

**Parental Rights in the Schools:  
Do They Exist After *Palmdale*?**

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**I. Introduction**

In the 1920s, the United States Supreme Court explicitly recognized the parental right “to direct the upbringing and education of children under [the parent’s] control,”<sup>1</sup> in *Meyer v. Nebraska*<sup>2</sup> and *Pierce v. Society of Sisters*.<sup>3</sup> In the last eighty years, the Court has repeatedly affirmed this basic right, deeming it “fundamental,” a rarely achieved designation of huge constitutional importance.<sup>4</sup> Most recently, the Court reiterated its

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<sup>1</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

<sup>2</sup> *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking down a law prohibiting class instruction in any language other than English, and holding that parents have a right to “control the education of their own”).

<sup>3</sup> In *Pierce*, the Supreme Court struck down a compulsory attendance law requiring all children in Oregon to attend public schools, holding that parents had a right to decide whether to send their children to public or private schools. *Pierce*, 268 U.S. at 510 (1925).

<sup>4</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty

support for the *Meyer-Pierce* right in *Troxel v. Granville*, broadly stating that the “liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>5</sup>

Although the existence of this right is well-settled, its boundaries are far from clear.<sup>6</sup> After *Meyer* and *Pierce*, the Supreme Court decided two cases that provide the starting point for discussing the scope of this constitutional parental right: *Prince v. Massachusetts*<sup>7</sup> and *Yoder v. Wisconsin*.<sup>8</sup> In *Prince v. Massachusetts*, a Jehovah’s

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interests recognized by this Court.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing a “fundamental liberty interest of natural parents in the care, custody and management of their child”); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (noting that “[i]n *Meyer v. Nebraska*, the Court recognized that the right ‘to . . . bring up children’ is a central part of the liberty protected by the *Due Process Clause*.”); *Keyes v. Sch. Dist.*, 413 U.S. 189, 246-47 (1973) (“The law has long recognized the parental duty to nurture, support, and provide for the welfare of children, including their education.”); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (listing “activities relating to . . . family relationships . . . child rearing and education” as fundamental rights protected under the Fourteenth Amendment); *Yoder v. Wisconsin*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that statutes like the one in *Meyer*, prohibiting schools from teaching foreign languages to students, . . . unconstitutionally interfere with the liberty of [the] . . . parent”); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (recognizing the right protected in *Meyer* and *Pierce* as an “essential part of the liberty guaranteed by the Fourteenth Amendment”); *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (establishing that the constitutional “right to direct the education of [a parent’s] own child without unreasonable restriction,” extends to all parents, including, in this case, Japanese parents). This right is “one of the few fundamental rights recognized by courts are protected under the doctrine of substantive due process.” Elliott M. Davis, *Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 29 HARV. J.L. & PUB. POL’Y 1133, 1133 (2006).

<sup>5</sup> *Troxel*, 530 U.S. at 65 (holding that a parent’s right to direct the “care, custody and control” of her children trumped the grandparents’ right to visitation).

<sup>6</sup> See *Combs v. Norwin Sch. Dist.*, 2005 U.S. Dist. LEXIS 32007, 97 (W.D. Pa. 2005) (stating that “while the ‘precise boundaries of a parent’s right to control a child’s upbringing and education’ are not fully delineated, it is ‘clear . . . that the right is neither absolute nor unqualified.’” (quoting *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005)); *C.N. v. Ridgewood Bd. of Educ.* 430 F.3d 159, 182 (3d Cir. 2005) (“The Supreme Court has never been called upon to define the precise boundaries of a parent’s right to control a child’s upbringing and education. It is clear, however, that the right is neither absolute nor unqualified.”). See also William G. Ross, *The Contemporary Significance of Meyer and Pierce For Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 184 (2000) (stating that “[w]hile *Pierce* . . . clearly provides a constitutional foundation for some type of parental rights, the scope of those rights remains unclear”).

<sup>7</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>8</sup> *Yoder v. Wisconsin*, 406 U.S. 205 (1972).

Witness appealed her conviction for defying child labor laws claiming that the laws were unconstitutional, violating both her right to free exercise and her right to parental control of the children in her custody.<sup>9</sup> In affirming her conviction, the Court recognized the parental right established by *Meyer* and *Pierce*, but stated that the “rights of parenthood are [not] beyond limitation.”<sup>10</sup> The Court explained that the state’s interest in “protect[ing] the welfare of children” outweighed the parental right to direct religious upbringing when such activity violated child labor laws.<sup>11</sup>

Almost thirty years later, however, the Court decided *Yoder v. Wisconsin* and held that an Amish father was entitled to an exception from state compulsory school attendance laws once his children completed the eighth grade.<sup>12</sup> The Court stated that “the power of the parent, . . . may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child,” but continued that in this case, “accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, . . . or in any other way materially detract from the welfare of society.”<sup>13</sup> Thus, *Yoder* illustrates that the limitation on parental rights established in *Prince* can be overcome in the school context. But how far does this parental right in schools extend?

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<sup>9</sup> *Prince*, 321 U.S. at 164. In the case, Mrs. Prince, who served as guardian for her niece Betty, allowed Betty to sell magazines consistent with her faith’s requirement of evangelizing, but in violation of the state’s child labor laws. In the case, Mrs. Prince, who served as guardian for her niece Betty, allowed Betty to sell magazines consistent with her faith’s requirement of evangelizing, but in violation of the state’s child labor laws.

<sup>10</sup> *Id.* at 166.

<sup>11</sup> *Id.* at 165.

<sup>12</sup> *Yoder*, 406 U.S. at 205.

<sup>13</sup> *Id.* at 233-34. Note that the Court also rested its decision in part on the Amish father’s First Amendment right to free exercise. For a detailed discussion of this concept and the implications of *Yoder*, see generally, SHAWN FRANCIS PETERS, *THE YODER CASE: RELIGIOUS FREEDOM, EDUCATION AND PARENTAL RIGHTS* (2003).

Since the Supreme Court decided *Yoder*, courts have struggled to define the boundary between parental and school control over a child.<sup>14</sup> In a recent attempt to determine the reach of the *Meyer-Pierce* parental right in the education context, the Ninth Circuit held in *Fields v. Palmdale School District* that the “*Meyer-Pierce* right does not extend beyond the threshold of the school door.”<sup>15</sup> In Part II of this essay, I examine the *Palmdale* decision itself, tracing the arguments regarding the scope of the *Meyer-Pierce* right, the court’s resolution of those issues, and the reasoning it employed. In Part III, I address public reaction to the *Palmdale* decision. In Part IV, I analyze the court’s reasoning and discuss the way its rule will operate in the current legal landscape. And in Part V, I conclude that the court’s bold decision in *Palmdale* was a necessary formulation of the relationship between public schools and parents that should be embraced by courts around the country as the debate concerning the scope of this traditional parental right is litigated.

## **II. The *Palmdale* Decision**

### **A. Facts and Posture**

In *Palmdale*, the plaintiff parents sued the Palmdale School District in the United States District Court for the Central District of California after Mesquite Elementary School permitted a volunteer mental health counselor to administer a survey to first,

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<sup>14</sup> See discussion *infra* at Part IV.

<sup>15</sup> *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005). Although the *Palmdale* court does not cite *Tinker*, Judge Reinhardt, writing for the majority, may have intended this language as a nod to Justice Fortas’ opinion in *Tinker*. Justice Fortas wrote: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

third and fifth grade students, including the plaintiffs' children.<sup>16</sup> The survey was designed to identify signs of early childhood trauma,<sup>17</sup> and in an effort to achieve this goal, the seventy-eight question survey included ten surprisingly explicit questions on the subject of sex.<sup>18</sup> The survey asked, for example, that the children rate the frequency with which they found themselves "thinking about having sex" or "washing [themselves] because [they] feel dirty on the inside."<sup>19</sup> Although the school district required a parental consent form for each child participating in the survey,<sup>20</sup> the plaintiffs complained that the objectionable, sexual nature of the questions was not addressed in the notice, and therefore, the administration of the survey violated their substantive due process rights to privacy and parental control.<sup>21</sup>

The district court, however, found that the plaintiffs failed to allege any constitutional violation. The court dismissed the claims, stating that the right asserted, "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," did not on its own "rise to the level of a fundamental right protected by Substantive Due Process."<sup>22</sup> The district court further held that the right asserted by the plaintiffs was not encompassed by the well-established *Meyer-Pierce* right, the "fundamental right to

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<sup>16</sup> *Palmdale*, 427 F.3d at 1200. The plaintiffs included four sets of parents whose children participated in the survey. They sued only after administrative relief made available through the school board was denied. *Id.* at 1202.

<sup>17</sup> *Id.* at 1200.

<sup>18</sup> *Id.* at 1201.

<sup>19</sup> *Id.* at n.3. The complete list of sex-related questions on the survey included: "Touching my private parts too much," "Thinking about having sex," "Thinking about touching other people's private parts," "Thinking about sex when I don't want to," "Washing myself because I feel dirty on the inside," "Not trusting people because they might want sex," "Getting scared or upset when I think about sex," "Having sex feelings in my body," "Can't stop thinking about sex," and "Getting upset when people talk about sex." *Id.*

<sup>20</sup> For the full text of the consent notice, see *Id.* at 1200 n.1.

<sup>21</sup> *Id.* at 1202. The consent form allegedly only notified parents that "answering questions may make [the] child feel uncomfortable." *Id.* at 1200 n.1.

<sup>22</sup> *Id.* at 1203.

direct the upbringing and education of one’s children.”<sup>23</sup> The Ninth Circuit affirmed the district court’s decision, but framed the issue on appeal in slightly different language, as “whether parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children.”<sup>24</sup> In evaluating the plaintiffs’ case, the court analyzed two bases for the substantive due process rights asserted—privacy and the *Meyer-Pierce* right to parental control.

## **B. Bases for Plaintiffs’ Asserted Right**

### **1. Right to Privacy**

In this context, the constitutional right to privacy offers protection for two distinct interests: “the disclosure of sensitive information and the right to ‘independence when making certain kinds of important decisions.’”<sup>25</sup> The Ninth Circuit rejected the plaintiffs arguments that the Palmdale School District had violated either of these protected privacy rights.<sup>26</sup> The court explained its decision by making a simple distinction.<sup>27</sup> The court stated that “the survey simply did not interfere with the right of the parents to make intimate decisions. Making intimate decisions and controlling the state’s determination of information regarding intimate matters are two entirely different subjects.”<sup>28</sup> In other words, while it is undisputed that parents are constitutionally protected from state control of where to educate their children, parents do not have a constitutional privacy

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1207.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1208.

<sup>28</sup> *Id.* The court lists parental decisions that have qualified as implicating a privacy interest including, “whether to bear children, who has control over children, and other decision related to procreative autonomy.” These “other decisions” include decisions to use contraceptives, to have an abortion, to seek custody of children and to engage in sexual intimacy. *Id.*

right to dictate what the public school can teach the children. The rather dismissive tone in this short section of the court's opinion suggests that the court believes that the issue of parental rights does the heavy lifting in this case.<sup>29</sup>

## 2. Parental Substantive Due Process Right

The Ninth Circuit recognized the *Meyer-Pierce* substantive due process right “of parents to make decisions regarding the care, custody, and control of their children,” but notes that this right, “[a]s with all constitutional rights,” has limits.<sup>30</sup> The court then defined this limit very clearly, stating that “the *Meyer-Pierce* right does not extend beyond the threshold of the school door.”<sup>31</sup> In drawing this bright line, the court relies on two concepts borrowed in large part from First and Sixth Circuit authority: first, that the *Meyer-Pierce* parental right does not include the right to control information disseminated from the school to the students, and second, that extending the *Meyer-Pierce* right to allow for such parental editing would cause serious disruptions to the school's educational mission.

In *Brown v. Hot, Sexy & Safer Productions*, the First Circuit considered whether a compulsory, sexually explicit AIDS awareness program implicated substantive due

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<sup>29</sup> Some courts treat the *Meyer-Pierce* right as a form of a privacy right, therefore not using two separate analyses. See *id.* at 1207 (explaining that “[s]ome courts, including the district court, have construed the two rights [to privacy and parental control] as one and the same when discussing a parent's privacy interest in controlling the upbringing and education of children.”). See e.g., *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178-85 (3d Cir. 2005).

<sup>30</sup> *Palmdale*, 427 F.3d at 1204 (noting that “parents' liberty interest in the custody, care, and nurture of their children resides ‘first’ in the parents, but does not reside there *exclusively*, nor is it ‘beyond regulation [by the state] in the public interest’” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))). The court lists limits such as compulsory attendance laws, child labor laws, school uniforms, and most significantly, sex education programs. *Id.* at 1204-05.

<sup>31</sup> *Id.* at 1207.

process rights to privacy and parental control.<sup>32</sup> The *Brown* court rejected the plaintiffs' assertion of parental rights, stating 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>33</sup> The court in *Palmdale* embraced the First Circuit's reasoning without reservation, stating that

[p]arents have a right to inform their children when and as they wish on the subject of sex; they have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so.<sup>34</sup>

To further support its reading of the *Meyer-Pierce* line of cases, the court cites *Blau v. Fort Thomas Public School District*, a case in which the Sixth Circuit addressed the issue of whether a school dress code "interferes with [a father's] fundamental right to direct the education of his child."<sup>35</sup> In rejecting the father's claim, the Sixth Circuit stated that "[w]hile 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."<sup>36</sup>

The *Palmdale* court also emphasizes, as does the *Brown* court, that recognizing a parental right to dictate how a public school teaches their children and what information the school provides would be totally impractical. First, determining the constitutional legitimacy of "the countless moral, religious, or philosophical objections that parents might have," would be an extraordinarily difficult task.<sup>37</sup> And if a school has

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<sup>32</sup> *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525 (1st Cir. 1995).

<sup>33</sup> *Id.* at 534.

<sup>34</sup> *Palmdale*, 427 F.3d at 1206.

<sup>35</sup> *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005).

<sup>36</sup> *Id.*

<sup>37</sup> *Palmdale*, 427 F.3d at 1206.

no basis on which to distinguish such interests, accommodating all objections, “whether those objections regard information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origin of life,” would be a fatal disruption to the educational process.<sup>38</sup>

Resting its decision squarely on the reasoning from both *Brown* and *Blau*, the *Palmdale* court holds that “[t]here is no fundamental right of parents to be the *exclusive* provider of information regarding sexual matters to their children, either independent of their right to direct the upbringing and education of their children or encompassed by it.”<sup>39</sup> The court even goes so far as to declare that the children in this case were exposed to the survey specifically because the plaintiff parents had exercised their constitutional right under *Meyer* and *Pierce* by choosing to send their children to Mesquite Elementary School.<sup>40</sup>

### **C. Rational Basis Review**

The Ninth Circuit found that the right asserted by the parent plaintiffs, narrowly defined as the parental right to “exclusive control over the introduction and flow of sexual information to their children,” was not fundamental and therefore requires only rational basis review, the most deferential form of constitutional scrutiny.<sup>41</sup> In applying

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1200.

<sup>40</sup> *Id.* at 1207.

<sup>41</sup> *Id.* at 1208. The Supreme Court has outlined three levels of constitutional inquiry, or scrutiny, when considering whether an official action transgresses the bounds of the constitution. The following passage summarizes the three levels of scrutiny:

In applying the Equal Protection Clause to most forms of state action, we . . . seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. But we would not be faithful to our obligations under the Fourteenth

the test, which involves asking whether the government's action "bears a rational relationship to a legitimate state purpose,"<sup>42</sup> courts must engage in a two-part analysis. First, the court must identify the asserted state interest, and determine whether that interest is legitimate. In *Palmdale*, the court identified several legitimate state interests in the surveys, including identification of "children's exposure to early trauma," "[p]rotecting the mental health of children," and "improv[ing] the students' ability to learn."<sup>43</sup> In so finding, the court rejected the defendants' argument that such interests were too broad, stating that "neither education itself nor the legitimate functions of a public school are limited to the curriculum."<sup>44</sup>

Second, the court must determine whether the action taken is rationally related to that legitimate state interest. Here, the court held that "it is reasonable for the School District to believe that the students' answers to [the survey] questions . . . would aid the establishment of a district-wide intervention program to identify and treat barriers to learning caused by exposure to childhood trauma," and therefore, the survey was "rationally related to [the school district's] legitimate state interest in effective education

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Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right." With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.

*Plyler v. Doe*, 457 U.S. 202, 216-18 (1982). Because the court in *Palmdale* determined that no fundamental right was at stake, and this case does not fall into the "limited circumstances" requiring intermediate scrutiny, it applied rational basis review.

<sup>42</sup> *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 183 (1980).

<sup>43</sup> *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1209-10 (2005).

<sup>44</sup> *Id.* at 1209.

and the mental welfare of its students.”<sup>45</sup>

### III. Reactions to *Palmdale*

Public reaction to the *Palmdale* decision was wide-ranging and at times visceral. Perhaps the most remarkable response to the decision came in the form of a House Resolution introduced in the United States House of Representatives by Tim Murphy, a Republican representative from Pennsylvania. Mr. Murphy proposed House Resolution 547 under the title “Expressing the Sense of the House of Representatives that the United States Court of Appeals for the Ninth Circuit Deplorably Infringed on Parental Rights in *Fields v. Palmdale School District*.”<sup>46</sup> The resolution, which was adopted by the House in a vote of 320 to 91,<sup>47</sup> declared that the *Palmdale* decision “establishes a dangerous precedent for limiting parental involvement in the public education of their children,” and called on the Ninth Circuit to rehear the case and “reverse this constitutionally infirm rule.”<sup>48</sup>

A variety of organizations promoting family values also condemned the decision.<sup>49</sup> One website, sponsored by the National Coalition for the Protection of

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<sup>45</sup> *Id.* at 1210-11.

<sup>46</sup> H.R. RES. 547, 109th Cong. (2005).

<sup>47</sup> Erica Werner, *House Chastises Court for Dismissing Palmdale School Sex Survey Case*, N. COUNTY TIMES, Nov. 16, 2005, available at [http://www.nctimes.com/articles/2005/11/17/news/state/16\\_31\\_4211\\_16\\_05.txt](http://www.nctimes.com/articles/2005/11/17/news/state/16_31_4211_16_05.txt) (last visited Nov. 26, 2006).

<sup>48</sup> H.R. RES. 547, 109th Cong. (2005).

<sup>49</sup> See e.g., Linda Klepacki, *Ninth Circuit Court: Parents Have No Rights in Public Schools*, FOCUS ON THE FAMILY, available at <http://www.citizenlink.org/FOSI/abstinence/education/A000001079.cfm> (last visited Nov. 26, 2006) (calling the *Palmdale* decision “one of the most brazen anti-parental rulings”); Eric Rauch, *No Fundamental Right*, AMERICAN VISION: A BIBLICAL WORLDVIEW MINISTRY, available at <http://www.americanvision.org/articlearchive/11-09-05.asp> (last visited Nov. 26, 2006) (responding to the *Palmdale* decision by asking “Is this really the environment that Christian parents want their own children “educated” in? How long will we turn a blind-eye to this open hostility to the values and morals of Christianity? If this isn’t the “wake-up call” to pull our children out of the state system, then just what will it take? When is enough, enough?”); Steven Voigt, *The Ninth Circuit Tells First Graders—Let’s Talk About*

Children and Families and found at the address [www.9thcircuit.com](http://www.9thcircuit.com), is devoted entirely to the *Palmdale* case. The site collects news stories and postings, virtually all of which express outrage about the decision and predict its catastrophic consequences. For example, the site includes the following item:

Carrie Gordon Earll, an issues analyst with Focus on the Family Action, called the ruling "one of the most abhorrent examples of judicial tyranny in American history. The 9th Circuit did more than rule against parents who were upset that their elementary-school-aged children were being asked explicit questions about sex in class. They told all parents they have no right to protest what public schools tell their children." Earll said the court essentially declared parenthood unconstitutional.<sup>50</sup>

The website also includes sections titled "More Filth From the 9th Circuit Court of Appeals," "Ninth U.S. Circuit Court of Appeals Devalues Parental Rights," "The recent ruling from the 9th Circuit Court of Appeals in the case of *Fields vs. Palmdale School District* is cause for great alarm," along with calls to split the Ninth Circuit.<sup>51</sup>

On the other end of the spectrum, the Washington Post published an article called "Parents, Children, Sex and Judges" in which the author, Ruth Marcus, states that in *Palmdale* "the court managed to get it right."<sup>52</sup> Marcus, in her less emotional, more reasoned approach to the decision makes two trenchant points. First, she highlights the irony that conservative groups are decrying the fact that "[a] liberal judge gave a narrow, even cramped, reading of the Constitution," when more often conservatives "complain[ ] about activist judges conjuring up new constitutional rights."<sup>53</sup> Marcus' general approval of the Ninth Circuit's decision, though, is not without an edge.

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*Sex*, RENEW AMERICA, available at <http://www.renewamerica.us/columns/voigt/051120> (last visited Nov. 26, 2006) (calling the *Palmdale* decision "the latest of the atrocities from our courts").

<sup>50</sup> *Fields vs. The Palmdale School District*, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN & FAMILIES, available at, [www.9thcircuit.com](http://www.9thcircuit.com) (last visited Nov. 26, 2006).

<sup>51</sup> *Id.*

<sup>52</sup> Ruth Marcus, *Parents, Children, Sex and Judges*, WASH. POST, Nov. 27, 2005 at B7.

<sup>53</sup> *Id.*

She also suggests that the court's decision may have been a bit disingenuous: "Those who believe, as Reinhardt [the judge who authored the *Palmdale* opinion] does . . . , that the Constitution should be interpreted expansively enough to embrace protection for abortion and gay rights have a hard time explaining why that approach doesn't encompass a broad view of parental rights."<sup>54</sup>

#### **IV. Analysis of *Palmdale***

The Ninth Circuit reaches the right decision in *Palmdale*, but along the way, the court creates several problems for itself. First, the court reframes the right asserted by the plaintiffs, unnecessarily creating the appearance of overreaching. The court also uses gratuitously forceful language, severely limiting the opinion's power to persuade. Despite these self-constructed obstacles, however, the court's rejection of the asserted constitutional right is a correct and critical step to ensuring the efficient, effective functioning of public schools.

##### **A. Unnecessarily Creating Obstacles**

In the first paragraph of the *Palmdale* decision, the court sets out the right asserted by the plaintiff parents as the right "to control the upbringing of their children by introducing them to matters of and relating to sex."<sup>55</sup> Only two sentences later, the court reframes the right at issue, stating that "there is no fundamental right of parents to be

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<sup>54</sup> *Id.* See also, Ross, *supra* note 6, at 179 (noting the paradox that those groups that supported the Supreme Court's *Meyer* and *Pierce* decisions, are the same groups that oppose cases like *Roe v. Wade*, for which *Meyer* and *Pierce* provided a foundation).

<sup>55</sup> *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1200 (2005).

the *exclusive* provider of information regarding sexual matters to their children.”<sup>56</sup> This slight linguistic twist has significant consequences. Mesquite Elementary School gave parents the opportunity to opt out of allowing their children to take the survey. And in their lawsuit, the parents assert that had the school informed them of the sexual nature of the questions, they would have chosen to do so.<sup>57</sup> Given this context, the court’s statement of the issue appears a bit contrived, and accusations of judicial activism may be justified.<sup>58</sup> After all, the parents are only asking that the school provide more complete information and remove their child from the classroom as requested; they are not telling the school what to teach or what information not to provide.<sup>59</sup>

Although the court skips a step in its logic, its formulation of the issue proves correct. Recognizing a constitutional right to opt out of receiving any information a parent finds disagreeable ultimately amounts to asserting intimate control over the school’s curriculum: teachers would have to submit lesson plans for parental approval, and schools would be burdened with the need to establish procedures for removing students from class at the parents’ whim for fear of violating a constitutional right. This level of control would strip schools of authority over the curriculum, effectively establishing a child’s parent as the exclusive source of information about sex—and everything else. The issue, therefore, boils down to whether a parent has the constitutional right to assert such tight control of the information provided by the school to the students.

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

<sup>57</sup> *Id.* at 1202.

<sup>58</sup> See *supra* notes 46-51 and accompanying text.

<sup>59</sup> In their Petition for Rehearing En Banc, the plaintiffs accused the court of “Improperly Characteriz[ing] the Parents’ Fundamental Right.” *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1189 (2006) (*reh’g denied*). Although the court, in denying the motion, does not address its own rewording of the asserted right, this is perhaps what the plaintiffs meant to refer to.

After accepting the court's formulation of the right at issue, one does not get far before the court's sweeping language raises another red flag. Judge Reinhardt, in writing for the court, uses broad language such as: "[p]arents have . . . no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide . . .," and "the *Meyer-Pierce* right does not extend beyond the threshold of the school door."<sup>60</sup> At first blush, it may appear that the court intends its decision to extend to "all school policies—even those manifestly unrelated to the school's educational mission."<sup>61</sup>

It is important to see, however, that the consequence of the court's holding that parents do not have a constitutional right to control the flow of information from the school to the student does *not* mean that a school can teach whatever it wants. The limit on parental control is qualified by rationality review: a school may only provide students with information that is rationally related to accomplishing the state's legitimate educational goals.<sup>62</sup> In an effort to dull its sharp words, the court in this case even took the unusual step of clarifying some of this language. In its opinion denying the Motion for a Rehearing En Banc, the court retracted its statement that "the *Meyer-Pierce* right does not extend beyond the threshold of the school door," substituting the following:

In sum, we affirm that the *Meyer-Pierce* due process right of parents to make decisions regarding their children's education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions, or to collect monetary damages based on the information the schools provide.<sup>63</sup>

Thus, although some of the language in the court's initial opinion sounds excessively

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<sup>60</sup> *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (2005).

<sup>61</sup> *Davis*, *supra* note 4, at 1139.

<sup>62</sup> See *supra* notes 41-45 and accompanying text.

<sup>63</sup> *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1189 (2006) (*reh'g denied*).

forceful, neither application of the rule under rational basis constitutional review, nor the court's intentions behind the rule turn out to be as all-encompassing as some critics fear.

## **B. Locating the Line Between Parental and School Authority**

Although the outcry in response to the *Palmdale* decision may suggest otherwise,<sup>64</sup> limiting parental control of education is far from a radical idea. The *Palmdale* court's approach is, in fact, consistent with existing case law. Courts have routinely held that parents' rights yield to school authority in a variety of contexts including challenges to sex education,<sup>65</sup> school uniform policies,<sup>66</sup> and mandatory community service.<sup>67</sup> In such cases, parental authority is bound in by state authority: the state can not tell the parents where to educate their children, but once the parents have chosen a school, they can not tell the school what to teach their children. In *Brown v. Hot, Sexy and Safer Productions, Inc.*, for example, the Sixth Circuit held that a mandatory and surprisingly explicit<sup>68</sup> AIDS awareness presentation did not violate, *inter alia*, the parents' substantive due process rights under *Meyer* and *Pierce*:

The *Meyer* and *Pierce* cases, . . . evince the principle that the state cannot

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<sup>64</sup> See *infra*, section III, Reactions to *Palmdale*.

<sup>65</sup> See *e.g.*, *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (holding that parents' substantive due process rights do not include the right to control the school's curriculum); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (same); *Parents United for Better Schools, Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260 (3d Cir. 1998) (same).

<sup>66</sup> See *e.g.*, *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005) (holding that the school's uniform policy does not infringe on parents' right to direct the upbringing and education of their children); *Littlefield v. Forney Indep. Sch. Dist.*, 108 F. Supp. 2d 681 (N.D. Tex. 2000) (same).

<sup>67</sup> See *e.g.*, *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996) (holding that mandatory community service does not violate parents' right to direct the upbringing and education of their children); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (same).

<sup>68</sup> Sexually explicit material in the AIDS awareness program included: directing a male student to "lick an oversized condom with [the program performer]," informing a male student "that he was not having enough orgasms," and making "eighteen references to orgasms, six references to male genitals, and eight references to female genitals." *Brown*, 68 F.3d at 529.

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. 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 instance involves the state proscribing parents from educating their children, while the second involves parents proscribing what the state shall teach their children.<sup>69</sup>

These mutual limits lie at the heart of the conflict between parental rights and school authority.<sup>70</sup>

While all courts attempting to determine the scope of parental authority in schools readily acknowledge the right established under *Meyer* and *Pierce*, the boundary between parental rights and school authority has proved difficult to establish. Generally speaking, however, courts have tended to contract parents’ reach. In *Brown*, the court’s limit on parental authority was rather narrow, denying only the “right to dictate the curriculum.”<sup>71</sup> But since *Brown* was decided in 1995, the realm of school authority described as the “curriculum” has been broadened to include not only the curriculum itself, but also the “issues of public education.”<sup>72</sup> And these “issues of public education,” in turn, have been defined in varying degrees of breadth by different courts.

In *Immediato v. Rye Neck School District*, for instance, the school’s mandatory community service program furthered the educational mission by “teaching students the values and habits of good citizenship, and introducing them to their social

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<sup>69</sup> *Id.* at 533-34.

<sup>70</sup> See also *Blau*, 401 F.3d at 395-96 (“The critical point is this: 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 her, a dress code, these issues of public education are generally ‘committed to the control of the state and local authorities.’” (quoting *Goss v. Lopez*, 419 U.S. 565, 578 (1975))).

<sup>71</sup> *Brown*, 68 F.3d at 533.

<sup>72</sup> *Blau*, 401 F.3d at 396.

responsibilities as citizens.”<sup>73</sup> And in *Littlefield v. Forney Independent School District*, the school’s uniform policy was upheld because it served to “improve student performance, instill self-confidence, foster self-esteem, increase attendance, decrease disciplinary referrals, and lower drop-out rates.”<sup>74</sup> This broad conception of protected school authority is carried forward into *Palmdale* itself, where the court defines the legitimate school interest as identification of “children’s exposure to early trauma,” “[p]rotecting the mental health of children,” and “improv[ing] the students’ ability to learn.”<sup>75</sup> And of course, as the scope of school authority expands, the realm of parental authority must contract.

Even given the trend toward liberal conceptions of school authority, however, courts still protect parental rights. In *Arnold v. Board of Education*, for example, the court found that a school counselor and vice principal violated parental constitutional rights when they coerced a student to have an abortion, and discouraged the student from discussing the decision with her parents.<sup>76</sup> Such coercion violated constitutionally protected parental rights because whether to have an abortion is a “decision which touches fundamental values and religious beliefs parents wish to instill in their children.”<sup>77</sup> Similarly, in *Gruenke v. Seip*, the court found that a high school swimming coach violated parental rights when he spread rumors that a student was pregnant and orchestrated an effort to force her to take a pregnancy test, all without notifying her parents.<sup>78</sup> The court in *Gruenke* acknowledged that there are “circumstances in which

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<sup>73</sup> *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996).

<sup>74</sup> *Littlefield v. Forney Indep. Sch. Dist.*, 108 F. Supp. 2d 681, 686 (N.D. Tex. 2000).

<sup>75</sup> *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1209 (9th Cir. 2005).

<sup>76</sup> *Arnold v. Bd. of Educ. of Escambia County*, 880 F.2d 305, 309 (11th Cir. 1989).

<sup>77</sup> *Id.* at 312.

<sup>78</sup> *Gruenke v. Seip*, 225 F.3d 290, 305-307 (3d Cir. 2000).

school authorities, in order to maintain order and a proper educational atmosphere . . . may impose standards of conduct on students that differ from those approved by some parents.”<sup>79</sup> Nevertheless, administering pregnancy tests exceeds this authority.

In deciding *Palmdale*, the Ninth Circuit appropriately navigated the middle ground between *Brown* and *Arnold*. The “egregious scenarios”<sup>80</sup> in *Arnold* and *Gruenke*, simply do not fall within the limit on parental rights as delineated in *Palmdale*. The proscription in *Palmdale* that “parents . . . do not have a fundamental right to generally direct *how* a public school teaches their children” would not in any way approve or protect the school’s actions in *Arnold* or *Gruenke*.<sup>81</sup> And although conducting a survey aimed at identifying factors that impair students’ ability to learn may extend school authority beyond the right to dictate the curriculum, such an activity serves an important educational purpose that is just totally absent when a guidance counselor coerces a student to have an abortion.

The Third Circuit’s reasoning in *C.N. v. Ridgewood Board of Education* lends further support to this position.<sup>82</sup> In *C.N.*, the school district permitted a community group to conduct a survey of high school and middle school students. Like in *Palmdale*, a number of the survey questions on the topic of sex upset the parents who then sued alleging a violation of their constitutional parental rights.<sup>83</sup> The court, however, rebuffed this attempt to extend parental rights in light of *Gruenke*:

We read *Gruenke* to recognize a distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest

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<sup>79</sup> *Id.* at 304.

<sup>80</sup> Davis, *supra* note 4, at 1142.

<sup>81</sup> Fields v. Palmdale Sch. Dist., 427 F.3d at 1197, 1206 (9th Cir. 2005).

<sup>82</sup> C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159 (3d Cir. 2005).

<sup>83</sup> *Id.* at 161. The survey included questions about “drug and alcohol use, sexual activity, experience of physical violence, attempts at suicide, personal associations and relationships (including the parental relationship), and views on matters of public interest.” *Id.*

importance and other actions that, although perhaps unwise and offensive, are not of constitutional dimension. . . . [I]ntroducing a child to sensitive topics before a parent might have done so herself can complicate and even undermine parental authority, but . . . the survey in this case did not intrude on parental decision-making authority in the same sense as occurred in *Gruenke*.<sup>84</sup>

According to the court in *C.N.*, absent an effort to “indoctrinate” students, or replace parental influence in making intimate family decisions, simply providing students with information on “sensitive topics” contrary to their parents’ wishes does not rise to the level of a constitutional violation.<sup>85</sup>

### **C. Appropriately Narrowing Parental Authority**

Defining parental authority narrowly, as the court did in *Palmdale*, is not only consistent with existing case law, it is critical if schools are to function effectively while providing students with a comprehensive education. Schools are in the unique position to be able to prepare students to participate responsibly as citizens of our democracy,<sup>86</sup> and teach them “about a wide spectrum of cultures.”<sup>87</sup> And while critics have leveled

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<sup>84</sup> *Id.* at 184-85.

<sup>85</sup> *Id.* at 185. Although the Court’s decision in *Yoder* seems to be contrary to this conclusion, it is important to note the Court’s focus on the potential damage that compulsory education laws could cause to the Amish way of life. *Yoder v. Wisconsin*, 406 U.S. 205, 215-18 (1972). In *Yoder*, the Amish parents were not trying to edit the information given to their children, they wanted the children to receive no information from the school at all. *Id.* at 207. To the contrary, the problem confronted in *Palmdale*, *Brown*, and *Blau*, inter alia, involves a parent wanting to choose which rules the school can impose on their children. Considering this distinction, *Yoder* looks more like *Pierce*—a case in which the parents are choosing whether to allow a particular to school to teach their children anything at all. See also *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998) (holding that there is no constitutional parental right to send home-schooled children to a public school part time and to “pick and choose which courses their children will take from the public school”).

<sup>86</sup> *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (stating that “public schools are vitally important ‘in the preparation of individuals for participation as citizens,’ and as vehicles for ‘inculcating fundamental values necessary to the maintenance of a democratic political system.’” (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979))).

<sup>87</sup> Ross, *supra* note 6, at 193.

attacks on parental rights under complex theories based in property rights<sup>88</sup> or objections to religious indoctrination,<sup>89</sup> restrictions on parental control in the educational context are necessary for a very simple reason: If parents were constitutionally entitled to control the information provided to their children, the demand on the school system would be overwhelming. Schools would have no hope of accommodating the idiosyncratic views of thousands of parents. In fact, a requirement that schools do so would “pose a perennial threat of litigation that would tend to encourage school administrators to dilute the curriculum, reaching for the lowest common denominator of public sensibilities.”<sup>90</sup> Therefore, “recognition of such a fundamental right . . . 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>91</sup> As such, it is inconceivable that the “Constitution imposes such a burden on state educational systems,”<sup>92</sup> and *Meyer* and *Pierce* “do not begin to suggest”<sup>93</sup> that this is the case.

Accepting the impossibility of accommodating all views in the educational process, the question then becomes whether some views could be taken into consideration—whether some views deserve accommodation above others. As a constitutional matter, however, the answer is no. “[T]here is no constitutional reason to distinguish [concerns about sexuality] from any of the countless moral, religious or

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<sup>88</sup> Erik M. Zimmerman, *Defending the Parental Right to Direct Education: Meyer and Pierce as Bulwarks Against State Indoctrination*, 17 REGENT U.L. REV. 311, 330 (2004).

<sup>89</sup> *Id.* at 334.

<sup>90</sup> Ross, *supra* note 6, at 187.

<sup>91</sup> *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003).

<sup>92</sup> *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995).

<sup>93</sup> *Leebaert*, 332 F.3d at 141.

philosophical objections that parents might have.”<sup>94</sup> Moreover, if parental preferences deserved constitutional protection, one parent would essentially hold a veto over the subjects taught to all children in the school.<sup>95</sup> Thus, without a constitutional basis for valuing concerns for weapons in schools above concerns for drugs or homosexuality, and with no practical way to accommodate all concerns, a parental substantive due process rights to proscribe dissemination of information cannot stand.

## V. Conclusion

The *Meyer-Pierce* right is deeply rooted in our society. But as with all basic values, parents’ right to control the education of their children cannot be limitless. The boundary of this right, as drawn by the Ninth Circuit in *Palmdale*, appropriately reflects both existing authority that prevents parents from dictating the intimate operations of a school, and the profound need for schools to remain free of parental control that would hinder the educational process. The *Palmdale* court’s decision is a necessary formulation of the relationship between public schools and parents that should be embraced by courts around the country as the debate concerning the scope of this traditional parental right continues.

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<sup>94</sup> *Fields v. Palmdale Sch. Dist.*, 1197, 1206 (9th Cir. 2005).

<sup>95</sup> *Ross*, *supra* note 6, at 187 (stating that “[s]uch veto power would interfere with the curricular preferences of a majority of parents, thereby interfering with their right to direct their children’s education by sending them to public schools”).