sup>267</sup> Thus, if a child dissents from a familial opting-out request, the parental request should be dismissed.<sup>268</sup>

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263. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 503 (2001).

264. *Id.* at 500 (“The ‘right to associate,’ the ‘right to culture,’ the ‘right to religion,’ and other laws are interpreted to defend cultural groups against the forces of modernization and change.”).

265. Instead of what Sunder views as the prevalent “cultural survival” approach, Sunder favors an approach of “cultural dissent.” *Id.* at 500–01; see also Janet E. Halley, *Culture Constrains*, in IS MULTICULTURALISM BAD FOR WOMEN? 100, 103–04 (Joshua Cohen et al. eds., Princeton University Press 1999).

266. I thank Chapin Cimino for offering this example.

267. A similar principle applies here. Just as dissenting families should possess the liberty to dissent from mandated state education, dissenting individual family members should possess the liberty to dissent from mandated family laws.

268. If a child individually wishes to opt out of a program or policy, against parental wishes to the contrary, a different grounding principle may be necessary. In a current work in progress entitled “Cultivating Thinking,” I further develop the premise of lawmaking individuals.

While detecting cultural dissent may prove a difficult task for judges, the school setting may offer resources for detecting and empowering dissenters. Thus, when a family seeks an opt-out based on a family law, the inquiry would ideally begin with an age-appropriate evaluation by guidance counselors or other professionals, assessing the particular family and its norms, and how the individual child relates to those commitments.<sup>269</sup> This inquiry should help the school, and later the court, if needed, to determine if the family's law warrants the liberty to opt out.

## 2. *Violent Family Laws*

Not all family laws should trigger the liberty to opt out. A family law that supports violence against others should not trigger a family's liberty to opt out. Consider the following examples: A family wishes to excuse a child from classes about the Civil War because the family believes that forced slavery is morally superior to equal citizenship; a family wishes to opt out of Holocaust education based on a family law that favors killing Jews, Gypsies, homosexuals, and people with disabilities; a family wishes to opt out of reading about transgender people because it believes in bullying and shaming transgender children; a family wishes to opt out of sex education classes because it believes that promiscuous women deserve to be sexually abused. Even if such families can establish the existence of a family law, the liberty to opt out should not be granted in such cases.<sup>270</sup>

There are at least two justifications for excluding violent family laws. First, the second part of the proposed family-laws test involves laws that are religious, ethical, or moral.<sup>271</sup> Family laws that preach hatred and violence rarely can be grounded on religion, ethics, or morality. Thus, they may not qualify as family laws to begin with.<sup>272</sup> The vast majority of religious, ethical, and moral systems have a general requirement of other-regardingness, usually reflected in a host of more concrete obligations. Individual deviations lack grounding in these traditions, and thus are likely to lack the regularity of a law. Second, when family laws advocate violence against others, there is a reason to worry that children raised in such families may indeed harm others. Refusing an opt-out request in such

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269. The norms guiding these professionals would probably have to be rules rather than standards if we wish to avoid alliance with majority values and dismissal of family laws that do not appeal to the evaluating professional.

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

271. See *supra* Part III.A.2.

272. However, there may be family laws that are offensive and should nonetheless merit opting out.

situations may help to cultivate internal dissent within violent families, and at the same time possibly protect potential victims of violence.

### 3. *Non-Invasiveness*

The liberty to opt out proposed here does not carry with it any prerogative to change or alter the curriculum for other children. It only enables a temporary exit, a “time-out” by choice, for students whose family laws conflict with a given program or policy. Courts have repeatedly dismissed opting-out claims based on the notion that parents cannot “prescribe the curriculum.”<sup>273</sup> This language is misguided. Dissenting families rarely sue in courts attempting to “prescribe” the curriculum. They seek to opt out. This Article argues that, subject to three limiting principles, they should possess the liberty to do so.

Dissenting families may sometimes seek a remedy that is more robust than an opt-out. Consider for example condom machines. Even if dissenting families can demonstrate that condom machines seriously offend family laws regarding sexual abstinence, there is no meaningful way to enable dissenters to opt out without burdening the architecture of the school and the lives of other students.<sup>274</sup> Likewise, because school cafeterias usually do not offer enough vegetarian options, vegetarian children often end up bringing their own lunch.<sup>275</sup> By bringing their own lunch, these students are already exercising the liberty to opt out of eating cafeteria food. Dissenting families in both examples would not be able to utilize this proposal beyond an inherent liberty that they can already exercise, that is, the choice not to obtain condoms or eat cafeteria food.

### C. *Implications of the Liberty to Opt Out*

By strengthening the liberty of lawmaking families to opt out, lawmakers could breathe new life into the liberty professed by *Meyer* and *Pierce*.<sup>276</sup> This Article argues, with some qualifications discussed above,

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273. See *supra* Part II.C.

274. See, e.g., *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995).

275. CAROL J. ADAMS, *LIVING AMONG MEAT EATERS: THE VEGETARIAN'S SURVIVAL HANDBOOK* 176 (Three Rivers Press 2001) (“School cafeterias. Assume nothing. From preschool to high school, the choices may be very limited. Bringing lunches will be your best option. If you wish to make some changes, contact EarthSave and find out about their school-lunch campaign.”).

276. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925). In these two cases, the Court expressed an aversion to the idea of the state producing “ideal citizens” at the cost of familial liberty. *Meyer*, 262 U.S. at 401 (“That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the

that a dissenting family today should be granted the liberty to opt out when its family laws conflict with a public school mandatory program or policy. Notably, for religious families, recognition of the liberty to opt out of aspects of public school education is already on the rise: it is increasingly created through new state and local legislative initiatives.<sup>277</sup> This Article offers a theory to explain and qualify this legislative development, and argues that it should apply to families associated with the political left as well.

We now turn to three representative types of familial lawmaking: (1) religious; (2) feminist; and (3) vegetarian. For all three types, this Article argues, the establishment of a family law would trigger the liberty to opt out of mandatory programs and policies, subject to the limitations described above. We will now see how the proposed approach would affect outcomes of past and future opting-out disputes.

### *1. Religious Family Laws*

Given the secularization of public schools throughout the twentieth century, much contemporary opting-out litigation involves religious dissent.<sup>278</sup> Part II argued that courts currently lack effective tools to address religious family laws. We have also seen that state legislatures share this insight and are gradually stepping in to fill that gap.<sup>279</sup> Several cases involving religious dissent provide useful examples for the application of the family-laws framework.

In *Leebaert*,<sup>280</sup> a father sought to excuse his child, who was in the seventh grade at the time, from mandatory health-education classes.<sup>281</sup> The father explained in an affidavit how the contested health curriculum conflicted with his sincerely held religious beliefs:<sup>282</sup>

While I do not belong to any institutionalized religion, I have religious beliefs which incorporate, in my view, the best from all religions. . . . [C]hildren should be taught just do not engage in drugs or tobacco. . . . [M]y religious view on sex before marriage is that it is something I do not want my sons to be involved in. I teach

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individual has certain fundamental rights which must be respected.”); *Pierce*, 268 U.S. at 535 (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children . . .”).

277. See discussion *supra* Part II.C.

278. See *supra* Part II.B.

279. See *supra* Part II.C.

280. *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

281. *Leebaert*, 332 F.3d at 135.

282. *Id.* at 137–38.

them abstention because my religious view is that sex should be reserved for marriage when it is appropriate. . . . I believe that the way the school system teaches the subjects to which I sought to opt my son out of, is anti-religion. For one example, it doesn't support a married man and woman together as the basic unit of the family. The school teaches that this unit can be comprised of anything or anyone, that anything you say can be a family. This contradicts my religious beliefs.<sup>283</sup>

The father's affidavit satisfies the three elements of a family law. First, the norms cited are general and articulable: children should be warned rather than educated about tobacco and alcohol; sex should be reserved for marriage; and only a man and a woman can form a family. Second, these norms are grounded in religion. The plaintiff claims to incorporate "the best from all religions," but considers himself mostly Christian.<sup>284</sup> Third, the plaintiff views himself as bound by these norms and would deem himself lawless and blameworthy if he failed to educate his son according to them.<sup>285</sup> Nonetheless, under the narrowly construed coercion standard, the Second Circuit denied the family's attempt to opt out.<sup>286</sup> Under the scheme proposed in this Article, the *Leebaert* father and son would have been granted the liberty to opt out of the health curriculum.

*Parker* and *Mozert* prompt a similar analysis.<sup>287</sup> In both of these cases parents objected to mandatory readings in public schools that offended general and articulable religious family rules that family members probably viewed as binding. In *Parker*, the family laws involved a family's commitment to heterosexual unions.<sup>288</sup> This commitment may have been reflected in a family law that prohibits reading books such as *King and King* to children.<sup>289</sup> In *Mozert*, the parents invoked a wide range of family laws, such as a commitment to traditional gender roles, a

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283. *Id.*

284. *Id.* ("The basis of my religious beliefs is Christian, I consider myself to be a Christian and I was baptized a Catholic.").

285. *Id.* at 138 ("I believe that God has empowered human beings with the right to bring their children up with correct moral principles in dealing with the issues taught in this course, not the school system. I claim the right, and responsibility, to impart those religious values which I have been taught to my children to develop their moral, ethical and religious character.").

286. *Id.* at 145.

287. *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

288. *Parker*, 514 F.3d at 92.

289. LINDA DE HAAN & STERN NIJLAND, *supra* note 181 (telling a children's story in which a prince does not like any of the princesses brought before him, but falls in love with one princess's brother and lives happily ever after).

commitment not to question the existence of God by teaching evolution, and a commitment not to question the killing of animals.<sup>290</sup> Likewise, in *Hot, Sexy & Safer Productions*,<sup>291</sup> parents and students alleged, in the context of a mandatory HIV-awareness program, that the school's "endorsement and encouragement of sexual promiscuity at a mandatory assembly 'imping[ed] on their sincerely held religious values regarding chastity and morality.'"<sup>292</sup>

Plaintiffs in *Leebaert*, *Parker*, *Mozert*, and *Hot, Sexy & Safer Productions*, all of whom were unsuccessful in federal courts under the courts' narrow construction of *Meyer*, *Pierce*, and *Yoder*, would satisfy the family-laws test for similar reasons.<sup>293</sup> Plaintiff families pointed to specific family laws that conflicted with a mandated public school teaching. Religion served as the basis for objection, and the family expressed attitudes of deep commitment to their religious family laws. Thus, subject to the limits above, the liberty to opt out would be available to all these plaintiffs under the proposed scheme.

Not all religious dissenters would prevail however. It seems that parents such as those in *Fields*<sup>294</sup> and *C.N.*<sup>295</sup> may not satisfy the family-laws test. In *Fields*, elementary school children were questioned about a range of topics including sexuality.<sup>296</sup> The parents invoked their religious faith and claimed that they possessed the liberty to direct the education of their children in all matters regarding sexuality.<sup>297</sup> But they did not demonstrate any specific familial ethical, religious, or moral laws.<sup>298</sup> These parents were only asserting a right to control certain aspects of education. Likewise, in *C.N.*,<sup>299</sup> parents complained that their children's participation in a survey involving issues such as drug and alcohol use, sexual activity, suicide, and personal associations, intruded upon their parental authority to decide when and how to introduce their children to

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290. *Mozert*, 827 F.2d at 1062.

291. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995).

292. *Id.* at 537 (alterations in original).

293. Likewise, the Native-American family in *Needville* would easily establish the existence of a religious family law that is violated by a strict grooming policy. *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

294. *Fields v. Palmdale*, 427 F.3d 1197 (9th Cir. 2005).

295. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005).

296. *Fields*, 427 F.3d at 1200. The questioning was part of a survey regarding psychological barriers to learning, and the parents learned of the sexual nature of some of the questions on the survey when their children informed them of the questions after they had completed the questionnaires. *Id.*

297. *Id.* at 1202.

298. *Id.* at 1203.

299. *C.N.*, 430 F.3d 159.

these topics.<sup>300</sup> Again, these parents did not invoke existing family laws.<sup>301</sup> In such cases, the state's interest in the health and education of its citizens may prevail, and parents would not have the liberty to opt out. Thus, these two cases would probably not have come out differently, and the parents still would have lost under the proposed family-laws framework.

We will sometimes agonize over the outcomes of this liberty. Some families will seek to opt out of learning about ethical and moral issues that may be dear to our hearts, such as sexual pluralism, reproductive rights, or civil liberties.<sup>302</sup> There may also be real harms to the confidence and self-esteem of children when they learn why their classmates have opted out of certain educational programs.<sup>303</sup> But regardless of whether society blames or praises the content of any given family law, an honest social and legal commitment to liberty, pluralism, and diversity demands that family laws be taken seriously.<sup>304</sup>

## 2. *Feminist Family Laws*

Feminist family laws offer another domain of familial lawmaking. This Article argues that when public school education conflicts with a feminist family law, the liberty to opt out should also be automatically triggered. But first let us see how feminist family laws can satisfy the three-part test above.

First, feminist family laws often generate an articulable set of rules or principles. These rules and principles may vary, depending on the feminist principles that family members are committed to. For example, an equality principle may generate rules like equal sharing of childcare;<sup>305</sup>

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300. *Id.*

301. *Id.*

302. *Mozert*, 827 F.2d 1058 (6th Cir. 1987); *Leebaert*, 332 F.3d 134 (2d Cir. 2003); *Parker*, 514 F.3d 87 (1st Cir. 2008).

303. Perhaps it is worthwhile for a child to experience real life consequences of liberty and diversity rather than read about it. Recall, however, that the proposal includes limits on the sorts of harms that will be tolerated—through, for instance, the exclusion of violent family laws and of accommodation that would reshape the curriculum for everyone.

304. *Cf.* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1101 (2005) (arguing that “democracy sometimes benefits from having decisionmaking bodies that do not mirror the underlying population, but instead encompass a wide range of compositions. Second-order diversity involves variation among decisionmaking bodies, not within them . . .”).

305. *See, e.g.*, Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why and How the Burden of Care for Children Should Be Shifted*, 76 CHL-KENT L. REV. 1753 (2001).

hyphenation of last names;<sup>306</sup> equal contribution to household chores;<sup>307</sup> or related measures. An anti-subordination principle may generate rules involving types of sexual activities that are outside the limits of the family, such as bondage and sadomasochistic sex,<sup>308</sup> or rules and principles involving the hiring and pay of household labor.<sup>309</sup> A sexual liberation principle may involve radical honesty and sexual experimentation.<sup>310</sup> Anti-gender stereotyping principles may involve a commitment to nonconforming choices in children's toys, names, or dress.<sup>311</sup> These principles may even include encouraging children to choose their own gender.<sup>312</sup> Of course, these are only a few examples of feminist family laws, and families can also combine any of the above or with religious or vegetarian laws.

Second, feminist family laws are usually grounded in various ethical commitments such as equality,<sup>313</sup> anti-subordination,<sup>314</sup> ethics of care,<sup>315</sup> sexual liberation,<sup>316</sup> autonomy,<sup>317</sup> and social justice.<sup>318</sup> The interpretive enterprise of feminist family laws involves interrogations of these core feminist principles out of a sense of commitment to the ethical systems that they represent. For some families, these acts of interpretation provide the foundation of a legal system that the family or household experiences as an essential part of its existence—a part that family members cannot

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306. See, e.g., Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007).

307. *Id.*

308. *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

309. Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997).

310. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

311. See, e.g., Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51 (2006).

312. Some families have gone as far as resisting the gendering of children altogether by not revealing the child's biological sex to the outside world. See *id.*

313. Case, *supra* note 29.

314. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (Harvard University Press 1987); ANDREA DWORKIN, *LIFE AND DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN* (1997).

315. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (Harvard University Press 1993); ROBIN WEST, *CARING FOR JUSTICE* (1999); MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

316. See, e.g., Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Janet Halley, *Sexuality Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catharine A. MacKinnon & Reva B. Siegel eds., Yale University Press 2004); Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER* (Carole Vance ed., 1984).

317. MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* (Oxford University Press 1999).

318. FINEMAN, *supra* note 315.

live without. Finally, family members often feel bound by feminist family laws, and violating such laws can often be perceived as blameworthy or lawless. Mary Anne Case has aptly called such ethical commitments “feminist fundamentalism.”<sup>319</sup> Just like religious family laws, a conflict between a mandatory school program and a feminist family law may be experienced as a violation of one’s core beliefs, ethics, or morals.

Consider two recent opting-out conflicts involving feminist family laws and public education. In *Miller*,<sup>320</sup> after a female teen who had “sexted” a photo of herself was caught, her mother resisted a gender-education program that would teach her daughter about the perils of female sexual permissiveness.<sup>321</sup> The mother “object[ed] to the education program’s lessons in why the minors’ actions were wrong, [and] what it means to be a girl in today’s society” and “[s]he particularly opposes these value lessons from a District Attorney who has ‘stated publicly that a teen[age] girl who voluntarily posed for a photo wearing a swimsuit violated Pennsylvania’s child pornography statute.’”<sup>322</sup> The mother claimed that “the program’s teachings that the minors’ actions [sexting] were morally ‘wrong’ and created a victim contradict the beliefs and wishes she wished to instill in her daughter.”<sup>323</sup>

The mother here would likely satisfy the family-laws test. First, she specified an articulable and general feminist norm: the sexuality of girls should not be perceived as dangerous or inappropriate because sexuality is not in and of itself dangerous or immoral. Second, this sex-positive norm can be seen as grounded in a certain strand of feminist ethics.<sup>324</sup> Third, the mother’s commitment to feminist sex-positive principles seems to have been conveyed throughout this litigation. She does not seem to be following feminist rules because she finds them trendy or because she is particularly supportive of “sexting.” The mother’s actions seem driven by an actual commitment to feminist principles that she finds ethically binding and wishes to raise her child by.

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319. Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 382 (2009) (defining feminist fundamentalism as “an uncompromising commitment to the equality of the sexes as intense and at least as worthy of respect as, for example, a religiously or culturally based commitment to female subordination or fixed sex roles”).

320. *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

321. *Id.*

322. *Id.* at 150.

323. *Id.*

324. See sources cited *supra* note 316.

Therefore, this feminist mother would likely prevail under the family-laws scheme. Her claim would trigger the liberty to opt out of the educational program that she is challenging. Indeed, the court agreed that the district attorney could not “impose on . . . children his ideas of morality and gender roles,” and that the non-voluntary gender education program violated the mother’s right to direct the (feminist) upbringing of her child.<sup>325</sup> Thus, *Miller* serves as an excellent example of a feminist family law dealing with female sexual liberation and gender stereotyping that triggered a right to opt out.

By contrast, a federal court has recently rejected a mother’s feminist challenge to sex-based segregation in a public school.<sup>326</sup> In *Doe v. Vermilion Parish School Board*, a mother challenged the constitutionality of a single-sex class policy in a school where two of her daughters attended. The plaintiff claimed that sex-based segregation violates constitutional and federal principles of equal protection.<sup>327</sup> The court denied her request for a preliminary injunction, holding that the board did not intend to discriminate.<sup>328</sup>

Would the alternative proposal offered here yield different results? That depends on what the plaintiff sought to achieve in the lawsuit. On the one hand, the mother could (and did) exempt *her* daughters from single-sex education.<sup>329</sup> This individual opt-out may be grounded in feminist ethics. The mother could readily demonstrate her commitment to such principles, and the harms she would suffer by their violation. Therefore, if all the mother had sought was to opt out of mandatory sex segregation, based on a family law, she would probably prevail under the proposed standard. But here the mother attempted to invalidate the *entire* system. She was not merely seeking to opt out.<sup>330</sup> Thus, the actual outcome of the case may remain intact under the family-laws proposal offered here.

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325. *Miller*, 598 F.3d at 151 (holding that the district attorney “impermissibly usurped and violated [the mother’s] fundamental right to raise her child without undue state interference”).

326. *Doe ex rel. Doe v. Vermilion Parish Sch. Bd.*, 421 Fed. App’x 366 (5th Cir. 2011) (affirming the district court’s denial of a preliminary injunction in *Doe v. Vermilion Parish School Board*, No. 6:09-CV-1565 (W.D. La. 2010)).

327. The mother claimed that the policy violated the Equal Protection Clause of the Fourteenth Amendment, various federal regulations implementing Title IX, and other laws. *Id.* at 368.

328. *Doe v. Vermilion Parish Sch. Bd.*, No. 6:09-CV-1565 (W.D. La. 2010). On appeal, the Fifth Circuit held that the Equal Protection Clause does not require discriminatory intent, and remanded the case to the lower court to determine questions of mootness and reconsider the constitutional claims. *Doe ex rel. Doe v. Vermilion Parish Sch. Bd.*, 421 Fed. App’x 366 (5th Cir. 2011).

329. The board responded by making the single-sex classes voluntary, but the coed classes were disproportionately filled with students with special needs and the single-sex classes had significantly higher GPAs. *Id.* at 370. In addition, the school admitted to using different teaching techniques in the single-sex classes to “tailor learning toward the strengths and needs of boys or girls.” *Id.* at 371.

330. The case is also distinguishable in that the mother was not invoking only a family law, but

Another area where feminist family laws could trigger serious opting-out conflicts with public schools involves gender non-conforming and transgender children. As of today, several states already offer specific protections for gender non-conforming children.<sup>331</sup> Nonetheless, present and future families may wish to opt out of a range of school policies, such as dress and grooming codes,<sup>332</sup> restroom policies,<sup>333</sup> and choice of name.<sup>334</sup> The commitment of families to their gender non-conforming children often stems from feminist and queer ethics and from critical attitudes towards societal policing of gender norms. Such families, assuming they can satisfy the three-part test offered here,<sup>335</sup> would be able to exercise the liberty to opt out of school policies or programs that mandate gender conformity.

### 3. *Vegetarian Family Laws*

How you live your vegetarian life can become a challenge because of this conflict in meaning—we see death in their meals, they see it in ours.

—Carol Adams, *Living Among Meat Eaters*<sup>336</sup>

Vegetarian families also create or adopt laws that can come into conflict with public school education.<sup>337</sup> Such laws can easily satisfy the above characteristics of family laws. First, vegetarians often live by an articulable set of rules or principles. A vegan outreach website, for example, sets forth the following principle: “By not buying meat, eggs,

also state and federal laws about sex equality.

331. States with specific protections for transgender children in schools or public accommodations include California, Colorado, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington and the District of Columbia. SCOPE OF EXPLICITLY TRANSGENDER-INCLUSIVE DISCRIMINATION LAWS, NAT’L GAY & LESBIAN TASK FORCE FOUND. (Aug. 1, 2008), [http://www.thetaskforce.org/downloads/reports/fact\\_sheets/TI\\_antidisc\\_laws\\_7\\_08.pdf](http://www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_08.pdf).

332. *See, e.g., Doe v. Yunits*, 15 MASS. L. RPTR. 278 (Mass. Super. 2001) (holding that a transgender student had stated a viable sex-discrimination claim under state law).

333. *See, e.g., Andy Run, “Which restroom should I use?” Challenges facing transgender children in public schools*, OFFBEAT MAMA (Sept. 6, 2011), <http://offbeatmama.com/2011/09/which-restroom-should-i-use-challenges-facing-transgender-children-in-public-schools>.

334. *See* Noa Ben-Asher, *Paradoxes of Health and Equality: When a Boy Becomes a Girl*, 16 YALE J.L. & FEMINISM 275 (2004) (discussing a case where a child with gender identity disorder was forced against the child’s gender of choice based on a certain understanding of mental health advocated by a school and other state authorities).

335. This conclusion also assumes that none of the three limitations applies. *See supra* Part III.B.

336. CAROL J. ADAMS, *LIVING AMONG MEAT EATERS: THE VEGETARIAN’S SURVIVAL HANDBOOK* 6 (Three Rivers Press 2001).

337. In this part I discuss vegetarianism as the umbrella category of which veganism is a branch.

and dairy products, we withdraw our support from cruelty to animals, undertake an economic boycott of factory farms, and support the production of cruelty-free foods.”<sup>338</sup>

Second, personal and community narratives of vegetarians involve deep ethical convictions and a commitment to the interpretation of ideas and texts involving these convictions. Many vegetarians share a range of personal narratives about their transition from being meat eaters to being vegetarians. These narratives often incorporate inspiring themes of progression, ethnicity, and personal development.<sup>339</sup> As with any legal system, interpretation is essential to articulating vegetarian ethical principles. Thus, while most vegetarian systems agree that a no-meat eating rule is essential, opinions may vary on dairy products or plants. For example, animal products are clearly proscribed for vegans.<sup>340</sup> Other interpretive domains include the use of animals in cases of medical necessity or the keeping of household pets.<sup>341</sup> These interpretations reflect a commitment to a set of ethical ideas dealing with animal life.

Third, these norms are often experienced by family members as binding. Many vegetarians choose to abstain from meat products because they would otherwise violate ethical principles such that blameworthiness and lawlessness would result. For example, one vegetarian complains about meat eaters: “[t]hey simply don’t understand that I don’t miss meat and I’d probably drop dead if I ate it.”<sup>342</sup> This statement, which may not capture the experience of all vegetarians, reflects a sentiment analogous to that of the Amish in *Yoder* and many other religious believers: breaking the law is an unimaginable way of living. Once a rule has been articulated, it is perceived as binding and often immanent to one’s self-perception as a vegetarian.

Vegetarian family laws may come into conflict with public schools. Consider two examples. First, classroom education about nutrition is a classic situation where the liberty to opt out may be necessary for the recognition and respect of vegetarian family laws. In the summer of 2011, the federal government unveiled “MyPlate,” a new guide to making

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338. *On Living with Compassion*, VEGAN OUTREACH, <http://www.veganoutreach.org/guide/being-vegan.html> (last visited Nov. 23, 2012).

339. ADAMS, *supra* note 336, at 6 (“To you, your vegetarianism is a natural progression in eating habits and philosophy. To nonvegetarians, it represents a profound disjunction.”).

340. *Defining Vegan*, VEGAN OUTREACH, <http://www.veganoutreach.org/guide/definingvegan.html> (last visited Nov. 23, 2012).

341. *Id.*

342. ADAMS, *supra* note 336, at 3 (quoting and discussing stories of collision from vegetarians).

healthier food choices.<sup>343</sup> MyPlate emphasizes the fruit, vegetable, grains, protein, and dairy food groups. Many of the elaborated protein options and all of the dairy foods involve animal meat and products. Teaching school children about the food groups typically involves the portrayal of animals as legitimate sources of food. For many families this education is helpful and welcome, but for vegetarian and vegan families it may be devastating.<sup>344</sup> Thus, some of these families choose to homeschool their children.<sup>345</sup> Under the opting-out scheme proposed here, vegetarian families would be able to opt out of any such educational program when they meet the family-laws test. Perhaps such an opt-out regime would draw some vegetarian families who home school their children back to the public school system.

Second, the dissection of frogs and other animals in science classes has triggered serious opting-out disputes. For example, in 1987 a lawsuit ensued after a fifteen-year-old vegetarian student in California refused to dissect a frog in biology class.<sup>346</sup> The court ruled that mandatory dissections were permissible, but that a student could ask to dissect a frog that had died of natural causes.<sup>347</sup> Many states today have laws that recognize the rights of students to opt out of such dissections.<sup>348</sup> In line with this trend, the opting-out scheme proposed here would enable all

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343. Press Release, U.S. Dep't of Agriculture, Agriculture Secretary Launch MyPlate Icon as a New Reminder to Help Consumers to Make Healthier Food Choices (June 2, 2011), <http://www.cnpp.usda.gov/Publications/MyPlate/PressRelease.pdf>.

344. Adams, for example, recounts a story in which her second grade child, who said during the teaching of the food pyramid in class that he does not eat meat products, to which a classmate responded that he would die without eating meat. ADAMS, *supra* note 275, at 4–5. Adams describes the experience of explaining to her son why he is not dead and will not die despite the fact that he eats no meat. *Id.*

345. Melanie Wilson, *Homeschooling and the Vegan Family*, VEGFAMILY: THE MAGAZINE FOR VEGAN FAMILY LIVING, <http://www.vegfamily.com/vegan-children/homeschooling.htm> (last visited Nov. 23, 2012) (“[A]llowing our children to learn at home gives us the opportunity to instill strong vegetarian values without the conflict inherent in public school curriculum assignments related to nutrition, health, animals, and the environment.”).

346. Pl.’s 1st Amend. Compl., *Graham v. Bd. Trs. Victor Valley Union High Sch. Dist.*, CV-87 03764 (C.D. Cal., filed Dec. 15, 1987); see also F. BARBARA ORLANS ET AL., *THE HUMAN USE OF ANIMALS: CASE STUDIES IN ETHICAL CHOICE* 210–13 (1998).

347. *Id.* However, the impracticality of obtaining such frogs in effect enabled the student to opt out of the required dissection.

348. Such states include:

Florida, California, Pennsylvania, New York, Rhode Island, Illinois, Virginia, Oregon, New Jersey and Vermont. Student-choice legislation is currently pending in Connecticut. Maine, Maryland, Massachusetts and New Mexico have Board of Education policies, and Louisiana passed a state resolution in 1992. Many schools and school boards have also independently enacted student-choice policies.

*Questions and Answers About Dissection*, THE HUMANE SOC’Y (Sept. 28, 2009), [http://www.humane.society.org/issues/dissection/qa/questions\\_answers.html](http://www.humane.society.org/issues/dissection/qa/questions_answers.html).

families, where they can demonstrate the existence of a family law that opposes such dissections, to opt out of any such dissections.<sup>349</sup>

#### CONCLUSION

Almost a century has passed since the Supreme Court declared the liberty of parents to educate their children in *Meyer v. Nebraska*.<sup>350</sup> Since then, the quest for familial liberties has been transformed. Today, public schools manage the health, happiness, and values of public school citizens mostly through nudges, special educational programs, and surveys. Obviously, this governance may be beneficial to many students and to the general population. It is not intended as a means to repress children and families. However, as a recent trend in legislation indicates, courts and educators may need more guidance in finding the proper balance between familial liberties and the state's interest in the health, happiness, and values of its future citizens. A fine starting point for articulating this balance would be the recognition and validation of the lawmaking family, on the left and on the right.

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349. Of course, such dissenting students could also dissent based on individual laws as well. The framework of family laws, however, is helpful because it enables the more likely litigants in such cases—parents—to trigger the right on behalf of a child.

350. 262 U.S. 390 (1923).