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## Civics in Yiddish: State Regulation of Language of Instruction in New York's Private Schools

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# CIVICS IN YIDDISH: STATE REGULATION OF LANGUAGE OF INSTRUCTION IN NEW YORK'S PRIVATE SCHOOLS

*Stephen Rutman\**

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## INTRODUCTION

For centuries, New York City has been home to a diverse population.<sup>1</sup> Small communities have thrived in New York, and those communities have, in turn, helped New York thrive.<sup>2</sup> The City has cultivated a reputation as a place where one can walk down the street and hear a dozen different languages.<sup>3</sup> In fact, with over 600 languages and dialects, the New York metropolitan area contains the greatest linguistic diversity of any urban center in the world.<sup>4</sup> New proposals for enforcing New York State’s education laws,<sup>5</sup> however, do not reflect this same commitment to pluralism.

A recent controversy over the quality of the education in New York’s religious private schools — and the state’s regulation thereof — raises questions about the American promise of fostering a pluralistic society, in which small enclaves outside the mainstream can prosper. Over the past decade, a group of advocates has asserted that certain Orthodox Jewish day schools, or “yeshivas,” have failed to provide instruction “substantially equivalent” to the instruction offered in surrounding public schools,<sup>6</sup> as required by state statute.<sup>7</sup>

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1. See TYLER ANBINDER, *CITY OF DREAMS: THE 400-YEAR EPIC HISTORY OF IMMIGRANT NEW YORK* xxv (2016).

2. See Edward L. Glaeser, *Urban Colossus: Why Is New York America’s Largest City?*, 11 *ECON. POL’Y REV.* 7, 17–19 (2005).

3. Nancy Beth Jackson, *A Neighborhood Traveled in Dozens of Languages*, *N.Y. TIMES* (July 17, 2005), <https://www.nytimes.com/2005/07/17/realestate/a-neighborhood-traveled-in-dozens-of-languages.html> [<https://perma.cc/T5F9-CUV7>].

4. *NYC Language Map*, ENDANGERED LANGUAGE ALL., <https://www.elalliance.org/our-work/maps/nyc-map> [<https://perma.cc/ZR2Q-EL2V>] (last visited Oct. 14, 2020).

5. . See, e.g., 41 N.Y. Reg. 1 (proposed July 3, 2019).

6. See *infra* notes 39–46 and accompanying text.

7. N.Y. Educ. Law § 3204 (McKinney 2020). See generally Alisa Partlan et al., *Young Advoc. for Fair Educ., Non≠Equivalent: The State of Education in New York City’s Hasidic Yeshivas* (2017), <https://yaffed.org/wp-content/uploads/2021/01/Yaffed-Report-FINAL-one-up.pdf> [<https://perma.cc/Z5LC-WMKX>] (detailing certain schools’ noncompliance with the New York Education Law and associated consequences).

As a result, the critics contend, many graduates of these schools emerge with insufficient skills in foundational subjects, such as English language and math, to pursue educational and professional goals,<sup>8</sup> actively participate in democratic processes,<sup>9</sup> and negotiate departure from their communities, if they wish.<sup>10</sup> In response to these allegations, the New York State Education Department (NYSED) has developed regulatory guidelines to enforce New York's "substantial equivalence" requirement.<sup>11</sup> Among other things, the guidelines demand that private schools conduct classes in all statutorily required subject areas exclusively in English.<sup>12</sup>

This Note posits that these efforts to heighten enforcement of the "substantial equivalence" requirement overstep constitutional boundaries. A series of Supreme Court cases from the 1920s upheld parents' constitutional rights to control their children's education through private schooling.<sup>13</sup> The same cases, however, recognized the state's power to regulate the instruction in private schools.<sup>14</sup> The Court is not precise about the acceptable extent of regulation, except

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8. Naftuli Moster, *Here Is Why YOU Should Care About Hasidic Children's Education*, MEDIUM (Nov. 27, 2016), <https://medium.com/@Yaffedorg/here-is-why-you-should-care-about-hasidic-childrens-education-b08bee4d0f35> [<https://perma.cc/T7KN-FRPH>] ("Hasidic boys typically leave high school with limited spoken and written English skills, and have virtually no prospects of gainful employment in the secular world.").

9. See Anita Altman, *Orthodox Children Need Access to a Secular Education*, FORWARD (Sept. 25, 2020), <https://forward.com/scribe/455260/orthodox-children-need-access-to-a-secular-education/> [<https://perma.cc/AG4V-G8FV>] ("[T]hese students, uneducated in basic civics, will grow to be adults in our society. How can we expect them to be informed citizens who will vote, sit on juries, and be active participants in civic society, if the institutions tasked with preparing them for adulthood have abdicated this responsibility?").

10. See Michael Orbach, *US Haredi Group Facing Uphill Battle Making up for Poor Secular Education*, JEWISHPRESS.COM (July 11, 2012), <https://www.jewishpress.com/news/breaking-news/us-haredi-group-facing-uphill-battle-making-up-for-poor-secular-education/2012/07/11/> [<https://perma.cc/ZB9F-E4A5>] (highlighting efforts to provide educational resources to individuals seeking to leave insular Jewish communities).

11. 41 N.Y. Reg. 1 (proposed July 3, 2019).

12. *Id.* (including the use of instruction in English for "common branch subjects" as a criterion for determining schools' compliance with the New York Education Law); see also N.Y. EDUC. LAW § 3204(3) (McKinney 2020) (listing "twelve common school branches" of required instruction for the first eight years of study and a slightly shorter list of required subjects for high school students).

13. See generally *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925); *Bartels v. Iowa*, 262 U.S. 404 (1923); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

14. See generally *Farrington*, 273 U.S. at 299; *Pierce*, 268 U.S. at 535; *Bartels*, 262 U.S. at 410–11; *Meyer*, 262 U.S. at 403.

in clarifying that the state lacks the power to “standardize its children” through public schooling.<sup>15</sup> Establishing the constitutionality of the proposed NYSED regulation involves a substantive due process analysis — evaluating the government’s interest in the proposed regulation and the proposed regulation’s design in addressing any such interest.<sup>16</sup> The analysis in this situation requires weighing the United States’ commitment to fostering a pluralistic society against its commitment to establishing a unified polity. Here, these competing commitments play out as a tension between cultivating a society where parents are free to educate their young in nontraditional ways<sup>17</sup> and a society where the government promotes linguistic homogeneity through its education systems and laws.<sup>18</sup> This Note concludes that, even if the state has an interest in a populace competent in the English language, the proposed requirement of teaching secular subjects exclusively in English is not an appropriate mechanism for addressing that concern.

Part I of this Note examines parents’ rights to opt out of educating their children through the public-school system in favor of private schooling and state power to regulate private schools, including New York’s statutory requirement of “substantial equivalence.” It further evaluates the recent NYSED proposal relating to language of instruction in the context of various non-English educational programs in New York. Part II then explores a tension found in a series of cases from the early twentieth century over the constitutional limits of private school regulation under the Fourteenth Amendment and questions whether regulatory guidelines requiring secular instruction exclusively in English exceed those limits. Finally, Part III argues that while the state may demand English competence, the NYSED guidelines would unconstitutionally abridge parents’ fundamental right to control their children’s education.

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15. *Pierce*, 268 U.S. at 535.

16. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (characterizing the Court’s substantive due process analysis as “examin[ing] carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation”). For a discussion on the relationship between substantive due process rights and other constitutionally protected rights — such as First Amendment freedoms — implicated by the new guidelines, see *infra* Section I.B.

17. See E. Vance Randall, *Pluralism, Private Schools and Public Policy*, 1994 BYU EDUC. & L.J. 35, 61–62 (1994).

18. See generally Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 328–50 (1992) (tracing the history of legal enforcement of linguistic conformity).

## I. BACKGROUND ON THE DEBATE OVER ENGLISH INSTRUCTION IN NEW YORK CITY PRIVATE SCHOOLS

Reflecting the City's linguistically diverse population, New York's schools feature a wide array of non-English learning opportunities in both public and private schools.<sup>19</sup> One prominent example in the private school setting is Orthodox Jewish parents choosing to send their children to yeshivas, where Yiddish is the predominant language used for instruction.<sup>20</sup> The Supreme Court has established that parents and guardians may elect to educate their children outside the public-school system; however, it qualified this right in holding that the state maintains the power to regulate education in non-public schools.<sup>21</sup> Exercising that power, New York State has mandated that the instruction in private schools be on par with that of public schools.<sup>22</sup> In response to claims that the yeshivas have failed to live up to this standard, the State Education Department has proffered new guidelines, which could curtail non-English education across New York's private schools.<sup>23</sup>

### A. The Non-English Education Landscape in New York City

Parents select schools with non-English instruction for a variety of reasons.<sup>24</sup> In some cases, where English is students' primary language, non-English instruction is supplementary.<sup>25</sup> In other cases,

19. See ÁNGELA REYES-CARRASQUILLO, DIANE RODRÍGUEZ & LAURA KAPLAN, CUNY-NYS INITIATIVE ON EMERGENT BILINGUALS, NEW YORK STATE EDUCATION DEPARTMENT POLICIES, MANDATES AND INITIATIVES ON THE EDUCATION OF ENGLISH LANGUAGE LEARNERS 17, 22 (2014), <https://www.cuny-nysieb.org/wp-content/uploads/2016/05/CUNY-NYSIEB-NY-State-Policies-Report-Feb-2014-Final.pdf> [<https://perma.cc/D3TW-VYT8>].

20. See Jennifer Miller, *Yiddish Isn't Enough*, N.Y. TIMES (Nov. 21, 2014), <https://www.nytimes.com/2014/11/23/nyregion/a-yeshiva-graduate-fights-for-secular-studies-in-hasidic-education.html> [<https://perma.cc/3324-G4HL>].

21. See, e.g., *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also Aaron Saiger, *State Regulation of Curriculum in Private Religious School: A Constitutional Analysis*, in RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK 49, 50–52 (Jason Bedrick, Jay P. Greene & Matthew H. Lee eds., 2020).

22. N.Y. EDUC. LAW § 3204(2) (McKinney 2020).

23. 41 N.Y. Reg. 2 (proposed July 3, 2019) (“[W]hen making a substantial equivalency determination, [a local school authority], and the Commissioner, when he/she is responsible for making the final determination, must consider . . . [whether] English is the language of instruction for common branch subjects.”).

24. See Jean Sheff, *The Best Bilingual Schools in New York: Public, Private and Enrichment*, N.Y. FAM. (Apr. 16, 2019), <https://www.newyorkfamily.com/the-best-bilingual-education-for-new-york-city-kids/> [<https://perma.cc/7ACR-XUDB>].

25. See *id.*

non-English instruction is a necessity — at least, temporarily — for teaching students without prior knowledge of English.<sup>26</sup> Members of certain Yiddish-speaking Jewish communities in New York fall into the latter category.<sup>27</sup> Regardless of parents' reasons, New York has generally accommodated various forms of non-English education.<sup>28</sup> In recent years, however, the substandard English skills of some graduates of New York's non-English instructional programs, including the yeshivas, have prompted scrutiny about these educational options.<sup>29</sup>

*i. The Yeshiva Controversy*

New York's *haredi*<sup>30</sup> Jewish communities settled in small pockets of Brooklyn and Queens in the wake of the Holocaust.<sup>31</sup> Residents of these neighborhoods are marked not only by their distinctive traditional attire but also by their extreme pietism and strict adherence to Jewish law.<sup>32</sup> These tight-knit, insular communities migrated from Eastern Europe to the United States, where they have flourished, in large part, based on their freedom to self-segregate and avoid assimilation.<sup>33</sup> New York's *haredi* population is by no means monolithic; various branches differ significantly in their ritual practices, ideological perspectives, and socioeconomic situations.<sup>34</sup>

26. *See id.*

27. *See* Miller, *supra* note 20.

28. *See Office of Bilingual Education and World Languages (OBEWL)*, N.Y. ST. EDUC. DEP'T, <http://www.nysed.gov/program-offices/office-bilingual-education-and-world-languages-obewl> [<https://perma.cc/X78F-6R XR>] (last visited Oct. 15, 2020) (demonstrating the multiple formats of non-English instruction offered in New York's public schools alone).

29. *See, e.g.*, Miller, *supra* note 20; Stephanie Gutmann, *The Bilingual Ghetto: Why New York's Schools Won't Teach Immigrants English*, CITY J. (Winter 1992), <https://www.city-journal.org/html/bilingual-ghetto-why-new-yorks-schools-wont-teach-immigrants-english-12716.html> [<https://perma.cc/A4WU-XK6U>].

30. "*Haredi*" (sometimes "*charedi*") means "trembling," in the context of trembling before God. *Cf. Isaiah* 66:2, 5. As used in this Note, *haredi* Jews (pl. "*haredim*") is an umbrella term containing Hasidic and certain non-Hasidic communities of Orthodox Jews. *See Introduction: Yeshivas vs. New York, in RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK* xxi n.6 (Jason Bedrick, Jay P. Greene & Matthew H. Lee eds., 2020).

31. *See* Jonathan D. Sarna, *AMERICAN JUDAISM: A HISTORY* 296–98 (2004).

32. *See id.*

33. *See id.*

34. *See* Yaakov Schwartz, *A Guide to the Diverse Groups of Jews Living in 20 NY Virus Hotspot ZIP Codes*, TIMES ISR. (Oct. 14, 2020, 7:48 PM), <https://www.timesofisrael.com/a-guide-to-the-diverse-groups-of-jews-living-in-20-ny-virus-hotspot-zip-codes/> [<https://perma.cc/VVJ4-8583>].

Based on their religious convictions, *haredim* minimize their contact with the secular world, in part, by sending their children to private yeshivas.<sup>35</sup> As of 2018, over 110,000 students attended Jewish day schools and yeshivas in New York — roughly the same number of students as were enrolled in the City’s charter school network.<sup>36</sup> Yeshiva students, particularly male students, spend much of their days engaged in Jewish text study.<sup>37</sup> Although select classes in these schools use Aramaic or Hebrew, the default language of instruction in many yeshivas is Yiddish — the European vernacular *haredim* have used for generations.<sup>38</sup>

Over the past decade, a small but vocal group of activists, many of whom attended New York’s yeshivas, have begun sounding alarm bells about the state of secular education in *haredi* private schools.<sup>39</sup> They allege — in scores of media profiles, op-eds, and public letters — that graduates of these schools emerge without the requisite skills to navigate the secular world, let alone to seek gainful employment in it.<sup>40</sup> In vivid and wrenching terms, these advocates have described the failures of yeshivas to provide students with basic knowledge of science, mathematics, or history.<sup>41</sup> One of this group’s foremost

35. See Moshe Krakowski, Opinion, *The Truth About Secular Studies in Haredi Schools*, FORWARD (Sept. 19, 2019), <https://forward.com/opinion/431757/the-truth-about-secular-studies-in-haredi-schools/> [<https://perma.cc/9ZKN-JL36>] (“These schools’ purpose is to develop in students a distinctly religious worldview, and not the worldview and culture of secular society.”).

36. *Student Population at NYC Jewish Schools Rises to Equal Numbers as Charters*, JEWISH TELEGRAPHIC AGENCY (Oct. 8, 2018, 12:24 PM), <https://www.jta.org/2018/10/08/united-states/student-population-nyc-jewish-schools-rises-rival-numbers-charter-schools/> [<https://perma.cc/LDK2-KY43>].

37. Moshe Krakowski, *What Yeshiva Kids Are Actually Studying All Day*, FORWARD (Dec. 26, 2018), <https://forward.com/life/faith/416616/what-yeshiva-kids-are-actually-studying-all-day/> [<https://perma.cc/T34H-KSNW>] (describing the religious curriculum at yeshivas, which centers on close readings of sacred Jewish texts and analysis of the philosophical and legal concepts embedded in the texts).

38. PARTLAN ET AL., *supra* note 7, at 4, 31–32.

39. See, e.g., Leslie Brody, *Local Yeshiva Has Ardent Fans and Critics*, WALL ST. J. (Sept. 17, 2018, 7:00 AM), <https://www.wsj.com/articles/local-yeshiva-has-ardent-fans-and-critics-1537182001> [<https://perma.cc/9NPM-BV7F>]; Moster, *supra* note 8; Miller, *supra* note 20.

40. Young Advocates for Fair Education lists over 100 links to media items featuring the organization’s perspectives on its website. See *News & Articles*, YAFFED, <https://yaffed.org/news-articles/> [<https://perma.cc/PH63-2TPB>] (last visited Oct. 15, 2020).

41. See, e.g., Shulem Deen, Opinion, *Why Is New York Condoning Illiteracy?*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/opinion/yeshivas-literacy-new-york.html> [<https://perma.cc/J3BU-ECQP>]; Josefin Dolstein, *New York Is Trying to Reform the Orthodox Yeshiva System, Which Some Graduates Say Barely Taught Them to Speak English*, JEWISH TELEGRAPHIC AGENCY (Jan. 13, 2020,

spokesmen has recounted reaching the age of 18 without knowing how to do long division or draft an essay.<sup>42</sup> He had never learned what a molecule or a cell was, and he had no familiarity with the American Revolution or the country's system of government.<sup>43</sup> A focal point in these narratives has been the limited English language instruction provided to *haredi* students.<sup>44</sup> Beyond stifling students' educational or professional pursuits, widespread English illiteracy in these communities depresses civic participation among their members.<sup>45</sup>

In 2015, Young Advocates for Fair Education (YAFFED) ignited its long-standing conflict with New York City and State agencies when it published a letter signed by some affected *haredi* community members alleging that the quality of secular instruction in certain yeshivas did not meet the state's required standard.<sup>46</sup> The New York City Department of Education (DOE) committed to investigating the issue,<sup>47</sup> but after two years of waiting for the results of an investigation, YAFFED released its own report regarding the status of secular education in New York City's yeshivas.<sup>48</sup> The YAFFED report also set forth demands for DOE and NYSED to rectify the issues it identified and condemned DOE for its failure to follow

11:50 AM), <https://www.jta.org/2020/01/13/united-states/new-york-is-trying-to-reform-the-orthodox-yeshiva-system-which-some-graduates-say-barely-taught-them-to-speak-english> [https://perma.cc/JHE9-Z6YY]; Shulim Leifer, Opinion, *Stop Rationalizing Child Neglect: Many Yeshivas Fail Thousands of Kids, End of Story*, N.Y. Daily News (Apr. 16, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-hasidim-failed-by-city-pols-20210416-p34yn6dd3bcyxn7oxlxvdmre-story.html> [https://perma.cc/M9LD-UXZS].

42. Amy Sara Clark, *Chasidic Parents, Yeshiva Grads Sue State for Ignoring Subpar Secular Ed*, N.Y. JEWISH WK. (Nov. 20, 2015, 12:00 AM), <https://jewishweek.timesofisrael.com/chasidic-parents-yeshiva-grads-sue-state-for-ignoring-subpar-secular-ed/> [https://perma.cc/2T9H-286Q].

43. *Id.*

44. *See, e.g.*, Deen, *supra* note 41; Dolstein, *supra* note 41.

45. *See supra* note 9 and accompanying text.

46. *See Parents Urge Probe of N.Y. Yeshivas for Neglecting Secular Education*, JEWISH TELEGRAPHIC AGENCY (July 27, 2015, 5:13 PM), <https://www.jta.org/2015/07/27/united-states/nyc-education-officials-urged-to-investigate-quality-of-yeshivas> [https://perma.cc/EAH4-7GBW]. Founded in 2012, YAFFED is a non-profit organization dedicated to improving the quality of secular education in New York's yeshivas through awareness campaigns and community-based advocacy. *See* PARTLAN ET AL., *supra* note 7.

47. Amy Sara Clark, *De Blasio: 'Zero Tolerance' for Subpar Math, English in Yeshivas*, N.Y. JEWISH WK. (July 28, 2015, 12:00 AM), <https://jewishweek.timesofisrael.com/de-blasio-zero-tolerance-for-subpar-math-english-in-yeshivas/> [https://perma.cc/GDU4-PYSY].

48. PARTLAN ET AL., *supra* note 7.

through on its promise to investigate.<sup>49</sup> In response to mounting pressure to regulate the schools, yeshiva supporters in the state legislature, including State Senator Simcha Felder, introduced and passed an amendment to the 2018–2019 state budget (known by some as the Felder Amendment), which effectively provided yeshivas special exemptions from the regulatory requirements imposed by New York Education Law.<sup>50</sup> In July 2018, YAFFED filed suit in federal court against Governor Andrew Cuomo and high-ranking New York education officials, challenging the amendment and reiterating its condemnation of DOE.<sup>51</sup> Shortly thereafter, DOE released the preliminary results of its investigation,<sup>52</sup> and NYSED issued new guidelines for the enforcement of the New York Education Law applicable to the yeshivas, effectively reversing the Felder Amendment.<sup>53</sup> Subsequently, early in 2019, Judge I. Leo Glasser dismissed YAFFED's case based on the plaintiff's lack of standing.<sup>54</sup>

Following the release of the new NYSED guidelines, unlikely allies of the yeshivas struck back at state education authorities. The New York State Association of Independent Schools (NYSAIS), Parents for Educational and Religious Liberty in Schools, and the New York State Council of Catholic School Superintendents filed lawsuits in state court challenging the guidelines on various theories.<sup>55</sup> The state trial court voided the NYSED guidelines on procedural grounds, leaving the substantive issues open for further litigation.<sup>56</sup> In July 2019, NYSED published notice of a proposed rule in the state register, seeking public comments on similar guidelines to those

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49. *Id.* at 7–11.

50. See Amy Sara Clark, *Questions over Felder's 'Yeshiva' Amendment*, N.Y. JEWISH WK. (Apr. 3, 2018, 8:26 PM), <https://jewishweek.timesofisrael.com/questions-over-felders-yeshiva-amendment/> [<https://perma.cc/QTP3-2UG9>].

51. *Young Advocs. for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 219 (E.D.N.Y. 2019).

52. Letter from Richard A. Carranza, C., N.Y.C. Dep't of Educ., to MaryEllen Elia, Comm'r, N.Y. State Educ. Dep't (Aug. 15, 2018), <https://int.nyt.com/data/documenthelper/164-chancellor-letter-to-sed-8-15/1bb49eafd0d208cd1088/optimized/full.pdf#page=1> [<https://perma.cc/C768-4MT3>].

53. Press Release, N.Y. State Educ. Dep't, NYSED Releases Updated Guidance and Resources on Substantial Equivalency of Instruction (Nov. 20, 2018), <http://www.nysed.gov/news/2018/nysed-releases-updated-guidance-and-resources-substantial-equivalency-instruction> [<https://perma.cc/FKS9-FDXL>].

54. *Young Advocs. for Fair Educ.*, 359 F. Supp. 3d at 238.

55. *N.Y. State Ass'n of Indep. Sch. v. Elia*, 110 N.Y.S.3d 513, 513–14 (Sup. Ct. 2019).

56. *Id.* at 517 (nullifying the proposed guidelines based on the agency's failure to comply with state requirements to provide notice of the proposal).

previously introduced.<sup>57</sup> Several months later, and nearly five years after YAFFED first requested an investigation, DOE released the results of its investigation, delivering mixed findings.<sup>58</sup> In February 2020, after receiving over 140,000 comments from interested stakeholders and members of the public, NYSED said it would continue to review comments and further engage stakeholders.<sup>59</sup>

Most recently, NYSED held a series of virtual meetings with relevant parties to solicit input on new regulations for enforcing New York's "substantial equivalence" requirement.<sup>60</sup> The meetings brought together approximately 500 individuals, who gathered in breakout rooms to discuss recommendations for criteria and methods for assessing non-public schools' compliance with the "substantial equivalence" law.<sup>61</sup> Following the meetings, NYSED released a roughly 50-page report detailing the substance of the conversations and committing to drafting new proposed regulations by fall 2021.<sup>62</sup>

57. 41 N.Y. Reg. 1 (proposed July 3, 2019).

58. Of the 28 schools surveyed, only two were deemed to have met the "substantial equivalence" standard, while five were considered "underdeveloped" in this regard; the majority of schools fell somewhere in between the two extremes, according to the report. *See* Letter from Richard A. Carranza, C., N.Y.C. Dep't of Educ., to Shannon Tahoe, Interim N.Y. State Comm'r of Educ. (Dec. 19, 2019), <https://www.politico.com/states/f/?id=0000016f-1fc6-dc86-ab7f-bfeed3d50000> [<https://perma.cc/6W6W-HRQ3>]. In April 2021, a local news outlet sued the DOE over the agency's refusal to provide documents related to its investigation. *See THE CITY Sues the Department of Education to Get Brooklyn Yeshiva Investigation Documents*, CITY (Apr. 27, 2021, 9:46 PM), <https://www.thecity.nyc/education/2021/4/27/22406898/city-sues-department-education-brooklyn-yeshiva-investigation-documents> [<https://perma.cc/YD4F-XJ42>].

59. *See* Press Release, N.Y. State Educ. Dep't, State Education Department Provides Update on Review of Public Comment on Proposed Regulations for Substantially Equivalent Instruction for Nonpublic School Students (Feb. 10, 2020), <http://www.nysed.gov/news/2020/state-education-department-provides-update-review-public-comment-proposed-regulations> [<https://perma.cc/GQ9D-6Q4A>].

60. Press Release, N.Y. State Educ. Dep't, State Education Department Releases Report on Stakeholder Input on Substantially Equivalent Instruction (May 10, 2021) [hereinafter May 2021 Press Release, Stakeholder Input], <http://www.nysed.gov/news/2021/state-education-department-releases-report-stakeholder-input-substantially-equivalent> [<https://perma.cc/6UJH-SQPH>]; Press Release, N.Y. State Educ. Dep't, State Education Department Announces Series of Regional Meetings to Gather Stakeholder Input on Substantially Equivalent Instruction for Nonpublic School Students (Oct. 27, 2020) [hereinafter Oct. 2020 Press Release, Stakeholder Input], <http://www.nysed.gov/news/2020/state-education-department-announces-series-regional-meetings-gather-stakeholder-input> [<https://perma.cc/BL9G-ZUNM>].

61. May 2021 Press Release, Stakeholder Input, *supra* note 60.

62. N.Y. STATE EDUC. DEP'T, DETERMINING SUBSTANTIAL EQUIVALENCE OF INSTRUCTION FOR NONPUBLIC SCHOOL STUDENTS IN NEW YORK STATE: A SUMMARY OF STAKEHOLDER FEEDBACK (2021),

Once developed, the new guidelines will be released for public comment before they are finalized.<sup>63</sup> The state agency has not provided any substantive information about specific changes it will make to the guidelines previously proposed.

Concurrent with the ongoing agency activity, the “substantial equivalence” controversy emerged as a key campaign issue in New York City’s 2021 mayoral race.<sup>64</sup> In an effort to court various voting blocs, candidates staked out a range of positions more or less sympathetic to the yeshivas that are wary of stricter enforcement of the New York law.<sup>65</sup>

### ii. *Other Examples of Non-English Instruction*

Although the July 2019 NYSED guidelines came on the heels of agitation from critics of the yeshivas, many other New York City schools — both public and private — offer non-English instruction.<sup>66</sup> This sub-Section evaluates these examples in turn. Non-English instruction in the public-school context is generally a short-term accommodation made for students who require support in integrating into mainstream public schools.<sup>67</sup> By contrast, non-English instruction in New York’s non-religious independent schools is typically supplemental. Although these examples differ in critical respects from the situation in New York’s yeshivas, they provide an

[https://www.regents.nysed.gov/common/regents/files/Subst%20Equiv%20stakeholder%20input%20report%202021-05-06\\_0.pdf](https://www.regents.nysed.gov/common/regents/files/Subst%20Equiv%20stakeholder%20input%20report%202021-05-06_0.pdf) [<https://perma.cc/NJ9W-FM88>].

63. *Id.* at 32–33.

64. *See, e.g.*, Shira Hanau, *Oversight of Orthodox Yeshivas Becomes a Major Issue in New York City’s Mayoral Race*, JEWISH TELEGRAPHIC AGENCY (Mar. 25, 2021, 10:11 AM), <https://www.jta.org/2021/03/25/ny/oversight-of-orthodox-yeshivas-becomes-a-major-issue-in-new-york-citys-mayoral-race> [<https://perma.cc/SJ6F-GTQH>].

65. *See, e.g.*, Jacob Kornbluh, *After Visiting Yeshiva, Eric Adams “Impressed” by Secular Education*, FORWARD (Mar. 9, 2021), <https://forward.com/fast-forward/465460/after-visiting-yeshiva-eric-adams-impressed-by-secular-education/> [<https://perma.cc/P9TT-DP4R>]; Hannah Dreyfus, *On the NYC Mayoral Campaign Trail, Andrew Yang Hints at Hands-off Approach to Yeshiva Education*, JEWISH TELEGRAPHIC AGENCY (Feb. 11, 2021, 9:00 PM), <https://www.jta.org/2021/02/11/ny/on-the-nyc-mayoral-campaign-trail-andrew-yang-hints-at-hands-off-approach-to-yeshiva-education> [<https://perma.cc/K3DK-4N6F>].

66. *See* Sheff, *supra* note 24.

67. Support services for non-English speakers in public schools and the preservation of Yiddish in the yeshivas reflect two competing visions of multiculturalism. One model emphasizes social integration of sub-populations and minority representation in the public sphere. The other model focuses on maintaining group identity and autonomy. *See* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1268–82 (2011).

important basis for comparison, and they may ultimately be implicated by any regulatory action directed at the yeshivas.

As one of the key inputs in the “substantial equivalence” formula, the available offerings in New York public schools are highly relevant. Non-English instruction in public schools creates room for opponents of the NYSED guidelines to argue that the state is holding yeshivas to a higher standard than their public counterparts. In recent years, New York City has redoubled its efforts to provide services in public schools for English Language Learners (ELLs) and Multilingual Learners (MLLs).<sup>68</sup> These programs, which include separate tracks for dual language education, transitional bilingual education, and English as a new language education, are generally aimed at students whose primary language is not English and require additional support in achieving English language proficiency.<sup>69</sup> The City’s investment in advancing multilingual education is evident in its establishment of over 100 dual language programs at the pre-kindergarten level.<sup>70</sup> Although local and state agencies are quick to highlight the benefits of multilingual education,<sup>71</sup> New York’s

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68. See, e.g., DIV. MULTILINGUAL LEARNERS, N.Y.C. DEP’T OF EDUC., POLICY AND REFERENCE GUIDE FOR MULTILINGUAL LEARNERS/ENGLISH LANGUAGE LEARNERS (Aug. 2020), <https://infohub.nyced.org/docs/default-source/default-document-library/ell-policy-and-reference-guide.pdf> [<https://perma.cc/GZ2N-X4M5>]; REYES-CARRASQUILLO ET AL., *supra* note 19, at 17, 22; Janie Tankard Carnock, *How Accountability Shaped New York City’s Dual Language Push*, NEW AM. (Mar. 14, 2017), <https://www.newamerica.org/education-policy/edcentral/accountability-dll-nyc/> [<https://perma.cc/577B-EJKW>]; *Program Options for English Language Learners/Multilingual Learners*, N.Y. ST. EDUC. DEP’T [hereinafter *N.Y. State Program Options*], <http://www.nysed.gov/bilingual-ed/program-options-english-language-learnermultilingual-learners> [<https://perma.cc/3P9R-Y47K>] (last visited Oct. 15, 2020); *Programs for English Language Learners*, N.Y.C. DEP’T EDUC. [hereinafter *N.Y.C. Program Options*], <https://www.schools.nyc.gov/learning/multilingual-learners/programs-for-english-language-learners> [<https://perma.cc/DHR8-VFMK>] (last visited Oct. 15, 2020).

69. See *N.Y. State Program Options*, *supra* note 68; *N.Y.C. Program Options*, *supra* note 68.

70. Press Release, Mayor de Blasio and Chancellor Carranza Announce 47 New Pre-K Dual Language Programs Across Every Borough (Feb. 4, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/077-19/mayor-de-blasio-chancellor-carranza-47-new-pre-k-dual-language-programs-across-every#0> [<https://perma.cc/4UUK-XWHP>].

71. See *id.* (quoting Mayor Bill de Blasio stating, “[b]y offering even more dual-language Pre-K programs across the five boroughs, we’re readying our children for the global economy of the future”); *English Language Learner/Multilingual Learner Parent Resources*, N.Y. ST. EDUC. DEP’T (Jan. 6, 2021), <http://www.nysed.gov/bilingual-ed/english-language-learnermultilingual-learner-parent-resources> [<https://perma.cc/5WCA-QJRS>] (“Bilingual children have unique assets and advantages and have great opportunities ahead.”).

government ultimately considers these programs necessary services to support the non-English-speaking populations in New York's predominantly English-oriented public schools.<sup>72</sup> Students are required to demonstrate their eligibility for these services,<sup>73</sup> which are typically temporary.<sup>74</sup> In the 1990s, New York's bilingual education programs faced public scrutiny and legal challenge, as parents insisted that the state was too permissive in granting extensions for these temporary services.<sup>75</sup> Critics of the programs claimed that the schools allowed children from non-English-speaking homes to languish in bilingual classes, without ushering them into the mainstream English-speaking classroom.<sup>76</sup> The recent revitalization of these services has largely alleviated such concerns; however, new criticisms have surfaced about the misappropriation of these needed services by families using them electively for the purported educational benefits native-English speakers receive from non-English instruction.<sup>77</sup>

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72. See N.Y. EDUC. LAW § 3204(2)(i) (McKinney 2020) (“English shall be the language of instruction . . . except that for a period of three years, which period may be extended by the commissioner with respect to individual pupils, upon application therefor by the appropriate school authorities, to a period not in excess of six years, from the date of enrollment in school, pupils who, by reason of foreign birth or ancestry have limited English proficiency, shall be provided with instructional programs as specified in subdivision two-a of this section and the regulations of the commissioner.”).

73. See DIV. MULTILINGUAL LEARNERS, *supra* note 68; *ELL Identification & Placement/Home Language Questionnaire*, N.Y. ST. EDUC. DEP'T, <http://www.nysed.gov/bilingual-ed/ell-identification-placementhome-language-questionnaire> [https://perma.cc/MF5M-UFMD] (last visited Oct. 15, 2019).

74. See N.Y. EDUC. LAW § 3204(2)(i) (McKinney 2020).

75. See *Bushwick Parents Org. v. Mills*, 649 N.Y.S.2d 516, 517 (App. Div. 1996); see also Rosalie Pedalino Porter, *The Case Against Bilingual Education*, ATLANTIC (May 1998), <https://www.theatlantic.com/magazine/archive/1998/05/the-case-against-bilingual-education/305426/> [https://perma.cc/WS4Q-USZP] (summarizing the issue in *Bushwick Parents*: “thousands of students [were] routinely kept in native-language classrooms for six years or longer without even the pretense of individual progress reviews”).

76. See Gutmann, *supra* note 29.

77. See Conor Williams, *The Intrusion of White Families into Bilingual Schools*, ATLANTIC (Dec. 28, 2017), <https://www.theatlantic.com/education/archive/2017/12/the-middle-class-takeover-of-bilingual-schools/549278/> [https://perma.cc/FUR8-8E73] (“[I]f a two-way dual-immersion program helps generate middle-class interest in multilingualism, that dynamic could also undermine the program’s design and effectiveness. What happens when rising demand from privileged families starts pushing English learners out of these programs?”). A small portion of New York’s multilingual learner programs are two-way Dual Language programs, which contain both native English speakers and ELLs. See *Program Options for English Language Learners/Multilingual Learners*, N.Y. ST. EDUC. DEP'T, <http://www.nysed.gov/bilingual-ed/program-options-english->

The supplemental use of non-English instruction is far more prevalent in the private school arena. Despite the (often substantial) costs,<sup>78</sup> many parents select private schools with immersive language programs for their English-speaking children to unlock the cultural, social, and cognitive advantages of multilingualism.<sup>79</sup> One K–8 school in Manhattan’s financial district, which offers immersive Mandarin-Chinese and Spanish instruction, advertises that students develop an “[e]conomic [e]dge,” “[o]pen-[m]inded [o]utlook,” and “[s]ocial [a]ptitude” through bilingual education.<sup>80</sup> Individual approaches to foreign language instruction vary by school. Many offer 100% immersion for the youngest students and gradually increase the proportion of English instruction as students progress through the school.<sup>81</sup> A hallmark of these programs is teaching core curriculum subjects, like math and science, in the target language.<sup>82</sup> No public concerns have been raised as to whether the instruction in these private schools is “substantially equivalent” to the instruction provided in nearby public schools.<sup>83</sup>

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language-learners/multilingual-learners [https://perma.cc/EU67-DUBA] (last visited Oct. 15, 2020).

78. Tuition for the 2021–2022 school year at Avenues, a school with immersive language offerings, was \$59,800. *See Tuition & Financial Aid*, AVENUES, <https://www.avenues.org/nyc/tuition-financial-aid> [https://perma.cc/QNE9-2SVW] (last visited July 25, 2021).

79. *See, e.g.*, Anya Kamenetz, *6 Potential Brain Benefits of Bilingual Education*, NPR (Nov. 29, 2016, 6:00 AM), <https://www.npr.org/sections/ed/2016/11/29/497943749/6-potential-brain-benefits-of-bilingual-education> [https://perma.cc/ZUB3-Q87F]; Yudhijit Bhattacharjee, *Opinion, Why Bilinguals Are Smarter*, N.Y. TIMES (Mar. 17, 2012), <https://www.nytimes.com/2012/03/18/opinion/sunday/the-benefits-of-bilingualism.html?mcubz=1> [https://perma.cc/P6LS-RJ48].

80. *Dual Language Immersion*, PINE ST. SCH., <https://www.pinestreetschool.com/academics/dual-language-immersion> [https://perma.cc/GR7B-EFA2] (last visited Oct. 18, 2020).

81. *See, e.g.*, *Philosophy & Approach*, SCI., LANGUAGE & ARTS INT’L SCH., <https://slaschool.org/about/philosophy-approach/> [https://perma.cc/TXK2-V9S3] (last visited Oct. 18, 2020); *What Is Language Immersion?*, HUDSONWAY IMMERSION SCH., <https://hwis.org/Immersion/#concept> [https://perma.cc/G2VP-HPW6] (last visited Oct. 18, 2020).

82. *See, e.g.*, *Elementary: Illuminating Essentials from Two Educational Systems Form A Rich Foundation for Learning*, ÉCOLE, <https://www.theecole.org/academics/elementary/> [https://perma.cc/E24P-8DL3] (last visited July 19, 2021) (“Native-speaking teachers guide each class through Humanities, Math, and Science in both English and French, adding in the study of Mandarin or Spanish in 3rd grade.”); *Elementary School / Grade 1–5*, LYCÉE FRANÇAIS DE N.Y., <https://www.lfny.org/academics/elementary-school--grade-1-5> [https://perma.cc/5CMK-BJDW] (last visited July 19, 2021).

83. Searches in legal research databases, academic scholarship aggregators, and mainstream internet search engines for examples of objections raised to New York’s

## B. Constitutional Basis for Private Education

The constitutional right of parents to control the education of their children dates back to a series of cases decided nearly a century ago in the aftermath of World War I.<sup>84</sup> The cases collectively operated as a corrective to the then-burgeoning movement to use mandatory universal public education as an instrument of homogenization.<sup>85</sup> While the Supreme Court upheld the state's power to compel parents to provide their children some form of education, it rejected calls for compulsory public schooling as a violation of parents' substantive due process rights guaranteed by the Fourteenth Amendment.<sup>86</sup>

Amidst the wave of nativism and xenophobia that took hold of the post-war United States, several states passed legislation restricting teachers' use of foreign languages, particularly German, in elementary schools.<sup>87</sup> The 1923 case of *Meyer v. Nebraska* involved a teacher convicted of violating a state statute for providing German reading lessons to a 10-year-old child in a parochial school maintained by the Zion Evangelical Lutheran Congregation.<sup>88</sup> The Supreme Court invalidated the statute, finding that the legislature had improperly infringed upon parents' liberty to direct their children's education.<sup>89</sup> Recognizing that individuals have "certain fundamental rights" protected by the constitution, Justice James Clark McReynolds wrote that the state could not pursue even "desirable end[s]" in contravention of those rights.<sup>90</sup>

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private immersive language programs with explicit reference to section 3204 of the New York Education Law yielded no results.

84. See William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 177 (2000).

85. See, e.g., Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 111 (2007); Erik M. Zimmerman, Note, *Defending the Parental Right to Direct Education: Meyer and Pierce as Bulwarks Against State Indoctrination*, 17 REGENT UNIV. L. REV. 311, 318–19 (2005).

86. See, e.g., Peggy Cooper Davis, *Little Citizens and Their Families*, 43 FORDHAM URB. L.J. 1009, 1013–15 (2016) (identifying the Fourteenth Amendment protection of family liberty); Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. UNIV. L. REV. 887, 891–95 (1996) (describing the doctrine of substantive due process, which prevents government interference with certain fundamental rights).

87. See WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927* 57–59 (1994); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1003–04 (1992).

88. 262 U.S. 390, 396 (1923).

89. *Id.* at 400.

90. *Id.* at 401.

In 1925, two years after the Court's decision in *Meyer*, the Court took up the question of compulsory public education directly in *Pierce v. Society of the Sisters*.<sup>91</sup> Motivated by anti-Catholic sentiment, Oregon passed a law mandating public school attendance for children under 16 years of age.<sup>92</sup> The intended effect of the statute, enacted by popular initiative, was to force parochial schools to shutter.<sup>93</sup> The Society of Sisters, an Oregon corporation that operated primary schools for orphans, sought an injunction against enforcement of the act.<sup>94</sup> Relying on his decision in *Meyer* two years prior, Justice McReynolds nullified the Oregon law for unjustifiably curtailing parents' freedom to control their children's education.<sup>95</sup> The Court in *Pierce* expressly rejected universal common schooling as a means of fostering a more uniform populace, declaring that the state lacked "any general power . . . to standardize its children by forcing them to accept instruction from public school teachers only."<sup>96</sup>

In 1927, in a case following the factual pattern of *Meyer*, the Court struck down a law passed by the territorial legislature of Hawaii imposing burdensome regulations on the territory's 163 foreign language schools.<sup>97</sup> The stated purpose of the act was to promote "the Americanism of the pupils."<sup>98</sup> The Court in *Farrington v. Tokushige* reiterated parents' rights to "procure for their children instruction which they think important and we cannot say is harmful."<sup>99</sup> As it had done in *Meyer*, the Court deemed the regulation at issue arbitrary and unreasonable.<sup>100</sup> *Farrington* and

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91. 268 U.S. 510 (1925).

92. See, e.g., Woodhouse, *supra* note 87, at 1017–18; Ross, *supra* note 84, at 178.

93. See, e.g., Karst, *supra* note 85, at 110; Eric A. DeGroof, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363, 371 (2003).

94. *Pierce*, 268 U.S. at 531–32.

95. *Id.* at 534–35. It is somewhat perplexing that Justice McReynolds — a notoriously bigoted and xenophobic Justice — should have authored the decisions in both *Meyer* and *Pierce*, which invalidated nativist legislation. Some postulate that Justice McReynolds was motivated by his support for exploitative child labor. See Louise Weinberg, *The McReynolds Mystery Solved*, 89 DENV. U. L. REV. 133, 157–60 (2011).

96. *Pierce*, 268 U.S. at 535.

97. See *Farrington v. Tokushige*, 273 U.S. 284, 290, 298–99 (1927).

98. *Id.* at 293.

99. *Id.* at 298.

100. *Id.* (explaining the law at issue went "far beyond mere regulation of privately supported schools, where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest"); accord *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) ("We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.").

*Meyer* thus establish that the government cannot by excessive regulation force private schools to sacrifice their distinctive missions, thereby causing them to operate functionally as public schools.<sup>101</sup>

These cases illustrate the judicial perspective that certain fundamental rights not expressly enumerated in the Bill of Rights are nevertheless protected by the Due Process Clause of the Fourteenth Amendment.<sup>102</sup> In the early twentieth century, the Supreme Court advanced similar arguments, most notably in *Lochner v. New York*,<sup>103</sup> to strike down laws infringing on individuals' economic liberty and freedom of contract.<sup>104</sup> The Supreme Court has subsequently renounced the reasoning of *Lochner* as illegitimate judicial policymaking.<sup>105</sup> However, the private school cases from the 1920s are still considered good law, even as the broader doctrine of substantive due process remains divisive.<sup>106</sup>

Debate over language of instruction in private schools also implicates First Amendment rights, such as freedom of speech<sup>107</sup> and freedom of religion.<sup>108</sup> The new guidelines may be interpreted as viewpoint discrimination that unconstitutionally constrains schools' and teachers' right to freedom of speech.<sup>109</sup> Defenders of the status quo at the yeshivas may also contend that the new guidelines violate *haredi* parents' and students' right to free exercise of their religion.<sup>110</sup> Whatever the merits of these arguments, they do not address the central issue of this Note — constitutional protection for New Yorkers' unenumerated rights to order their lives as they see fit.

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101. See Saiger, *supra* note 21, at 51.

102. See Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J. L. & FAM. STUD. 71, 71–72 (2006); Aaron J. Shuler, *E Pluribus Unum: Liberalism's March to Be the Singular Influence on Civil Rights at the Supreme Court*, 19 BARRY L. REV. 49, 55 (2013).

103. 198 U.S. 45 (1905) (invalidating a state law prohibiting bakers from working more than 60 hours per week as a violation of the economic substantive due process rights protected by the Fourteenth Amendment).

104. See Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971, 974 (1987).

105. See *generally* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

106. See Lawrence, *supra* note 102, at 71–72.

107. See *infra* note 149 and accompanying text.

108. See *infra* notes 167–71 and accompanying text.

109. Letter from Michael P. DeGrandis, Senior Litig. Couns. & Mark Chenoweth, Exec. Dir. & Gen. Couns., New C.L. All., to Christina Coughlin, N.Y. State Educ. Dep't (Sept. 3, 2019) [hereinafter NCLA Letter], <https://nclalegal.org/wp-content/uploads/2019/09/2019-09-03-NYSED-Substantial-Equivalency-Public-Comment-NCLA.pdf> [<https://perma.cc/X5AB-7VVJ>].

110. See Saiger, *supra* note 21, at 50 (recognizing this argument before deeming it unpersuasive).

Instead of focusing on the explicit rights of the First Amendment, the 1920s cases defend pluralism through the unwritten, fundamental rights protected by the Fourteenth Amendment.<sup>111</sup> Even the sectarians who brought suit in *Meyer* and *Pierce* recognized that the liberties threatened in their cases applied not only to families of certain faiths but to all guardians who sought to control their children's education untrammelled by government interference.<sup>112</sup> By the same token, decisions about state regulation of private schooling today need not depend on the particular religious affiliation or ideological orientation of the educators or pupils, but rather on the autonomy of parents generally to pursue the instruction they desire for their children.

### C. State Power to Regulate Private Schools

The Supreme Court's decisions in *Meyer*, *Pierce*, and *Farrington* do not cede all authority over education to parents. The parental rights recognized by the private school cases, while fundamental, are not unlimited.<sup>113</sup> The same set of cases that establish the constitutional right to private schooling also establish the state's power under the Constitution to regulate private schools.<sup>114</sup>

The Court in *Pierce* was quick to qualify its holding about permissible forms of education, stating, "[n]o question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils."<sup>115</sup> The Court continued by identifying the qualities and characteristics the state may demand that teachers possess and enunciating the state's power to provide curricular oversight.<sup>116</sup> *Meyer* similarly clarifies that "[t]he power of the state . . . to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned."<sup>117</sup>

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111. See Ross, *supra* note 84, at 181–82.

112. See *id.* at 182.

113. See *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (finding "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare").

114. See *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927); *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923).

115. 268 U.S. at 534.

116. See *id.* (describing the state's power to insist "that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare").

117. 262 U.S. at 402.

Both *Pierce* and *Meyer* indicate that the state's regulation of private schools must be "reasonable," without clarifying this standard further.<sup>118</sup> In a dissenting opinion in *Bartels v. Iowa*, the companion case to *Meyer v. Nebraska*, Justice Oliver Wendell Holmes Jr. grappled with the reasonableness standard.<sup>119</sup> The majority in *Bartels* invalidated statutes in Iowa, Ohio, and Nebraska that required "the use of the English language as the medium of instruction in all secular subjects."<sup>120</sup> In his dissent, Justice Holmes underscored the challenge of properly drawing the line of reasonableness. He confessed, "[i]t is with hesitation and unwillingness that I differ from my brethren . . . but I cannot bring my mind to believe that in some circumstances . . . the statute might not be regarded as a reasonable or even necessary method of reaching the desired result."<sup>121</sup> After explicating the particular result in question, he concluded, "I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried."<sup>122</sup> Despite this objection, the majority that decided both *Meyer* and *Bartels* disagreed, finding this sort of regulation lacking any meaningful connection to objectives within the state's purview to govern.<sup>123</sup>

#### D. New York's "Substantial Equivalence" Requirement and Proposed New Guidelines

Consistent with the Supreme Court's approval of the state's power to regulate private education, New York has imposed a statutory requirement that private schools provide instruction "at least substantially equivalent to the instruction given" to students attending nearby public schools.<sup>124</sup> The same law elaborates on the mandatory courses of study in New York public schools, to which the

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118. See *Pierce*, 268 U.S. at 534; *Meyer*, 262 U.S. at 402.

119. See *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

120. See *id.* at 409–11 (majority opinion) (quoting the invalidated statute from Iowa).

121. *Id.* at 412 (Holmes, J., dissenting).

122. *Id.* Although the dissent has no precedential value, it reveals that the fulcrum of the case was a fuzzy finding of reasonableness.

123. See *Meyer*, 262 U.S. at 403 ("We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state."); *Bartels*, 262 U.S. at 411 ("This statute is subject to the same objections as those offered to the act of 1919 and sustained in *Meyer v. Nebraska* . . .").

124. N.Y. EDUC. LAW § 3204(2)(i) (McKinney 2020).

private schools are compared in establishing their “substantial equivalence.”<sup>125</sup> The New York Education Law requires that public elementary and middle schools teach “the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science.”<sup>126</sup> For public high school students, the statute requires “instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States.”<sup>127</sup> Although these provisions are fairly onerous relative to other states’ approaches,<sup>128</sup> they resemble the sort of regulations contemplated by *Meyer* and *Pierce*.<sup>129</sup>

The recent controversy over the application of New York’s “substantial equivalence” requirement to yeshivas is not the first invocation of the law in the context of religious schools. The statute originated as part of a Protestant campaign opposing Catholic education led by Joseph Hodges Choate and Cuthbert Winfred Pound.<sup>130</sup> New York passed the “substantial equivalence” law in 1894, the same year delegates to the State Constitutional Convention adopted an amendment banning government funding for religious schools.<sup>131</sup> These anti-Catholic measures anticipated compulsory public education proposals, like the one eventually struck down in *Pierce*.

Over the long history of the “substantial equivalence” rule, New York has taken a relatively non-intrusive approach to enforcing the requirement.<sup>132</sup> Recently, however, NYSED has sought more

125. *See id.* § 3204(2).

126. *Id.* § 3204(3)(a)(1).

127. *Id.* § 3204(3)(a)(2).

128. *See generally* U.S. DEP’T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009), <https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf> [<https://perma.cc/DXN4-UFFP>] (describing state legal requirements applicable to private schools in every state).

129. *See supra* Section I.C.

130. *See* Menachem Wecker, *New York State Cracks Down on Jewish Schools*, EDUC. NEXT (July 16, 2019), <https://www.educationnext.org/new-york-state-cracks-down-jewish-schools-senator-simcha-felder-rabbi-chaim-dovid-zwiebel-joseph-hodges-choate/> [<https://perma.cc/44JS-6CQT>].

131. *See id.*

132. *See* Peter Murphy, *Under Assault: New York’s Private and Parochial Schools*, CITY J. (Sept. 5, 2019), <https://www.city-journal.org/new-york-substantially->

rigorous implementation of the requirement.<sup>133</sup> Following public uproar about the inadequacy of secular instruction in New York’s *haredi* schools, in July 2019, NYSED issued proposed regulations designed to facilitate stricter policing of the requirement.<sup>134</sup> The guidelines spelled out detailed subject and time requirements for Local School Authorities (LSAs) to monitor in evaluating private schools’ compliance with the “substantial equivalence” requirement.<sup>135</sup> They also established mandatory school inspections by state and local officials.<sup>136</sup> Finally, the guidelines contemplated withholding government services provided to private schools and declaring students truant where schools failed to meet the proposed standards.<sup>137</sup> Although NYSED subsequently withdrew this specific set of guidelines, it has committed to publishing new guidelines with a similar purpose in the near future.<sup>138</sup>

### E. Language of Instruction Regulation

In detailing the instruction required in public schools, sub-section 3204(2)(i) of New York Education Law specifies, “[i]n the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English,” with a temporary exception listed for English language learners.<sup>139</sup> With respect to English language learners in public schools, the statute identifies the aim of this exemption as fostering

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equivalent-provision [<https://perma.cc/NG78-NADY>] (describing the historically lax enforcement of the requirement).

133. *See id.*

134. 41 N.Y. Reg. 3 (proposed July 3, 2019) (identifying the objective of the rule as supporting local authorities “in fulfilling their responsibilities under Education Law §[] 3204”).

135. *Id.* at 2.

136. *Id.* at 1.

137. *Id.* at 2–3.

138. May 2021 Press Release, Stakeholder Input, *supra* note 60; *see also* Oct. 2020 Press Release, Stakeholder Input, *supra* note 60.

139. N.Y. EDUC. LAW § 3204(2)(i) (McKinney 2020). A significant portion of the statute is dedicated to the services public schools must provide for students learning English. Although these programs may provide useful models for private schools with non-English instruction, the debate over the suitability and availability of these services is distinguishable from the central issue of this Note. Controversy over multilingual education in public schools focuses on the introduction of non-English instruction into a predominantly English-oriented learning environment. On the other hand, this Note contemplates the state’s power to mandate English instruction in predominantly non-English-oriented school environments.

their development of English language competence.<sup>140</sup> By contrast, in articulating the “substantial equivalence” standard for non-public schools, the law provides that private elementary and middle schools must deliver English instruction that enables students to read both literature and non-fiction and to write essays.<sup>141</sup> These activities might be taken merely as an explication of English language competence mentioned in the previous paragraph. Or, alternatively, the legislature’s varied descriptions of the demands for public and private schools might suggest differing objectives for the two groups.

The requirement for common branch instruction in English contained in sub-section 3204(2)(i) of the New York Education Law is immediately followed with a specific requirement for non-public school students — “substantial equivalence.”<sup>142</sup> The juxtaposition here implies contrast. For public schools, English instruction in required courses is the rule; for private schools, it is “substantial equivalence.” The placement of the “substantial equivalence” requirement in this particular sub-section — when it could have reasonably stood elsewhere or on its own — suggests the drafters were drawing a distinction. The recent NYSED proposal for amplifying enforcement of the private school requirement stated that, “when making a substantial equivalency determination, an LSA, and the Commissioner, when he/she is responsible for making the final determination, must consider . . . [whether] English is the language of instruction for common branch subjects.”<sup>143</sup> This guideline suggests that private schools that fail to teach any common branch subject, which include arithmetic, physical education, and New York state history, in English could risk significant repercussions, such as declaring students truant.<sup>144</sup> The stated purpose of the NYSED guidelines was to address some of the ambiguity inherent in the “substantial equivalence” requirement.<sup>145</sup> To do so, the guidelines here adopted the language of instruction standard used for public schools as the standard for private schools.

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140. *Id.* (“The purpose of providing such pupils with instruction shall be to enable them to develop academically while achieving competence in the English language.”).

141. *Id.* § 3204(2)(ii).

142. *Id.*

143. 41 N.Y. Reg. 2 (proposed July 3, 2019).

144. *See id.*

145. *Id.* at 1 (defining the purpose of the rule as offering “guidance to local school authorities (LSAs) to assist them . . . in determining whether students in nonpublic schools are receiving instruction that is at least substantially equivalent to the instruction being provided to students of like age and attainments at the public schools.”).

The recent push in New York to guarantee universal English competence through more forceful implementation of the “substantial equivalence” requirement recalls past skepticism about multilingualism in the United States. Efforts to promote national unity through the English language date back to America’s founding.<sup>146</sup> John Adams asked Congress to create a national language academy to cultivate a common American language, which the country’s nascent government could in turn use to exert political influence.<sup>147</sup> Benjamin Franklin similarly expressed distrust for non-English speakers in the American colonies and their commitment to the national project he envisaged.<sup>148</sup> These sentiments have persisted throughout U.S. history, with numerous attempts to codify English as the official language in various jurisdictions.

The question of English-only legislation is often analyzed as a First Amendment issue, rather than one about due process.<sup>149</sup> The 1920s cases, however, address language of instruction in schools directly as part of their discussion of parental liberties located in the Fourteenth Amendment. *Farrington* is very clear in extending these constitutional safeguards to non-English-speaking parents: “The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.”<sup>150</sup> Recognizing this fundamental right, the Supreme Court rejected governmental interference with non-English instruction in private schools as an illegitimate use of state power.<sup>151</sup>

The dissent in *Bartels v. Iowa* was less convinced of this point, which was the key controversy in the case. Justice Holmes explained that he was “not prepared to say that it is unreasonable to provide that in his early years [a child] shall hear and speak only English at school.”<sup>152</sup> He justified this claim by noting children’s linguistic

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146. See Perea, *supra* note 18, at 287–97; Cecilia Wong, *Language Is Speech: The Illegitimacy of Official English After Yniguez v. Arizonans for Official English*, 30 U.C. DAVIS L. REV. 277, 280 n.27 (1996).

147. See, e.g., Perea, *supra* note 18, at 295–97; Wong, *supra* note 146, at 280 n.27.

148. See, e.g., Perea, *supra* note 18, at 287–91; Wong, *supra* note 146, at 280 n.27.

149. See Wong, *supra* note 146, at 277–79.

150. *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

151. *Id.* at 299 (“Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the states, are guaranteed by the Fifth Amendment against action by the territorial Legislature or officers. . . . [T]he limitations of the Constitution must not be transcended.”).

152. *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

impressionability and by observing that children may spend their time outside of school speaking another language.<sup>153</sup> Underlying his perspective was an assumption “that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one.”<sup>154</sup> The same majority that ultimately prevailed in *Bartels* arrived at the opposite conclusion in analyzing *Meyer*.<sup>155</sup> The Court began from the same premise, albeit a bit more hesitantly, stating, “[p]erhaps it would be highly advantageous if all had ready understanding of our ordinary speech.”<sup>156</sup> Recalling the United States’ experience in World War I, the Court expounded, “[t]he desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate.”<sup>157</sup> Despite this general aspiration, Justice McReynolds declared that knowledge of a foreign language in itself cannot be deemed detrimental to the state.<sup>158</sup> In fact, he acknowledged that the public had until recently considered knowledge of German useful and appealing.<sup>159</sup>

Taken together, the private school cases establish that although the state may demand some English instruction in private schools, it cannot prohibit foreign language instruction wholesale. While the case law and statutes related to the language of instruction in private schools developed in a bygone era, they remain influential today, as non-English instruction endures in various forms.

## II. DEMANDS FOR SECULAR INSTRUCTION EXCLUSIVELY IN ENGLISH

The debate over the extent of English instruction in New York’s private schools typifies a broader societal conflict in the United

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153. *Id.* (“Youth is the time when familiarity with a language is established and [there may be] sections in the State where a child would hear only Polish or French or German spoken at home.”).

154. *Id.*

155. The two cases were decided the same day. *Id.* (majority opinion); *Meyer v. Nebraska*, 262 U.S. 390, 390 (1923).

156. *Meyer*, 262 U.S. at 401.

157. *Id.* at 402.

158. *Id.* at 403 (“No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.”).

159. *Id.* at 400 (“Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable.”).

States, where the government's interest in encouraging social cohesion is viewed as a coercive threat to the rights of groups and individuals to order their own lives.<sup>160</sup> Using a series of Supreme Court cases as a guide, this Part explores the constitutionality of a state regulation mandating the use of English for all secular instruction in private schools. In addition to evaluating the historical context for this debate, this Part considers the potential for discriminatory application of this regulation in New York's private schools.

### A. Conflicting Interests in Pluralism and Homogenization

Underlying the question about the state's role in regulating instruction in private schools is a clash between two core U.S. values.<sup>161</sup> On one side is the American tendency towards individual liberty and self-determination. This pluralistic notion embraces the freedom of communities to pursue visions of the good that differ from the majority view of the polity.<sup>162</sup> In his essay *On Liberty*, John Stuart Mill captured this sentiment in articulating the virtue of what he termed "experiments in living."<sup>163</sup> Opposite this pluralistic notion is the impulse to establish a unified American society, with some degree of common culture and shared interests.<sup>164</sup> At a minimum, this perspective emphasizes communal civic duties, such as voting and jury service. In its more expansive form, this position seeks consensus on certain political precepts, moral standards, and appropriate modes of living.<sup>165</sup>

In the education context, this dichotomy plays out as a struggle between the freedom of parents to educate their young in unconventional ways and the government's power to ensure that all

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160. See generally Ashley Berner, *Educational Pluralism: Distinctive Schools and Academic Accountability*, in RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK 15, 15–25 (Jason Bedrick, Jay P. Greene & Matthew H. Lee eds., 2020); Randall, *supra* note 17, at 35.

161. See Berner, *supra* note 160, at 15–25.

162. See Randall, *supra* note 17, at 36–38.

163. JOHN STUART MILL, ON LIBERTY (1859), reprinted in ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS 5, 78–79 (Mark Philp & Frederick Rosen, eds., Oxford Univ. Press, 2015).

164. See Randall, *supra* note 17, at 36–38.

165. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1988); John Rawls, *The Idea of Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 9–12 (1987); David Brooks, *America Is Having a Moral Convulsion*, ATLANTIC (Oct. 5, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/collapsing-levels-trust-are-devastating-america/616581/> [https://perma.cc/RRK8-ZN49].

citizens obtain a robust education that allows them to lead successful lives and participate in democracy.<sup>166</sup> The prime example of the Court upholding a community's nontraditional approach to education is the 1972 case *Wisconsin v. Yoder*.<sup>167</sup> In *Yoder*, members of an Old Order Amish community were convicted of violating the state's compulsory education law, which conflicted with their religious conviction of concluding formal schooling after eighth grade.<sup>168</sup> The Court held that Wisconsin's interest in mandatory school attendance was insufficient to override the rights of the Amish parents.<sup>169</sup> The decision, which was grounded in free exercise rights, emphasized that the Amish community had a strong track record of providing vocational education to their high school-aged children,<sup>170</sup> and accordingly, that members of the community were unlikely to become dependent on the state, given the community's history of self-reliance and good citizenship.<sup>171</sup> A majority of the Court rejected concerns that exempting Amish community members from mandatory high school attendance might hinder children who wish to leave the community.<sup>172</sup> *Yoder* demonstrates the Court's willingness to let individuals and communities chart their own course in the realm of education, so long as no state interest is harmed.

In opposition to *Yoder* stands over two centuries of public discourse in support of the common school movement. Horace Mann, the leading exponent of universal public schooling in the nineteenth century, argued that common schools would inculcate a shared set of values, viewpoints, and loyalties among America's youth.<sup>173</sup> For Mann and likeminded reformers, common schooling served as a mechanism to homogenize an otherwise diverse population.<sup>174</sup> This effort entailed some degree of disregard for parental preferences about the methods and substance of their

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166. See Randall, *supra* note 17, at 61–62.

167. 406 U.S. 205 (1972).

168. *Id.*

169. *Id.* at 234–36.

170. *Id.* at 222.

171. *Id.* (“Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional ‘mainstream.’ Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.”).

172. *Id.* at 231–32.

173. See, e.g., CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL 4–5 (1988); Aaron Saiger, *School Funding Under the Neutrality Principle: Notes on a Post-Espinoza Future*, 88 FORDHAM L. REV. ONLINE 213, 217 (2020).

174. See Saiger, *supra* note 173, at 217.

children's education.<sup>175</sup> Mann's philosophy remains relevant for contemporary theorists.<sup>176</sup> Education scholar Amy Gutmann, although ambivalent about the practical impacts of universal public education, accepts the government's power to eschew parental control of their children's schooling to advance the cause of democratic education.<sup>177</sup> In support of the common school cause, other scholars have suggested overruling *Pierce* or other constitutional reforms to bypass its holding.<sup>178</sup>

### B. Tension in 1920s Cases over Acceptable Degree of Regulation

Regulating the language of instruction in yeshivas and other private schools reflects the challenge encapsulated by the opposing forces animating *Yoder* and the common school movement. Those favoring diversity in education based on parental prerogatives would strive to preserve non-English instruction in these institutions. Those favoring conformity in education would prefer to see secular instruction in English in pursuit of linguistic and social consensus. Both tendencies — amplifying the regulation of private schools and constraining it — have long histories in U.S. jurisprudence.

The 1920s cases at once enshrine the right to private education without excessive state interference and establish the government's power to significantly regulate private schools. The Court reiterated this double-edged doctrine in 1976, stating that “while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”<sup>179</sup> Whether a requirement that private schools offer all

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175. See Diane Ravitch, *Education and Democracy*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 15, 18 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

176. See, e.g., Brian L. Fife, *Renewing the American Commitment to The Common School Philosophy: School Choice in the Early Twenty-First Century*, 3 GLOB. EDUC. REV. 4 (2016) (asserting the significance of the common school ideal in a modern context); see also GLENN, *supra* note 173 (tracing the ideological history of the common school movement).

177. See AMY GUTMANN, DEMOCRATIC EDUCATION 115–23 (rev. ed. 1999).

178. See, e.g., MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 161–63 (1999) (advocating for the reversal or modification of the Supreme Court's prohibition of state mandated public schooling and excessive regulation of private schooling in service of the liberal education ideal advanced).

179. *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (first citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); then citing *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534 (1925); and then citing *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

secular instruction in English meets this definition of reasonableness remains a question of interpretation.

In explaining the appropriate scope of regulation, both *Meyer* and *Pierce* include dicta that suggest that certain matters are not on the table. In *Meyer*, Justice McReynolds writes, “the power of the state . . . to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned.”<sup>180</sup> *Pierce* echoes this language by noting that “[n]o question is raised concerning the power of the state reasonably to regulate all schools . . . .”<sup>181</sup> It is unclear how Justice McReynolds arrives at these declarations. This language in the cases is typically taken to mean that the permissibility of the regulations described is self-evident. Based on the decisions’ language, it is plausible that Justice McReynolds was making a descriptive statement (that the cases simply did not raise questions about state power to regulate schools) rather than a normative one (that the cases could not raise those questions).<sup>182</sup> The latter interpretation would leave open the possibility that the mere existence of English instruction requirements in private schools could be questioned, as opposed to questioning the scope of such requirements. Either way, the decisions leave unsettled the precise boundary of acceptable private school regulation. In a constitutional challenge, a court could help define these limits to prevent ongoing squabbles over legislation like New York’s “substantial equivalence” requirement.

### C. Demands for Exclusive English Instruction for Common Branch Subjects

Whether children in the United States need to be proficient English speakers is a debatable — and much debated — proposition.<sup>183</sup> Regardless, based on the 1920s cases, it is clear the

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180. *Meyer*, 262 U.S. at 402.

181. *Pierce*, 268 U.S. at 534.

182. For an example of the latter interpretation, see Saiger, *supra* note 21, at 51–52.

183. See, e.g., PETER D. SALINS, ASSIMILATION, AMERICAN STYLE 13 (1997) (describing a framework for American assimilation emergent in the 1960s under which learning English was optional, rather than mandatory); Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L. Rev. 885, 894–901 (1986) (advocating for the recognition of Americans’ rights to order their lives using languages other than English); Lloyd Garver, *Must Everyone Speak English?*, CBS NEWS (Nov. 2, 2005, 9:54 AM), <https://www.cbsnews.com/news/must-everyone-speak-english/> [<https://perma.cc/U3K8-9D4Y>] (questioning the need for universal English competence among the American public); Michael Seward, *Decolonizing the Classroom: Step 1*, NAT’L COUNCIL OF TCHRS. OF ENG. (Apr. 11, 2019),

state has the authority to mandate some amount of instruction in English,<sup>184</sup> as required by New York law.<sup>185</sup> It is less clear, however, that the state has the power to compel private schools to provide instruction in required subjects exclusively in English.

If enacted, guidelines resembling those previously proposed by NYSED could subject New York private elementary schools to sanctions for failure to teach 12 secular subjects in English.<sup>186</sup> The statute under examination in *Farrington* subjected “any school which is conducted in any language other than the English language or Hawaiian language, except Sabbath schools,” to repressive regulations.<sup>187</sup> The Court invalidated this statute because it forced the schools in question to deviate so profoundly from their individual missions that they would assume the characteristics of a public school.<sup>188</sup> It remains ambiguous what result would have obtained if the statute had only required that schools provide a portion of the secular curriculum in English. The same question pertains to the NYSED guideline. If the yeshivas provide some portion of common branch subjects in English and others in Yiddish, is a state guideline penalizing that conduct constitutional?

#### D. Potential Unanticipated Consequences of NYSED Regulation

As discussed in Section I.A.ii, yeshivas are not the only New York private schools offering non-English instruction. Even as immersive language learning programs have proliferated,<sup>189</sup> regulatory efforts have focused singularly on *haredi* schools.<sup>190</sup> Some New York private-school groups have supported the yeshivas in their resistance

<https://ncte.org/blog/2019/04/decolonizing-the-classroom/> [<https://perma.cc/A5L6-95TF>] (characterizing English instruction as objectionable given its historic connection to colonialism).

184. See *Farrington v. Tokushige*, 273 U.S. 284, 294 (1927); *Meyer*, 262 U.S. at 402.

185. See N.Y. EDUC. LAW § 3204(2)(i) (McKinney 2020) (“In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction . . .”).

186. 41 N.Y. Reg. 2 (proposed July 3, 2019).

187. *Farrington*, 273 U.S. at 291 (quoting the challenged statute).

188. *Id.* at 298–99.

189. See Melinda D. Anderson, *The Economic Imperative of Bilingual Education*, ATLANTIC (Nov. 10, 2015), <https://www.theatlantic.com/education/archive/2015/11/bilingual-education-movement-mainstream/414912/> [<https://perma.cc/ZD36-K3UJ>] (citing research demonstrating a steady rise in public and private language-immersion schools).

190. See *supra* note 134 and accompanying text.

to the heightened enforcement of the education law.<sup>191</sup> Others have bristled at the possibility that the proposed guidelines could affect their independence.<sup>192</sup> In a letter to parents, the Head of School at Trinity, an elite private school on the Upper West Side of Manhattan, wrote, “this proposal in effect transfers the oversight of our educational program from the school’s board of trustees to the local public school superintendent and the local board of education.”<sup>193</sup> Among the broader New York private school community, there is a sense that a few underperforming yeshivas could threaten independence across the City’s private school network.<sup>194</sup>

Other private schools with core instruction in foreign languages have not expressed public concern about the potential for the NYSED guidelines to obstruct their missions.<sup>195</sup> Based on the text of the proposed rule, it is plausible that the immersive language schools, which offer common branch subjects in students’ target languages, would face the same penalties as would the yeshivas.<sup>196</sup> Enforcement of the NYSED guidelines ultimately depends upon the judgment of state and local officials,<sup>197</sup> which could lead to its arbitrary or inconsistent application. Whether this possibility becomes a reality

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191. See N.Y. State Ass’n of Indep. Schs. v. Elia, 110 N.Y.S.3d 513 (Sup. Ct. 2019) (lawsuit filed by New York State Association of Independent Schools, Parents for Educational and Religious Liberty in Schools, and the New York State Council of Catholic School Superintendents challenging similar NYSED guidelines).

192. See Dana Schuster & Aaron Feis, *Private Schools Angry over State Proposal to Give City More Oversight*, N.Y. POST (July 11, 2019, 9:11 PM), <https://nypost.com/2019/07/11/private-schools-angry-over-state-proposal-to-give-city-more-oversight/> [<https://perma.cc/49EB-WZBZ>].

193. *Id.*

194. Editorial, *City Private Schools Have a Reasonable Fear — But the Fix Is Easy*, N.Y. Post (July 14, 2019, 8:57 PM), <https://nypost.com/2019/07/14/city-private-schools-have-a-reasonable-fear-but-the-fix-is-easy/> [<https://perma.cc/9FS8-3P7G>] (claiming that the concerns of New York City private schools are “all driven by a handful of yeshivas that refuse to allow inspections to prove (or disprove) critics’ charges that they don’t even try to teach basic math and English after third grade or so”).

195. While some private-school organizations have objected to the NYSED guidelines generally, searches in local and national media as well as legal scholarship aggregators do not reveal public comments specifically from non-English instructional schools opposing the proposed regulations.

196. An editorial in the New York Post suggests that schools that are accredited by the New York State Association of Independent Schools, a non-profit organization that provides accreditation to roughly 200 independent schools, may resist the invasive guidelines by asking the City and state agencies to defer to the NYSAIS accreditation, which ensures that member schools already meet the substantial equivalence requirements, without need for further review or enforcement. See *City Private Schools Have a Reasonable Fear — But the Fix Is Easy*, *supra* note 194.

197. See 41 N.Y. Reg. 2 (proposed July 3, 2019).

could depend upon a court's determination about the constitutionality of the guidelines.

### III. CONSTITUTIONAL BOUNDARIES FOR REGULATING LANGUAGE OF INSTRUCTION IN PRIVATE SCHOOLS

Recognizing the uncertain regulatory boundaries set by the 1920s cases, this Part argues that the proposed NYSED guidelines would violate parents' substantive due process rights. This Part begins by examining the appropriate level of scrutiny for courts to use in their analysis and contemplates the potential government interests advanced by the NYSED guidelines. Next, this Part considers the suitability of the guidelines in addressing the interests identified. After concluding that a court could, based on precedent, deem the NYSED guidelines unconstitutional, this Part argues that courts should rule this way, given the potential risks of excessive regulation.

#### A. Appropriate Levels of Scrutiny

In potential litigation, courts can and should find state regulations demanding instruction in English for all common branch subjects unreasonable and, as such, unconstitutional. The first step in evaluating whether government action violates an individual's personal liberties protected by the Due Process Clause of the Fourteenth Amendment is identifying the state's interest advanced by the law and determining the level of scrutiny warranted by that interest.<sup>198</sup> Where the government action violates an individual's fundamental rights, courts apply strict scrutiny, which requires demonstrating that the action is narrowly tailored to addressing a compelling government interest.<sup>199</sup> Where fundamental rights are not implicated, courts use a rational basis review, which considers whether the law in question is rationally related to a legitimate government interest.<sup>200</sup> The liberty interest protected in the private school cases has been a source of debate — both at the time they

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198. *See Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (describing liberty protected by the Due Process Clause as “a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment” (citations omitted)).

199. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11–12 (1967); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

200. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

were decided and since.<sup>201</sup> Justice Holmes considered the cases in the context of freedom to contract.<sup>202</sup> Today, since the demise of *Lochner*-era economic substantive due process, the private school cases have come to stand for the protection of parents' right to control their children's schooling.<sup>203</sup>

The private school cases from the 1920s at first blush appear to apply a standard resembling rational basis. In both *Meyer* and *Pierce*, the Court held that the government could not infringe upon protected liberties without "reasonable relation to some purpose within the competency of the state."<sup>204</sup> Although this language prefigures the reasonableness standard modern courts use for rational basis review, the cases were decided before the Court's development of a tiered substantive due process analysis.<sup>205</sup> More apposite is the Court's focus on protecting individuals' "fundamental rights" in *Meyer* and *Farrington*, which points to strict scrutiny.<sup>206</sup> In 2000, the Court embraced this view in *Troxel v. Granville* — a case involving the right of grandparents to visit their grandchildren over parental objections.<sup>207</sup> In a plurality opinion, the Court recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."<sup>208</sup> The appropriate level of scrutiny in parental rights cases, however, remains a live issue. In their concurring and dissenting opinions in *Troxel*, Justice Clarence Thomas and Justice Antonin Scalia advocated respectively for the use of strict scrutiny and rational basis review for issues involving parental rights.<sup>209</sup>

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201. See Woodhouse, *supra* note 87, at 1091–93 (noting the differing approaches of Justice McReynolds and Justice Holmes).

202. See *id.* ("To Holmes, [*Meyer* and *Bartels*] did not present a civil liberties issue. It was essentially a liberty of contract case . . .").

203. See Lawrence, *supra* note 102, at 74–77.

204. Both cases use this identical language. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923).

205. Zalman Rothschild, *Free Exercise's Outer Boundary: The Case of Hasidic Education*, 119 COLUM. L. REV. F. 200, 219–22 (2019).

206. See *id.* at 220; Donna F. Coltharp, *Speaking the Language of Exclusion: How Equal Protection and Fundamental Rights Analyses Permit Language Discrimination*, 28 ST. MARY'S L.J. 149, 190–211 (1996) (arguing for judicial application of heightened scrutiny in cases involving language discrimination); see also *Farrington v. Tokushige*, 273 U.S. 284, 299 (1927); *Meyer*, 262 U.S. at 401.

207. 530 U.S. 57, 65 (2000) (plurality opinion).

208. *Id.* at 66.

209. *Id.* at 80 (Thomas, J., concurring); *id.* at 92–93 (Scalia, J., dissenting).

## B. Unconstitutionality of Exclusive English Instruction Regulation

Although much debated,<sup>210</sup> there are strong arguments that children in a predominantly English-speaking society should obtain competence in English.<sup>211</sup> In the context of the yeshivas, advocates for increased regulation have advanced several arguments for the importance of teaching English well. English competence expands available professional opportunities; without it, many students cannot attain success in higher education and struggle to find financially viable employment.<sup>212</sup> English illiteracy also limits civic participation.<sup>213</sup> As a Sixth Circuit Judge recently noted, “[v]oting, taxes, the legal system, jury duty — all of these are predicated on the ability to read and comprehend written thoughts.”<sup>214</sup> Finally, any realistic exit opportunities from insular *haredi* communities likely depend on the ability to speak English.<sup>215</sup> For all of these reasons, the yeshiva critics are likely to contend that the government should take an interest in ensuring that all graduates attain a certain capacity in English.

The 1920s cases also considered the government’s interest in English competence. The Court in *Meyer* indicated that the government interest in English comprehension was insufficient to override constitutionally protected liberties.<sup>216</sup> Justice McReynolds concluded, “[p]erhaps it would be highly advantageous if all had

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210. See Stephen May, *Justifying Educational Language Rights*, 38 REV. RSCH. EDUC. 215, 216–29 (2014) (outlining the array of academic positions on educational language rights, including maximally pluralist viewpoints).

211. See Kevin Vallier, *In Defense of Yeshiva Autonomy*, in RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK 3, 6–7 (Jason Bedrick, Jay P. Greene & Matthew H. Lee eds., 2020).

212. See, e.g., Brief of Footsteps, Inc. as Amicus Curiae Supporting Plaintiff’s Motion for a Preliminary Injunction at 9, *Young Advocs. for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215 (E.D.N.Y. 2019) (No. 18-CV-4167-ILG-JO); Eric Grossfeld, *Poverty of the Mind: East Ramapo’s Educational Emergency*, 11 ALB. GOV’T L. REV. 425, 465–66 (2018) (describing “a vicious cycle in which Hasidic students are denied a sound English education, unable to achieve success in higher education, severely limited in their economic potential, becoming dependent on taxpayer-funded services, and have their next generation repeating the same pattern”).

213. See Brief of Footsteps, Inc., *supra* note 212 (describing the challenges of individuals seeking to leave their *haredi* communities with an incomplete command of English in “earning a living, securing meaningful employment, pursuing higher education, and fully participating in society”).

214. Gary B. v. Whitmer, 957 F.3d 616, 652–53 (6th Cir. 2020), *reh’g en banc granted*, *opinion vacated*, 958 F.3d 1216 (6th Cir. 2020).

215. See Brief of Footsteps, Inc., *supra* note 212, at 20.

216. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means.”<sup>217</sup> Here, Justice McReynolds provides a preemptive rebuke to the detractors of yeshivas and other non-English private school programs. Based on this excerpt, a court could hold that English competence is not a compelling state interest.

Assuming, however, that the government does have a compelling interest in English competence, which would trigger heightened scrutiny, the proposed NYSED guideline is insufficiently tailored to address such an interest. A state interest in English competence is not precluded by partial instruction of secular studies in another language. As demonstrated by New York’s private schools with immersive learning programs, students can achieve academic success, including in English, even where some common branch subjects are taught in a foreign language.<sup>218</sup> Early data from new public-school multilingual learning initiatives have also shown the promise of those programs.<sup>219</sup>

Abilities to comprehend and communicate in a language lie on a spectrum. Defining the precise level of English skills in which the state has an interest thus presents a line-drawing challenge. Although the aspiration for all Americans to have “ready understanding of our ordinary speech” is somewhat nebulous, more exacting standards of proficiency are prone to abuse.<sup>220</sup> Americans with limited English

217. *Id.*

218. In a list of its class of 2017 — class of 2019 matriculations, Lycée Français de New York reported 83% of graduates entered universities in English-speaking countries, including over 20 students attending Ivy League schools. *Class of 2017 to 2019 Matriculations, LYCÉE FRANÇAIS DE N.Y.*, <https://www.lfny.org/academics/college-counseling/matriculations> [<https://perma.cc/F9VS-QS5A>] (last visited Nov. 3, 2020). Another private language immersion school in New York highlights its above average score on standardized test, which are administered in English. *Academics, HUDSONWAY IMMERSION SCH.*, <https://hwis.org/academics/> [<https://perma.cc/WP3M-V6CA>] (last visited Oct. 18, 2020) (“Using the Educational Records Bureau (ERB) standardized test given in English, our students outperform national norms for independent and gifted and talented public school students in nearly all subjects in all grades.”).

219. See TINA CHEUK, N.Y. STATE EDUC. DEP’T, TRANSFORMING DISTRICTS, SCHOOLS AND CLASSROOMS IN NEW YORK STATE BY PRIORITIZING EQUITY AND ACADEMIC SUCCESS FOR MULTILINGUAL LEARNERS/ENGLISH LANGUAGE LEARNERS 14–15 (2019), <http://www.nysed.gov/common/nysed/files/programs/bilingual-ed/synthesis-report-obewl-08-07-2019-a.pdf> [<https://perma.cc/D2UT-9HXR>] (describing modest improvements in student achievement and graduation rates as well as declining dropout rates among multilingual learners).

220. See, e.g., Joseph Leibowicz, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL’Y REV. 519, 533–42 (1985) (detailing historic

proficiency have a long history in the United States.<sup>221</sup> In recognition of this history, the best approach for measuring the level of skill in which the state has an interest is in terms of a minimal set of activities, as provided in the New York statute.<sup>222</sup> Greater curtailments of individuals' language rights warrant further justification.

Beyond English competence, the only remaining government interest served by a stringent guideline demanding secular instruction exclusively in English would be raising the minimum instructional requirements for all New York schools, public and private, to achieve certain consistent student outcomes across the board.<sup>223</sup> In addition to the English instruction requirement, the NYSED guidelines also add requirements for "private schools to teach career development and occupational studies in first through sixth grades . . . [as well as] visual arts and music in seventh and eighth grades."<sup>224</sup> Demanding this sort of increased instructional conformity through coercive measures would essentially force private schools to behave like public schools.<sup>225</sup> *Pierce* expressly rejects this alternative state interest. The Court explained that "[t]he child is not the mere creature of the state."<sup>226</sup> Accordingly, *Pierce* declared that the state cannot pass legislation aimed at homogenizing children.<sup>227</sup> Based on *Pierce*, a court could find that a state lacks a compelling interest in demanding English instruction in common branch subjects for the sake of standardizing children.

The New York Education Law respects and reflects this precedent. The statute that the proposed NYSED guideline seeks to enforce requires private schools to provide an education "substantially

examples of discriminatory language requirements); Perea, *supra* note 18, at 328–50 (same).

221. See, e.g., James Crawford, *Language Politics in the U.S.A.: The Paradox of Bilingual Education*, 25 SOC. JUST. 50, 64 (1998); Perea, *supra* note 18, at 271–81.

222. See N.Y. EDUC. LAW § 3204(2)(ii) (McKinney 2020) (requiring "instruction in English that will prepare pupils to read fiction and nonfiction text for information and to use that information to construct written essays that state a point of view or support an argument").

223. See generally DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE (1995) (arguing in favor of implementing consistent educational goals for all American children).

224. NCLA Letter, *supra* note 109, at 3 (internal citations omitted); see 41 N.Y. Reg. 2 (proposed July 3, 2019).

225. NCLA Letter, *supra* note 109, at 6 ("Whether intentionally or unintentionally, the Proposed Rule's net effect would be homogenization of preschool through twelfth-grade education in New York.").

226. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535 (1925).

227. *Id.*

equivalent” to what public schools offer.<sup>228</sup> It does not call for “equivalent” instruction. Rather, it qualifies the comparison, acknowledging that the state cannot force conformity through its education laws.

### C. Dangers of Excessive Regulation

Based on the substantive due process analysis outlined above, courts can find exclusive English language instruction requirements unconstitutional. In potential litigation on this question, they should strike down such requirements to avoid certain undesirable consequences related to incremental doctrinal decay, overbreadth, and the possibility of discrimination.

Parental rights are not the only fundamental rights recognized under the Due Process Clause. Marriage,<sup>229</sup> procreation,<sup>230</sup> and contraception<sup>231</sup> have all received substantive due process protection as well. If parents’ fundamental rights may be trampled by state regulation, other fundamental rights — and the doctrine of substantive due process generally — may be similarly eroded.<sup>232</sup>

In addition to establishing a dangerous precedent, the guidelines may also paint with too broad a brush. Although the proposed NYSED guidelines appear to have followed calls for change in *haredi* schools, there is no reason to expect that other schools with overlapping methodological approaches would not suffer the same consequences.<sup>233</sup> New York’s immersive language programs have garnered praise.<sup>234</sup> The NYSED guidelines threaten to impede

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228. N.Y. EDUC. LAW § 3204(2) (McKinney 2020).

229. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

230. *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942).

231. *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972); *id.* at 460, 463–65 (White, J., concurring).

232. See Zimmerman, *supra* note 85, at 326 (“It can be argued that *Meyer* and *Pierce* are such an integral part of the Court’s elaborate substantive due process doctrine that an attack on the parental right to educate necessarily constitutes an attack on substantive due process itself.”).

233. See Philip Hamburger, *Education Is Speech: Why New York’s Attempts to Control Private Schools Are Unconstitutional*, FEDERALIST (Aug. 22, 2019), <https://thefederalist.com/2019/08/22/education-speech-new-yorks-attempts-control-private-schools-unconstitutional/> [https://perma.cc/G58A-UCA4] (“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.”).

234. See *The Benefits of a Bilingual, Immersion Education*, NYMETROPARENTS (Oct. 4, 2019), <https://www.nymetroparents.com/article/benefits-of-bilingual-immersion-education> [https://perma.cc/2566-LK2C]. While these programs have

innovative teaching models instead of allowing for experimentation in an open market.

A related concern is that the proposed guidelines, the enforcement of which depends upon state and city officials' judgments, may not be applied fairly. Although the new guidelines do not explicitly target any particular schools, circumstances suggest they are aimed at New York's *haredi* yeshivas. Guidelines designed to affect particular subpopulations have unpleasant histories and are especially alarming at a time when antisemitism in New York has seen an unprecedented rise.<sup>235</sup>

Given the potential that rules similar to the proposed NYSED guidelines would undercut substantive due process, capture inoffensive activities, and potentially lead to prejudice, courts should invalidate state regulations forcing private schools to conduct all secular subjects in English. As an alternative, NYSED and DOE might promote some of the other recommendations proffered for improving the quality of education in yeshivas that would not violate parents' substantive due process rights, like ensuring that all yeshiva graduates receive diplomas and transcripts and offering assistance to yeshivas struggling in developing curricula for common branch subjects.<sup>236</sup> If democratic participation is the end goal of the reformers, their proposed solutions should reflect that aim directly — for instance, by establishing substantive requirements for civics curricula — rather than instituting overreaching dictates that will not necessarily catalyze the desired reaction.

#### D. Practical Considerations

In a potential challenge to rules like the proposed NYSED guidelines, those favoring the new rules would likely contend that the only way to achieve English competence in certain private schools is by mandating English as the exclusive language of instruction for all common branch subjects. However, if English instruction in certain schools is deficient, that is a separate issue, remediable by other

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generated positive commentary, for the purposes of this Note, the actual merits of these initiatives are secondary. The right of parents to select these programs based on their preferences is paramount.

235. See Press Release, Anti-Defamation League, Antisemitic Incidents Hit All-Time High in 2019 (May 12, 2020), <https://www.adl.org/news/press-releases/antisemitic-incidents-hit-all-time-high-in-2019> [<https://perma.cc/P7GP-97CT>] (“More than half of the assaults nationwide took place in the five boroughs of New York City, including 25 in Brooklyn alone.”).

236. See PARTLAN ET AL., *supra* note 7, at 64–66.

means. Private schools deserve some agency in determining how to reach state-established educational targets, such as English competence. Instead of demanding that schools alter their language of instruction in numerous classes, new regulatory guidelines might better define the requisite skill level students must attain in English to meet state standards. While setting and measuring educational outcomes present certain difficulties,<sup>237</sup> the state would serve its interest best by providing resources to aid schools in achieving those outcomes.<sup>238</sup> As a starting point, making available better training resources for English teachers would go a long way in improving results.<sup>239</sup>

The yeshivas might also look to the success of their fellow foreign language schools in considering how to meet state requirements for English competence. Many of New York's private schools with immersive language options have adopted innovative techniques that the yeshivas could leverage, treating English as their "target language." For instance, one school assigns two teachers (one for each language) to every classroom, offering students the opportunity to develop their skills throughout the day.<sup>240</sup> For yeshivas with limited resources, a language rotation followed by a different bilingual school,<sup>241</sup> in which the foreign-language teachers could cycle through several classrooms over certain time intervals might prove more effective. Compelling private schools to adopt any of these options would be more egregious than the English instruction requirement itself. However, allowing schools to select from among these methods, and others, in their pursuit of delivering English competence, and accordingly allowing parents to select which

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237. See Saiger, *supra* note 21, at 58–59 (evaluating competency-based educational requirements in the context of the yeshiva controversy).

238. New York City mayoral candidates have similarly adopted an outcome-driven approach to this issue on the campaign trail. See Jacob Kornbluh, *Andrew Yang on Yeshiva Education: 'We Shouldn't Interfere,'* FORWARD (Feb. 7, 2021), <https://forward.com/news/463705/andrew-yang-says-he-wouldnt-interfere-as-mayor-in-the-yeshiva-education/> [<https://perma.cc/2J8V-824A>] (quoting one candidate who stated, "we shouldn't interfere with their religious and parental choice as long as the outcomes are good").

239. See PARTLAN ET AL., *supra* note 7, at 4 (alleging "[t]eachers are often unqualified — some barely know English themselves").

240. See *Dual Language Immersion*, PINE ST. SCH., <https://www.pinestreeschool.com/academics/dual-language-immersion> [<https://perma.cc/WFF3-KFZ8>] (last visited Nov. 3, 2020).

241. *Elementary School (K-5TH Grade)*, MARYEL SCH., <https://www.maryelschool.org/curriculum-by-division/elementary-school/> [<https://perma.cc/QW4L-HQ7T>] (last visited Nov. 3, 2020).

approach they prefer for their children, better reflects the principles of the 1920s cases.

A somewhat less constructive retort to claims that “substantial equivalence” can only be accomplished through exclusive common branch English instruction is to point out the dismal state of English language education in New York City public schools.<sup>242</sup> Even if holding private schools to a higher standard than public schools is constitutional,<sup>243</sup> to do so here calls for a legislative remedy rather than an administrative one. As long as the New York statute provides for “substantially equivalent” instruction, the performance of public schools is a relevant piece of the equation. But no matter whether one considers the relative quality of public schools, ameliorating inadequate English instruction in certain private schools should not necessitate new regulatory guidelines that undermine those schools’ missions.

Another contention in support of the NYSED regulations is that *haredi* students are free to use and develop their Yiddish and Hebrew in every other hour of their day, in every other aspect of their life. Echoing the Justice Holmes dissent in *Bartels*, these critics might ask why *haredi* students must also use Yiddish in their secular classes as well.<sup>244</sup> Based on New York Education Law, secular studies already constitute a significant portion of yeshiva students’ days.<sup>245</sup> Under the proposed NYSED guidelines, secular education would constitute an even greater portion of the *haredi* students’ time.<sup>246</sup> Perhaps more consequentially, further investments of time in English instruction represent an affront to the *haredi* way of life.<sup>247</sup> There is a difference

242. See Selim Algar, *Over Half of NYC Kids Can’t Handle Basic English, Math on State Tests*, N.Y. POST (Aug. 22, 2019, 2:32 PM), <https://nypost.com/2019/08/22/over-half-of-city-kids-cant-handle-basic-english-math-on-state-tests/> [<https://perma.cc/EWJ8-GGQ9>] (“[O]nly 47.4 percent of city students in grades 3 to 8 scored at proficient levels in English . . .”).

243. See Saiger, *supra* note 21, at 58–59.

244. See *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (“[I]f there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school.”).

245. See N.Y. EDUC. LAW § 3204 (McKinney 2020).

246. 41 N.Y. Reg. 2 (proposed July 3, 2019) (“Whether the instructional program in the nonpublic school incorporates instruction in the following subjects . . . mathematics (two units of study); English language arts (two units of study); social studies (two units of study); science (two units of study) . . .”).

247. See Moshe Krakowski, *The War Against the Haredim*, CITY J. (Autumn 2020), <https://www.city-journal.org/yeshiva-education> [<https://perma.cc/5MH8-RMDT>] (detailing the stakes of the controversy from the perspective of *haredim*).

between accepting learning how to read and write in English and accepting English as the default language of a community's specialized private schools.

A final argument put forth in favor of the proposed NYSED guidelines is that *haredi* communities and schools take — in various forms — support from the city, state, and federal government.<sup>248</sup> In response, it is argued, they should contribute to and participate in society rather than self-isolating. English instruction in all common branch subjects would represent a step in that direction. This contention clashes directly with the concept of constitutionally protected liberty discussed above. As long as individuals pay taxes honestly; abide by federal, state, and local laws; serve on juries when called upon; and defend the country, if the need should arise, then the government has no power to strip them of their fundamental rights merely because their behavior lies beyond the mainstream.

While achieving English competence in communities that are presently lagging may represent a challenge, it is a challenge the government should confront through constitutional methods.

#### CONCLUSION

New York's vitality stems from its variety. A seemingly minor regulation about the language of instruction in private schools threatens to undermine the pluralism that has defined the City for generations. Although many of the cases analyzed in the foregoing discussion are roughly a century old, they continue to teach an important lesson. Parents' rights to direct their children's education through private schooling is central to the American project. While a desire for the populace to share a common language and certain foundational knowledge is understandable, those social unifiers cannot come at the expense of individual liberty. As private schools shave away their particular pedagogies and unconventional approaches in response to incremental government regulations, they approach conformity. Any pluralistic society must tolerate activities in its margins that are out of step with the majority. With respect to non-English instruction, the Constitution protects these marginal activities. A legal showdown involving new proposals to enforce New York's "substantial equivalence" requirement seems inevitable.<sup>249</sup>

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248. See Vallier, *supra* note 211, at 12 (summarizing arguments about indirect assistance given to yeshivas).

249. See Barry Black & Sarah E. Child, *Is 'Substantial Equivalency' the Next Religious Freedom Fight?*, N.Y.L.J. (Mar. 11, 2021, 12:45 PM),

Courts will have a chance to protect the City's distinctive diversity based on a longstanding doctrine of constitutional law, and they should vigorously seize that opportunity.