New Civil Liberties Alliance

September 3, 2019

VIA E-MAIL

Ms. Christina Coughlin
New York State Education Department
State Office of Religious & Independent Schools
89 Washington Avenue, Room 1075 EBA
Albany, NY 12234

Re: I.D. No. EDU-27-19-00010-P: Substantially Equivalent Instruction for Nonpublic School Students

Dear Ms. Coughlin,

The New Civil Liberties Alliance ("NCLA") submits the following comments in response to the New York State Education Department's ("NYSED" or the "Department") proposed regulation, Substantially Equivalent Instruction for Nonpublic School Students, I.D. No. EDU-27-19-00010-P (the "Proposed Rule" or the "Substantial Equivalency Rule"). NCLA appreciates this opportunity to comment and express its concerns regarding the Proposed Rule.

I. Introduction & Summary

In NCLA's view, the Department must withdraw the Substantial Equivalency Rule because it violates the New York State and United States Constitutions in at least two ways. First, NYSED may not dictate to private and parochial schools, or their teachers, parents, or guardians, what and how to teach their schoolchildren. The Proposed Rule would subject these schools to the chilling effect of curricula inspections and the silencing effect of curricula subordination. Its proposed local school authority (LSA) inspection, equivalency determination, and remedial action plan supervision brazenly would supplant the schools' free speech with government-approved speech.

Second, the Department lacks the authority to promulgate the proposed rule. The New York State Legislature did not delegate the authority to NYSED to establish and enforce curriculum requirements for private and parochial schools. Where, as here, an administrative agency exceeds the scope of its authority by usurping the Legislature's exclusive policymaking and lawmaking prerogatives, that agency violates the separation of powers doctrine under the New York State Constitution. Moreover, the Legislature could not—under any circumstance—divest itself of its exclusive prerogatives to establish policy and enact law. Such divestment violates the nondelegation

doctrine, as only the New York Legislature may establish and enforce educational standards upon nonpublic schools.

To be sure, the Substantial Equivalency Rule has other constitutional and practical defects. For instance, the Proposed Rule implicates the free exercise, due process, and equal protection clauses of the New York State and United States Constitutions. One obvious practical defect is the Proposed Rule's projected costs. NYSED's claim that neither the regulators (LSAs and NYSED) nor the regulated (nonpublic schools) will incur additional costs for administration of, enforcement of, or compliance with the rule is simply preposterous.[1]

NCLA will focus this public comment, however, on the two principal dispositive defects in the Substantial Equivalency Rule—its constraint on free speech and its violation of the agency's proper scope of authority. NCLA reserves the right to comment further or to challenge the Proposed Rule's procedural, practical, or constitutional deficiencies in any appropriate venue of competent jurisdiction in the future, including on grounds not raised in this comment.

II. The New Civil Liberties Alliance's Statement of Interest

The New Civil Liberties Alliance is a nonprofit civil rights organization founded to defend constitutional rights through original litigation, *amicus curiae* briefs, the filing of public comments to proposed regulations, and other means. The "civil liberties" of the organization's name include rights at least as old as the Constitution itself, such as the due process of law, the right to trial by jury, the right to live under laws made by elected lawmakers rather than by prosecutors or bureaucrats, and the right to free speech without governmental interference.

NCLA defends civil liberties by asserting constitutional constraints on the administrative state at both the federal and state levels. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the framers of the state and federal constitutions sought to prevent. This unconstitutional administrative state within the Constitution's United States violates more rights of more Americans than any other aspect of American law, and it is thus the focus of NCLA's efforts.

NCLA would prefer not to have to bring a lawsuit to vindicate the civil liberties the Proposed Rule would violate. To that end, NCLA encourages agencies themselves to curb their own unlawful exercise of power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. Courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance such as content-based burdens on speech. NCLA therefore asserts that all agencies and agency heads must examine whether their modes of rulemaking, enforcement, and adjudication comply with applicable statutory procedures and with state and federal constitutions.

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[1] Consider also that NYSED and New York State will incur other non-enforcement/compliance costs as a direct consequence of attempting to unlawfully promulgate an unconstitutional regulation. In defense of their fundamental civil liberties, private schools and their parents, legal guardians, teachers, and related associations will file actions to enjoin enforcement of the Proposed Rule and to declare it void. Tens or perhaps hundreds of thousands of dollars in litigation costs should be reflected in the Proposed Rule's financial impact statement, not $0.

III. The New Civil Liberties Alliance's Objections to the Substantial Equivalency Rule

NCLA believes the Department must withdraw the Substantial Equivalency Rule because it is an unconstitutional content-based constraint on freedom of speech that discriminates against private and parochial schools on the basis of viewpoint. Moreover, NYSED must withdraw the Proposed Rule because the Department lacks the authority to promulgate it in the first instance.

A. The Substantial Equivalency Rule Unconstitutionally Constrains New Yorkers' Right to Freedom of Speech

The Substantial Equivalency Rule is fatally flawed because NYSED may not discriminate against speech freely expressed by private and parochial schools, their teachers, parents, and guardians, regarding what and how to teach. Furthermore, the Proposed Rule does not advance New York's compelling government interest. If anything, the Rule undermines it.

1. Freedom of Educational Speech Is a Civil Liberty Guaranteed by the New York State and United States Constitutions

Education *is* speech.[2] Indeed, education is *pure* speech, and no law or regulation may "unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[3] The New York State[4] and United States[5] Constitutions guarantee citizens freedom of speech and prohibit the government from restraining or abridging that right. New York courts have long celebrated freedom of speech, vigorously defending the right because it is "basic to a free and dynamic society[.]"[6] "Liberty of speech," as it is called in Article I, Section 8 of the New York Constitution, affords even broader protections than that of the First Amendment.[7]

Quite incongruously, the Department's Proposed Rule directly and unapologetically abridges liberty of speech by coercing private schools' curricula regarding what and how to teach. For instance, it requires private schools to teach career development and occupational studies in first through sixth grades,[8] visual arts and music in seventh and eighth grades,[9] and physical education and the arts in

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[2] *See Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 512 (1969) (explaining that the "classroom is peculiarly the 'marketplace of ideas[,]'" where interpersonal communication is "an important part of the educational process."). *See also Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (explaining that parents have the power "to control the education of their own.") *and Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 593 (1986) (noting that parochial schools are afforded First Amendment protections).

[3] *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

[4] N.Y. Const. art. I, § 8.

[5] U.S. Const. amends. I & XIV.

[6] *See, e.g.*, *Brown v. Kingsley Books, Inc.*, 1 N.Y.2d 177, 181 (1956).

[7] *See Festa v. N.Y. City Dept. of Consumer Affairs*, 12 Misc. 3d 466, 473 (Sup. Ct. 2006). New York courts have emphasized that Article I, Section 8 predates the Supreme Court's application of the First Amendment to the states, and that it uses affirmative, unequivocal terms to secure the right of New Yorkers to speak freely without government restraint. *See O'Neill v Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528-29 n.3 (1988) (citing N.Y. Const. art. I, § 8).

[8] N.Y. State Educ. Dept., *Proposed Regulations for Substantially Equivalent Instr. For Nonpublic School Students* Slide Presentation, at 7 (June 3, 2019).

[9] *See* Mem. from Elizabeth R. Berlin, N.Y. Comm'r of Educ., to P-12 Education Committee, at 7-8 (May 30, 2019) (hereinafter "Commissioner Memo").

ninth through twelfth grades.[10] New York's compulsory schooling and substantial equivalency statutes do not mention many of these subjects at all, even though these statutes are the purported basis for NYSED's authority to implement the regulation.[11]

Even if, for the sake of argument, these surplus curriculum requirements add value to education, NYSED's normative preference for the additional requirements do not—indeed, cannot—override New Yorkers' right to free and unencumbered educational speech. Private and parochial schools, the teachers who work there, and the parents and guardians who send their children there, own the right to educational speech, and the government may not substitute its speech preferences for theirs.

2. The Substantial Equivalency Rule Is Content-Based Viewpoint Discrimination

A regulation that restricts or controls speech because the government disagrees with the message that speech conveys is content-based.[12] Content-based restrictions on speech are presumptively invalid.[13] The Substantial Equivalency Rule is content-based because it examines speech communicated by teachers to private and parochial school students to determine whether the government believes it to be sufficiently similar to its own.[14]

To facilitate the review, private school administrators will be required to provide complete curricula for all classes in all grade levels.[15] Indeed, superintendents will be tasked with reviewing school curricula to establish "some basic assurance that [nonpublic school] pupils will be provided an opportunity to learn."[16] If the government prefers its curriculum to the private school's curriculum, the government will "review materials and data … and discuss with the officials of the nonpublic school plans for overcoming any deficiency."[17]

It is hard to imagine a more obvious case of content-based speech restrictions. This type of restraint on speech is presumptively invalid because, as the New York Court of Appeals has admonished, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content[,]" aside from very narrow exceptions.[18] It has also explained that "[t]he Constitution does not discriminate between those whose ideas are popular and those whose views

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[10] *Ibid.*

[11] *See* N.Y. Educ. Law § 3204(2)(ii)(3) (requiring instruction in English, mathematics, history, and science).

[12] *People v. Griswold*, 13 Misc. 3d 560, 563-64 (Rochester City Ct. 2006) (quoting *Ward v. Rock Against Racism*, 491 US 781, 791 (1989)).

[13] *United States v. Alvarez*, 567 U.S. 709, 716-17 (2012).

[14] *See* NYSED.gov, *Guidelines for Determining Equivalency of Instruction in Nonpublic Schools*, at I., http://www.p12.nysed.gov/nonpub/guidelinesequivofinstruction.html (last visited Sept. 3, 2019) (hereinafter "*Equivalency Guidelines*"). NYSED will "strongly recommend[] that the superintendent of schools of the district in which the nonpublic school is located undertake the review *to determine equivalency of instruction*." *Id.*

[15] *See id.* at I.A.5.

[16] *Id.* at I.A.

[17] *Ibid.*

[18] *Brown v. Kingsley Books, Inc.*, 1 N.Y.2d 177, 181 (1956).

arouse opposition or dislike or hatred guaranteeing the right of freedom of speech to the former and withholding it from the latter."[19]

The net effect of NYSED's Proposed Rule is discrimination against secular and religious minority viewpoints. Despite a parent's sending his or her first-grader to a parochial school, for example, the child might be precluded from enrolling in a religion class if it conflicts with the Substantial Equivalency Rule's career development and occupational studies requirement for first-graders. Likewise, although a parent may choose to send his or her ninth-grader to a science and math-oriented private school, the child might be precluded from enrolling in an extra unit of science if it conflicts with the Substantial Equivalency Rule's two units of physical education requirement for ninth-graders.

This naked viewpoint discrimination is also apparent in the Proposed Rule's academic rigor review. Outside overseers will determine "whether the curriculum provides academically rigorous instruction that develops critical thinking skills in the school's students, taking into account the entirety of the curriculum[.]"[20] If private and parochial schools are unwilling to conform their curricula to the government's, NYSED will shut them down even if there is a reasonable disagreement about the didactic ingredients and proportions needed to create a rigorous academic environment that encourages critical thinking.[21] Whether the government is correct that occupational studies enhance first-grade level critical thinking more than religious studies, or that one more unit of physical education enhances ninth-grade level critical thinking more than one more unit of science, is irrelevant to the Constitution. The Department simply may not make such a speech-curbing choice for private and parochial schools.

3. The Substantial Equivalency Rule Does Not Advance a Compelling Government Interest

The United States Supreme Court has suggested that education may be "the most important function of state and local governments."[22] But where the government burdens or constrains fundamental liberties, its proscription must be narrowly tailored to advance that compelling government interest.[23] The Substantial Equivalency Rule is not narrowly tailored, but more importantly, it does not advance New York's interest in elementary and secondary education.

In the view of the New York Court of Appeals, all "public, parochial *and* private [schools], by their very nature, *singularly* serve the public's welfare and morals."[24] Indeed, the Court of Appeals has recognized that it would be unconstitutional for a New York municipality to pass an ordinance prohibiting private or parochial schools.[25] But that is exactly what the Substantial Equivalency Rule

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[19] *People v. Feiner*, 300 N.Y. 391, 401 (1950). *See also Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 (2010) (explaining that the purpose of freedom of speech is to defend against those who would treat certain minority or unpopular subjects or viewpoints with repressive contempt).

[20] *See* Commissioner Memo at 8.

[21] *See* N.Y. Reg., *Substantially Equivalent Instruction for Nonpublic School Students*, No. EDU-27-19-00010-P (July 3, 2019) (explaining that "students will be considered truant if they continue to attend [a nonconforming] school.").

[22] *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

[23] *See People v. Griswold*, 13 Misc. 3d 560, 563 (Rochester City Ct. 2006) (citing *Perry Educ. Ass'n v. Perry Local Educs.' Ass'n*, 460 U.S. 37, 45 (1983)).

[24] *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 593 (1986) (emphasis added).

[25] *See id.*

will do, if nonpublic schools exercise their right to educational speech in a manner that is inconsistent with the government's.[26]

The United States Supreme Court was correct when it declared that a "child is not the mere creature of the State[.]"[27] Whether intentionally or unintentionally, the Proposed Rule's net effect would be homogenization of preschool through twelfth-grade education in New York. Private and parochial schools would be caught on the horns of a dilemma: Either teach as public schools teach—making the schools nearly indistinguishable—or close your doors. Gone will be the unique character and experience of private and parochial education, valued by so many New Yorkers.

New York's compelling government interest is in *education*, not in instructional *conformity* of content and viewpoint. New York may not homogenize children by forcing them to accept public curricula in a private or parochial classroom. The Proposed Rule's restrictions on language instruction and proliferation of required courses beyond those required by New York statute undermine the state's interest in education. They do not advance it.

B. The Separation of Powers and Nondelegation Doctrines Prohibit the Department's Promulgation of the Substantial Equivalency Rule

The Proposed Rule is fatally flawed because the New York State Legislature did not delegate to NYSED the authority to establish and enforce curriculum requirements for private and parochial schools. Moreover, the New York Legislature lacks the constitutional authority to divest itself of its policymaking and lawmaking prerogatives.

1. The New York State Legislature Did Not Delegate to NYSED the Authority to Establish and Enforce Curriculum Requirements for Private and Parochial Schools

The Substantial Equivalency Rule is void *ab initio* because its implementation impermissibly exceeds the Department's statutory mandate.[28] Article III, Section 1 of the New York State Constitution unequivocally directs that "[t]he legislative power of this State shall be Vested in the Senate and Assembly."[29] This constitutional provision forms the basis for New York's separation of powers doctrine, which requires that the Legislature make "critical policy decisions."[30] This limits an executive branch administrative agency's authority to only implementing legislative policies.[31] Thus, NYSED may not use its rulemaking "authority as a license to correct whatever societal evils it perceives."[32] No matter how expansive the Department's rulemaking authority may be, "it is no broader than that which the separation of powers doctrine permits."[33]

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[26] *See* N.Y. Reg., *Substantially Equiv. Instr.*, § 130.7(d)(9)(i) (regarding student truancy at nonconforming nonpublic schools).

[27] *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

[28] *See Boreali v. Axelrod*, 71 N.Y.2d 1, 6 (1987) (explaining that where agencies exceed their rulemaking authority, their rules are invalid).

[29] N.Y. Const. art. III, § 1.

[30] *See Greater N.Y. Taxi Ass'n v. Taxi & Limo. Comm'n*, 25 N.Y.3d 600, 609 (2015).

[31] *See id.*

[32] *See Boreali*, 71 N.Y.2d at 9.

[33] *See Acevedo v. Dept. of Motor Vehicles*, 29 N.Y.3d 202, 222 (2017) (quoting *Boreali*, 71 N.Y.2d at 9) (internal quotations omitted).

New York courts examine four coalescing circumstances to determine whether agency action violates the separation of powers.[34] First, courts will examine whether the agency "made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems."[35] The substantial equivalency statute merely delegates to NYSED the authority to consider whether nonpublic education is substantially equivalent, not to make value judgments regarding complex choices such as what and how to teach.[36] The Proposed Rule's addition of more than a dozen new required classes, broken down by exact per unit-instruction, is a complex value judgment, far exceeding NYSED's statutory authority.

Second, courts will consider whether the agency "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance[.]"[37] The Department's overarching mandate is that private and parochial schoolchildren receive education substantially equivalent to public schoolchildren. It is NYSED's job to monitor equivalency according to the criteria laid out by the Legislature. But the Department expanded its domain, creating its own comprehensive set of rules for mandatory curriculum composition, well beyond that which the Legislature required.[38]

Third, courts will consider whether the Legislature "unsuccessfully tried to reach agreement on the issue[.]"[39] There are at least five bills pending in the Legislature to amend the substantial equivalency statute. Two of these bills, Assembly Bill 6632 and Senate Bill 6589, if enacted, would conflict with material portions of the Proposed Rule.[40] Assembly Bill 6632 would change the requirement that students be taught in English and Assembly Bill 6589 would change the mandatory classes taught in private and parochial schools.[41] The Legislature could not offer a more clear signal that it has plenary authority to regulate the very same issues NYSED is attempting to regulate with the Substantial Equivalency Rule.

Fourth, courts will consider whether "special expertise or technical competence was involved in the development of the challenged Regulations."[42] While the Proposed Rule reflects NYSED opinions borne of departmental technical expertise, the coalescing circumstances, on balance, establish that the Department far exceeded its statutory authority in proposing the Substantial Equivalency Rule. The Proposed Rule sets forth broad policy goals to resolve social problems, it establishes a comprehensive set of rules without the benefit of legislative guidance, and it acts in a legislative and policy space in which the Legislature is currently actively engaged.

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[34] *See Boreali*, 71 N.Y.2d at 11.

[35] *See Acevedo*, 29 N.Y.3d at 222 (internal quotations and citations omitted).

[36] *Compare* N.Y. Educ. Law § 3204(2)(ii)(3) (requiring instruction in English, mathematics, history, and science and instructing NYSED to consider substantial equivalence according to certain criteria) *with* N.Y. Reg., No. EDU-27-19-00010-P, § 130.10(e) (July 3, 2019) (expanding curriculum mandates from English instruction in three subjects to more than a dozen subjects broken down by unit-taught requirements).

[37] *See Acevedo v. Dept. of Motor Vehicles*, 29 N.Y.3d 202, 223-24 (2017) (internal quotations and citations omitted).

[38] *See* N.Y. Reg., *Substantially Equiv. Instr.*, § 130.10(e).

[39] *See Acevedo*, 29 N.Y.3d at 224 (internal quotations and citations omitted).

[40] *Compare* AB 6632, An Act to Amend the Educ. Law (language) *and* SB 6589, An Act to Amend the Educ. Law (state standards report) *with* N.Y. Reg., *Substantially Equiv. Instr.*, § 130.10(b) & (e).

[41] *Compare* AB 6632, An Act to Amend the Educ. Law (language) *with* SB 6589, An Act to Amend the Educ. Law (state standards report).

[42] *See Acevedo*, 29 N.Y.3d at 225 (internal quotations and citations omitted).

2. The New York State Legislature Is Constitutionally Prohibited from Divesting Itself of Its Authority to Regulate Education

Article III, Section 1 of the New York State Constitution also serves as the basis for a doctrine related to separation of powers, the nondelegation doctrine.[43] The Court of Appeals has emphasized that "[m]anifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends."[44] The Legislature's prerogative to establish New York policy and to make law is exclusive, and "it cannot cede its fundamental policy-making responsibility to an administrative agency."[45] Thus, NYSED does not have the authority to promulgate the Substantial Equivalency Rule because there is no constitutional circumstance in which the Legislature could have divested itself of its exclusive prerogatives.

It should be noted that the Proposed Rule has a *double*-nondelegation problem. The Department claims to have been delegated the authority to establish and enforce its Substantial Equivalency Rule by the Legislature, but the Rule subdelegates that purported authority to LSAs. No New York law gives LSAs the power to investigate private and parochial school curricula and determine whether nonpublic schools are providing substantially equivalent instruction to their students. Since the Legislature could not divest itself of its policy and lawmaking authority to NYSED, NYSED cannot not subdelegate powers it never had to LSAs.

IV. NCLA's Specific Recommendations and Conclusion

Perhaps the Department had the best interests of children in mind when it proposed the Substantial Equivalency Rule, and the accompanying constraints on free speech are an unintended consequence. Perhaps the Department genuinely believes that it has the constitutional and statutory authority to promulgate the Proposed Rule and it is not aware of New York's robust separation of powers and nondelegation doctrines. Nevertheless, good intentions cannot form the legal basis for agency rulemaking, and they are no substitute for freedom of speech or structural constitutional bulwarks that safeguard civil liberties.

The Department may not dictate to private schools, teachers, parents, or legal guardians what and how to teach their schoolchildren. The Proposed Rule will subject private schools to the chilling effect of curricula inspection and the silencing effect of curricula subordination. The Rule claims that "[s]ubstantially equivalent does not mean equal or the same[,]"[46] but there is little practical point to private or parochial education if it cannot control its own curricula.

Columbia Law School Professor Philip Hamburger, President of NCLA, has written an enlightening article for *The Federalist* website that addresses some of the issues raised here, and it delves

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[43] *See Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 609.

[44] *See Boreali*, 71 N.Y.2d at 13.

[45] *See id.* Indeed, New York's nondelegation doctrine reaches to all levels of state and municipal government. A city regulatory agency, for instance, may not engage in lawmaking because doing so infringes upon the city council's exclusive legislative prerogative to make policy and law. *See N.Y. Statewide Coal. of Hispanic Cham. of Commerce*, 23 N.Y.3d 681, 690 (2014).

[46] *See* N.Y. Reg., N.Y. Reg., *Substantially Equiv. Instr.*, § 130.2(g).

more deeply into principled objections to the Substantial Equivalency Rule. His article is attached and incorporated into this public comment by reference.[47]

Thank you again for the opportunity to provide NCLA's perspective on these important issues. If you have any questions, comments or concerns, please feel free to contact NCLA at mike.degrandis@ncla.legal.

Very truly yours,

Michael P. DeGrandis
Senior Litigation Counsel

Mark Chenoweth
Executive Director & General Counsel

Attachment

[47] Prof. Hamburger's article may also be found at: https://thefederalist.com/2019/08/22/education-speech-new-yorks-attempts-control-private-schools-unconstitutional/.

NCLA Public Comment Attachment

Education Is Speech: Why New York's Attempts To Control Private Schools Are Unconstitutional

thefederalist.com
16 mins read

New York State recently announced regulations that would add sharp teeth to its policy of requiring private schools to be "substantially equivalent" to public schools. Although this initially sounds reasonable, on closer examination the regulations impose a stifling conformity on private educational speech.

This problem exists in many states. The New York regulations should therefore provoke a reconsideration of the threats to educational speech across the country.

A vast literature explores the freedom of speech of grade-school students against their teachers and schools, but curiously, there is very little recognition of the free speech rights of parents and schools against the states. These rights now need attention.

What Is Substantial Equivalence?

A long-standing New York State statute generically obliges private schools to offer education "substantially equivalent" to public-school education. Not content with something so open-ended, the state's Department of Education specifies in regulations how substantial

equivalence is to be enforced. It thereby accentuates the threat to freedom of speech.

The immediate targets of the regulations are 39 Yeshivas that, for religious reasons, reject much of what is considered standard in secular education. For example, they teach mostly in Yiddish rather than English, and they do not teach more than rudimentary math and English. But the regulations do not stop with these Yeshivas. They apply to all private schools, spelling out how their teaching must be at least roughly aligned with public education.

The regulations require “local school authorities,” and then the commissioner of education, to evaluate private schools and determine whether they are “substantially equivalent” to public schools in the same area. If not, and if remedial efforts fail, the state can cut off its supply of textbooks, transportation, special education, and other funding. Students who stay in these schools will be considered truant, parents may be fined, and some students might be subject to being jailed.

Last April, the Albany County Supreme Court struck these regulations down for noncompliance with state administrative procedures for issuing regulations. But in July the state again proposed them, this time in conformity with those procedures. So, the question of whether these regulations are constitutional will soon come before the courts.

Compelled Speech and Content Discrimination

There are several powerful constitutional objections to the New York regulations, most centrally that, in pressuring private schools on what and how to teach, the regulations abridge the freedom of speech. The initial problem consists of compelled speech and content discrimination.

Thirty states dictate the content of teaching in one way or another. The New York version of such regulation is very detailed. Though New York's substantial-equivalence statute specifies that elementary and middle private schools must teach English, math, history, and science, this just the beginning.

The state's new regulations require officials to judge substantial equivalence on the basis of whether private schools teach (in one way or another in various grades) a much wider range of subjects, including: arithmetic and mathematics, science, technology, social studies (including geography and U.S. history), the visual arts, music, career development and occupational studies, library and information skills, health education, physical education, and family and consumer sciences.

Although all of these subjects may be important in one sense or another, many could reasonably be left out of a classroom curriculum. Fine citizens have surely grown up without grade school instruction in the entirety of New York's baroque panoply of subjects. Such a multiplicity of topics may even distract many students from concentrating on what will matter to them.

New York is free to make its own idiosyncratic choices in its public schools, but not for private schools. It would have been much less unreasonable if it had required only two or three subjects in private schools—for example, math and at least one language, these being basic building blocks. To be sure, the unreasonableness by itself is not a constitutional objection, but it suggests the danger of New York's unconstitutional policy.

The substantial equivalence requirement, especially when coupled with the enumeration of subjects, amounts to compelled speech and content discrimination. The regulations force private schools to teach the subjects the state favors, and penalize the private schools that, on account of their different priorities, teach a different combination of subjects.

Viewpoint Discrimination

Worse, the statute and the regulations require viewpoint discrimination. They stipulate that the evaluation of substantial equivalence must consider whether a curriculum develops "critical thinking skills in the school's students." Of course, there is much to be said for critical thinking skills. But critical thinking, as revealed by its history, comes with a slant.

The most important development in American religion since the Revolution has been the rise of theological liberalism. Although it is often assumed that religious conflict in America tends to occur between different religions or denominations, the most significant religious division has not been denominational, but the tension between theological liberalism and orthodoxy. In the late nineteenth and twentieth centuries, theological liberals largely routed the orthodox, whom they disparaged as closed-minded and opposed to critical thinking.

This matters because much twentieth-century educational theory drew upon theological liberalism's advocacy of independent judgment and critical thinking in opposition to orthodoxy, especially religious orthodoxy. To be sure, most educators have abandoned the belief in God that once tended to underlie such ideas, and such ideas are therefore no longer distinctively religious. But ideas of critical thinking continue to be expressive of liberal animosity against orthodoxy, especially religious orthodoxy, and this animus is often still felt with religious intensity.

"Critical thinking skills," especially as applied to religious education, thus involves a point of view. On its face, this requirement would pressure schools to teach students the skill of confronting orthodoxy with skepticism.

In short, this is unconstitutional viewpoint discrimination. How it will be applied is unclear, because the phrase "critical thinking" is so vague. But it clearly stands in opposition to religious orthodoxy, and

far from absolving the state, the vagueness just adds to the constitutional problems.

From a theologically liberal perspective, orthodoxy demands uncritical and thus unthinking conformity. On this understanding, "orthodox thinking" is nearly an oxymoron—certainly not something the government needs to tolerate in education. But intellectual exploration is not possible without relying on some constants. Orthodoxies are at least candid in putting aside some variables and stating their constants. From this point of view, an overstated vision of critical thinking may be its own "unthinking" orthodoxy.

Government has no constitutional power to punish schools for their point of view. And it has no constitutional power to force orthodox schools to teach a central element of theological liberalism. For at least 150 years, religious and other orthodoxies have been opposed with demands for critical thinking. In this context, it is viewpoint discrimination when New York pressures private schools to teach "critical thinking skills."

A Sort of Political Speech?

Although freedom of speech is not confined to political speech, justifications of this freedom tend to focus on the value of unrestricted political expression. So it is telling that public constraints on private educational speech recognize it as political.

The states themselves acknowledge that educational speech is political.

For almost two centuries, it has been said that states have an interest in private education because children must learn how to become good citizens, who can think critically and so thoughtfully participate in civic affairs. Nativists popularized this civic justification of restrictions on private schools. And in line with old nativist concerns, it is still especially common on behalf of the requirements that

students learn American history and civics; be taught in English; and learn critical thinking.

But this civic justification is precisely what hammers home the unconstitutionality of the intrusion on private speech. The justification rests on a fear about the political significance of educational speech—the anxiety that, without state control, education will not inculcate the opinions, language, and mental habits appropriate for citizens. In other words, the states have long confined private educational speech on the theory that, because it is politically formative, it matters too much to be left to people to choose for themselves.

The states themselves thus acknowledge that educational speech is political. Accordingly, even if one believed educational speech were of lower status than political speech, this excuse would not apply here.

The Centrality of Speech

It is difficult to escape the reality of a threat to speech. Education is speech—to be precise, it is largely speech, or inextricably intertwined with speech. And New York's regulations, together with similar provisions in other states, focus on speech, even dictating content and viewpoint.

For more than a century, the danger that the regulation of education abridges the freedom of speech has eluded most commentators. In 1925, in *Pierce v. Society of Sisters*, the Supreme Court held a Ku Klux Klan-backed Oregon law unconstitutional for requiring attendance at public schools. The basis for this decision has long seemed a mystery.

Once the centrality of speech is understood, not only that old Klan statute but also a wide range of state educational controls can be seen with greater clarity.

Did it turn on the economic rights of private schools, the right of parents over their children, or the religious liberty of parochial

schools? The answer is actually more direct and more clearly based in the Constitution's express guarantees: Education is speech. The Klan statute, by intent and in effect, interfered in the speech of private schools.

Once the centrality of speech is understood, not only that old Klan statute but also a wide range of state educational controls can be seen with greater clarity. Regulation can be valuable, even in education, but when it veers off to abridge the freedom of speech, it becomes profoundly dangerous and unconstitutional.

Of course, none of this is to say that the courts will immediately recognize the full extent of the constitutional problem. The speech arguments, being new, are unimpeded by precedent; but for the same reason they are also unfamiliar. The courts may therefore hesitate to overturn some of the speech controls that many states have come to take for granted.

The courts, however, will not be able to ignore the reality that education is speech and that states are imposing unconstitutional content and viewpoint discrimination. Most immediately, the courts cannot ignore that New York's regulations go further than most. These regulations dictate very detailed content and a hostile viewpoint. They accordingly should induce the courts to take the very modest step of recognizing at least some limits to state assaults on private educational speech.

The Dubious Heritage of Nativism

Not far behind constitutional questions lies the dubious heritage of nativism. For more than a century, beginning in the 1830s and '40s, nativists resisted immigration and led a theologically liberal Protestant campaign against the Catholic Church and its parochial schools. Under that influence, public schools tended to inculcate a Protestant vision of American ideals, focusing on the King James Bible and the American flag. In response to this attempt to Protestantize

their children, Catholics organized their own schools, many of which persist to this day.

To nativists and many Protestants, the teaching in such schools was regrettable because of both its content and its viewpoint. For example, parochial schools did not teach Darwinism, or inculcate a critical attitude toward claims of truth, whether religious or secular.

One solution was to compel children to attend public schools. Another was to legislate what private schools had to teach.

One solution was to compel children to attend public schools. Another was to legislate what private schools had to teach; New York, for example, introduced its substantial equivalence test in 1895. This solution—dictating the content of private education—became especially popular after compulsory public schooling was precluded in 1925 by *Pierce*. That is, because anti-orthodox homogenization could no longer be achieved by compulsory public education, it could only be accomplished by imposing content and viewpoint requirements on private schools. Either way, it is an unconstitutional assault on private speech.

The nativist heritage of the substantial-equivalence regulations is seen in their demand for English language teaching. Sixteen states require even private curricula to be taught in English. New York aims to be particularly comprehensive.

By statute, New York requires English to be the teaching language in English, math, history, and science; but its new regulations pressure private schools to use English as the teaching language in the vast array of "common branch" subjects it requires in public schools, including arithmetic, science, reading, writing, geography, civics, U.S. history, New York history, hygiene, and physical training—as if writing could not be usefully taught in Latin, or math in German.

Although for New York today the disapproved language is Yiddish, for nativists after World War I the deviant language was German. After Nebraska responded to nativist demands by prohibiting teaching in

German, the Supreme Court in *Meyer v. Nebraska* in 1923 held this sort of language regulation unconstitutional. The New York Department of Education and its supporters surely do not identify as nativist, but their demand that private teaching of most topics be in English unconsciously echoes an unconstitutional legacy that should have been left in the past.

Now, as in nativist days of old, the insistence that private schools teach in English is justified as necessary to train children in a common language with which they can succeed personally and participate politically. But obviously students can learn English even in a school that teaches most other subjects in Latin or Mandarin. Ultimately, it is irrational and stifling, even unwittingly nativist, to bar private schools from teaching in a foreign language.

A Compelling Government Interest in Education?

In response, one might protest that there is a long history of requiring basics to be taught in private schools; that this is necessary to ensure an educated citizenry; and that states therefore have a pressing government interest in such regulation. In legal terms, New York has a "compelling government interest" that justifies its content and viewpoint discrimination. But on inspection, such arguments fall apart.

Undoubtedly, education comes within the scope of each state's plenary legislative power. This is not to say, however, that this state interest is so "compelling" as to justify the state in abridging the freedom of speech.

Only nativism elevated education to an interest so necessary to government as to override state and even federal constitutional speech rights.

Only nativism elevated education to an interest so necessary to government as to override state and even federal constitutional speech rights. At the beginning of the republic, some commentators theorized about the value of education for creating good citizens, but such ideas found little traction until nativists worried that Catholics would unthinkingly follow the dictates of a foreign potentate.

Nativists therefore preached that one of the primary functions of government was to educate children in "American" principles—so as to ensure the development of citizens who would think for themselves and be loyal to American "democratic" ideals. It thus became a popular assumption that the government's interest in education was so profound as to cut off contrary claims of rights—in legal terms, so compelling as to override concerns about the speech and religious rights of children, their parents, and their schools.

A compelling government interest in education became plausible due to hysterical, aggressive fears of Catholicism. This is hardly reassuring; indeed, it is worrisome. Prejudice is a poor foundation for constitutional doctrine. And it is particularly dangerous when it shifts constitutional baselines.

Limited government depends on the power of the people to shape their own opinions independently of government.

Even if nativism did not lurk behind the scenes—though it obviously did—a government interest in education cannot be so "compelling" or important as to slice through constitutional freedoms. The notion of a compelling government interest in education inverts the relationship between people and government.

Limited government depends on the power of the people to shape their own opinions independently of government. When government asserts the power to shape their opinions, it can liberate itself from the people's control.

It is therefore telling that government regulation of private education has long been justified as necessary to ensure that children acquire

civic values and are prepared to be good citizens—which is as much as to say that government must shape the people and their civic thoughts. This dark vision upends the Enlightenment theory of popular control of government, insisting that government must remake the people to conform to government standards.

To this it need only be added that, even if one thought New York had a lawful, compelling government interest in tamping down deviant private speech—which it does not—its regulations are profoundly disproportionate. They take aim at the "problem" of unacceptable dissent in some private schools by flattening out speech in all of them. This is the "substantial equivalent" of a nuclear weapon.

State Homogenization

Twentieth-century nativists candidly hoped that public schools would grind away the ethnic and religious differences among children and thereby homogenize the American people. But whatever the merits of public school homogenization, there is no constitutional room in America for state assaults on deviant private opinion, whether in education or elsewhere.

For early Americans, the education of children was largely a private affair, conducted usually in English but often entirely in German. Few Americans were so troubled by this or by corresponding differences in other schools' curricular content or viewpoint as to demand legal controls on their speech.

States wish to turn formerly independent private schools into instruments of homogenization.

This relative willingness to live with differences is nicely captured by the 1816 "Constitution" of an octagonal Union School, probably in Pennsylvania, which the local English and German communities jointly built and used in rotation—initially alternating annually and beginning five years later every semester—without either group

trying to dictate what the other taught, let alone in what language. Nowadays, however, private schools must conform to demotic demands for conformity in content, viewpoint, and language.

Such demands are especially dangerous for all sorts of unorthodox orthodoxies. If a handful of Yeshivas cannot experiment in teaching their preferred content and viewpoint, what will be the fate of other minorities who deviate from what is claimed to be the majority's sense of normality?

Government generally defers to the decisions of parents about their children and their welfare. It is therefore telling that when New York sweepingly departs from this principle, it is to interfere with parental control of private educational speech. The First Amendment apparently must get cast aside when states wish to turn formerly independent private schools into instruments of homogenization.

Government should not be the arbiter of what parents and schools teach their children.

To be sure, a refusal to teach much math, science, and English may come at great cost for many students. But the displacement of religious education may also come at great cost—especially when, as here, it is at the heart of the students' individual and communal identity. One way or another, government should not be the arbiter of what parents and schools teach their children.

John Stuart Mill wrote in his "On Liberty" about the value of "experiments in living," and this is never more clearly true than when the experimentation is almost entirely a matter of speech. What New York considers the failings of the Yeshivas is really an experiment—a speech experiment in a different mode of living. And given the abysmal failures of public schools, it is equally comic and tragic to respond to this experimentation by insisting that all private schools be homogenized to resemble public schools.

Administrative Control of Speech

Accentuating the danger to speech is administrative control. A New York statute recites the bare bones of substantial equivalence, but it is the state's administrative regulations that flesh the requirement out. This is troubling because traditionally one of the foundational protections for speech was that constraints on it could be imposed only through statutes—through laws openly adopted by a representative legislative body.

Administrative regulation of speech predictably threatens freedom, and should therefore always be viewed with suspicion.

It is commonly assumed that speech needs to be protected from political majorities, and that this is the primary purpose of the speech guarantees in the First Amendment and state constitutions. But speech also needs protection from elites and other factions less than a majority, and for this purpose it is important that binding constraints be constitutionally imposed only through acts of the legislature.

This is particularly clear in a relatively large state such as New York, where the legislative obstacles to oppression are reinforced by the political limits inherent in the state's diversity. As James Madison explained in Federalist No. 10, unjust or oppressive measures are less likely to be adopted in an extended republic than in a small one. Though Madison was speaking of the expansive republic formed by the United States, at a smaller scale his observation also applies to the Empire State, in which the breadth of different groups and interests impede the capacity of the legislature to act oppressively.

It is therefore no surprise that New York's substantial equivalence regulations are oppressive. By working through administrative regulations and avoiding the necessity of a legislative vote on the details of substantial equivalence, the state has sidestepped both the legislative process and the Madisonian political limits on oppression. Put doctrinally, administrative regulation of speech predictably

threatens freedom, and should therefore always be viewed with suspicion.

Administrative Evasion of the Judicial Process

That is not all. The administrative control of speech, which evades the legislative process, is accompanied by circumvention of the judicial process. Since the eighteenth century, one of the most valuable and traditional protections for speech was that the government could control it only through recourse to the courts, where defendants had the benefit of an independent judge and jury.

This leaves private schools and their speech rights to the tender mercies of persons fully committed to, and often even employed by, the public school system.

But by working through the Department of Education's regulatory process, the state of New York brushes aside the protections of judge and jury, allowing local school authorities and the commissioner of education to impose speech regulations and adjudicate conformity to them. This leaves private schools and their speech rights to the tender mercies of persons fully committed to, and often even employed by, the public school system—a conflict of interest utterly incompatible even with watered-down contemporary ideas of due process of law. More basically, it denies private schools a jury and allows access to a judge only long after any administrative adjudication, when the judge is apt to defer to the administrative determinations of fact and law.

All of this violates, if not the New York Constitution, then at least the jury and due process guarantees of the U.S. Bill of Rights as incorporated against to the states under the Fourteenth Amendment.

New York State's substantial equivalence regulations thus illustrate much that is appalling about administrative regulation of speech. The regulations deny speech the protection of the legislative and political

processes—even of the judicial process, including judge and jury—all to impose content and viewpoint discrimination in pursuit of constraints that reek of nativism.

The Way Forward

To move forward, the courts should begin by holding New York's substantial-equivalence regulations unconstitutional. This should be followed with decisions against other states' abridgments of educational speech.

More fundamentally, the public and the courts must recognize the problem: that education is speech. This speech, as much as political speech, deserves to be fully protected from content and viewpoint discrimination. Especially because much regulation of education is designedly aimed at the political judgment or opinion of citizens, and has disgraceful theological and nativist roots, it deserves skepticism and cannot be presumed to escape standard constitutional doctrines.

Ultimately, the Supreme Court ought to follow up on *Pierce* and *Meyer* with a new landmark decision protecting speech in education.

Americans need a new movement to protect private schools—a movement based on the principle that education is speech and recognizing that much regulation of private education is aimed at speech. A century after the Klan tried to impose compulsory public education on children in Oregon, many state legislatures are still trying to impose conformity in other ways—not least, by regulating educational speech in private schools. It is time to end state attempts to homogenize private speech.