From the Twin Cities to "Twin" States: Legislating the Classroom Placement of Twins and Other Higher Order Multiples

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I. INTRODUCTION

As reproductive technology progresses, more and more aspiring parents are turning to science for help in starting their families.\(^1\) Hormone therapy, in-vitro fertilization (IVF), and other assisted reproductive technologies (ARTs) are becoming commonplace alternatives to natural conception.\(^2\) These alternatives, though often costly and time-consuming, are providing the results that many aspiring parents desire—children.\(^3\)

In fact, due to the nature of the process, these methods may be doing too good of a job, as they frequently result in the birth of twins, triplets, and other higher order multiples.\(^4\) Without delving deep into the science, women using hormone therapy take hormones to encourage either the production or release of eggs.\(^5\) ARTs, on the other hand, typically involve more technological and invasive methods that tend to combine the egg and sperm outside of the body.\(^6\) The hope in each type of procedure is that the chances for fertilization and subsequent implantation will increase, producing a child.\(^7\) Often a child is produced, but occasionally, more than one egg or embryo will implant in the uterus, leading to the production of twins, triplets, or other higher order multiples.\(^8\)

Though many parents may not be completely prepared for the


\(^3\) Glaser, supra note 2.

\(^4\) Rosato, supra note 1, at 77.


\(^6\) Id.

\(^7\) Id.

\(^8\) See id.
heavier burden of multiples, it is certainly a well-known risk of both hormone therapy and the various types of ARTs. As these procedures have become more prevalent, the occurrence of twins and higher order multiples has increased, creating new challenges for doctors, parents, teachers, schools, and anyone else even partly responsible for the upbringing or welfare of these children.

One such challenge faced by new parents has surfaced in the realm of education. Traditional school policy, whether explicitly stated or not, has required the separation of twins and other multiples into different classrooms. This separation can often place a burden on both the parents and the multiples. Because many parents and psychologists feel that such mandatory splitting may be unnecessary, and in fact, counterproductive, there has been a relatively recent movement to allow parents to decide the classroom placement of their multiples.

In 2005, Minnesota became the first state to create a law pertaining to the classroom placement of twins and other multiples. In short, the legislation allows parents to decide whether multiples should be

9. Rosato, supra note 1, at 77.
10. Alexa Aguilar, Seeing Double, ST. LOUIS POST-DISPATCH, May 7, 2006, at C1; see also Nat'l Org. of Mothers of Twins Clubs, Inc., Multiple Birth Statistics, http://www.nomotc.org/index.php?option=com_content&task=view&id=66&Itemid=55 (last visited Oct. 3, 2007) (noting that the twinning rate is increasing, and the levels of triplet and other higher order multiple births have increased four-fold since the introduction of fertility therapies).
13. See Nancy L. Segal, Education Issues, 8 TWIN RES. & HUM. GENETICS 409, 410 (2005); Caroline M. Tancredy & R. Chris Fraley, The Nature of Adult Twin Relationships: An Attachment-Theoretical Perspective, 90 J. PERSONALITY & SOC. PSYCHOL. 78, 81 (2006); Dean, supra note 11, at 454 n.16; Bellafante, supra note 12; Powell, supra note 11.
14. Powell, supra note 11. “[M]any groups [are] asking for legislation that will give families a voice in their children’s placement—and encourage schools to look at each set of multiples on their own needs and merits.” Id. Parents in several states are also seeking to pass “twin bills” similar to the one already passed in Minnesota. Id.
15. See MINN. STAT. § 120A.38 (2006). The bill was passed on April 26, 2005, signed into law on May 5, 2005, and became effective for the 2005–2006 school year. Id. Oklahoma was the first state to address the issue of classroom placement of multiples when it passed a house resolution in 1994. H.R. 1054, 44th Leg., 2d Reg. Sess. (Okla. 1994).
separated or placed in the same classroom.\footnote{16} Similarly, Illinois adopted a resolution in 2006 calling for schools to defer to parents in the placement of multiples.\footnote{17} In 2007, Texas and Georgia followed Minnesota in adopting "twin legislation."\footnote{18} Petitions are also circulating in several other states calling for similar legislation, and advocates of this course of action hope the present problem may soon be addressed at the federal level.\footnote{19}

This Comment begins in Part II by examining why it is in the best interest of twins and multiples for parents and guardians to decide classroom placement. Part III of the Comment examines several states' attempts at drafting twin legislation, focusing on the unique provisions inserted by various states. Next, Part IV determines whether twin legislation is legally necessary, or if there is a better, alternative solution. Part V addresses the legislation's effects on public schools and examines both the advantages and disadvantages of the policy. Finally, Part VI concludes that twin legislation, though targeted at only a small segment of society, is in the best educational interests of twins and other multiples.

II. THE DEBATE OVER CLASSROOM PLACEMENT OF TWINS AND OTHER HIGHER ORDER MULTIPLES

Many pre-high-school educational institutions have either a mandatory or strongly suggested policy that twins and other multiples be split into different classrooms.\footnote{20} However, such policies are typically not created by parent-teacher associations, psychologists, or child-care specialists.\footnote{21} Rather, they are usually crafted by principals, school administrators, and occasionally school boards.\footnote{22} Sometimes the policies appear in handbooks, and sometimes they do not.\footnote{23} Consequently, only

\footnote{16} MINN. STAT. § 120A.38.
\footnote{20} Segal & Russell, supra note 11, at 70; Dean, supra note 11, at 455; Bellafante, supra note 12; Powell, supra note 11; Sanders, supra note 11.
\footnote{21} See Dean, supra note 11, at 455; Powell, supra note 11.
\footnote{22} Dean, supra note 11, at 455; Powell, supra note 11.
\footnote{23} See Powell, supra note 11. Kathy Dolan, founder of Parenting in Education: A
a fraction of parents have knowledge of the policies. Most parents of multiples, however, are usually aware that the splitting of twins and multiples is common and a likely possibility for their children. Whether the default twin-splitting policies are in the children’s best interests, though, is often up for debate.

For years, educators have split twins and multiples based upon the generalization that placement into separate classrooms is for the students’ own good. Particularly in the case of identical multiples, many teachers and school administrators feel it is best for each child to be in a different classroom where he or she can develop his or her own identity. Fears of multiples clinging to each other and remaining in an anti-social shell seem to be prevalent motivators for such policies, which teachers and administrators say encourage personal growth. However, these generalizations are not supported by the most recent scientific research and may be nothing more than “old wives’ tales.”

Though it is important for multiples to fully develop their own interests and abilities, many parents and experts feel that requiring or strongly encouraging the separation of multiples does not further this objective. Some believe that the reasons offered by those in favor of a strict separation policy are ridiculous generalizations. As each multiple

Child’s Entitlement, speculates that most of the time, schools have no written policy. Id.


25. Segal, supra note 13, at 409; Nancy L. Segal, Same or Separate Classrooms: A Twin Bill, 9 TWIN RES. & HUM. GENETICS 473, 473 (2006); Bellafante, supra note 12; Powell, supra note 11.

26. Segal, supra note 13, at 409; Segal, supra note 25, at 473; see also Bellafante, supra note 12; Powell, supra note 11; Sanders, supra note 11.

27. Segal, supra note 13, at 409; Segal, supra note 25, at 473; see also Bellafante, supra note 12; Powell, supra note 11; Sanders, supra note 11.


29. Segal, supra note 13, at 410; Segal, supra note 25, at 474; Segal & Russell, supra note 11, at 70; Dean, supra note 11, at 455; Bellafante, supra note 12; Powell, supra note 11; Sanders, supra note 11.

30. Powell, supra note 11; see also Segal, supra note 13, at 410. Nancy Segal relates a story of an article published by the Associated Press in 1991 stating that research showed twins performed better in school when separated. Id. Segal, seeking to investigate the claim, contacted the author, an Ohio school principal. Id. After questioning, the principal admitted that the research he mentioned did not exist, and his article was based solely on his own experience with a few pairs of twins. Id.
is an individual, separating multiples into different classrooms cannot
serve to create an individual identity, as individuality is simply inherent
in being human.\textsuperscript{31} Essentially, these parents and experts believe that
separating multiples to encourage the growth of individual identity is a
baseless generalization that educators should not make.\textsuperscript{32}

In fact, many parents of multiples report that having multiples in the
same classroom serves a beneficial purpose.\textsuperscript{33} Some multiples are very
closely attached to one another, and the security that same-classroom
placement offers may be necessary for the multiple to feel comfortable
in new surroundings with new people.\textsuperscript{34} The notion that security
provides greater comfort is true for most people, and with twins and
other multiples that comfort-providing bond is even stronger.\textsuperscript{35} Being in
the same classroom, even if at different tables or interacting with
different groups of children, may provide a level of security and comfort
that allows each multiple to explore new social interactions and settings
more freely.\textsuperscript{36}

Furthermore, when multiples are placed in different classrooms,
teachers and other pupils often have a difficult time distinguishing the
multiples from one another.\textsuperscript{37} The teachers and pupils also tend to
generalize that the twin or multiples whom they do not know must be
very similar to the twin or multiples whom they do know.\textsuperscript{38} These types
of generalizations undermine the sense of individual identity that is
important to twins and other multiples.\textsuperscript{39} When multiples are in the
same classroom, teachers and students are able to interact with each
multiple, thereby eliminating the need for arbitrary comparisons.\textsuperscript{40}

\textsuperscript{31} See Powell, supra note 11.
\textsuperscript{32} Segal & Russell, supra note 11, at 70; Powell, supra note 11.
\textsuperscript{33} Segal & Russell, supra note 11, at 70; Davenport, supra note 24; Powell, supra note 11; Sanders, supra note 11; see also Tancredy & Fraley, supra note 13, at 81 (reporting that twins often feel more secure together, which may lead to less social apprehension when together).
\textsuperscript{34} Tancredy & Fraley, supra note 13, at 81; Bellafante, supra note 12; Powell, supra note 11.
\textsuperscript{35} Tancredy & Fraley, supra note 13, at 81; see also Bellafante, supra note 12; Ayres, supra note 24; Sabrina Glidden, Beyond the Twin Bond: Encouraging Relationships with Others, http://twinstoday.com/articles/647.php?wcat=380 (last visited Oct. 4, 2007); Powell, supra note 11; Sanders, supra note 11.
\textsuperscript{36} Segal, supra note 13, at 410; Segal, supra note 25, at 473; Powell, supra note 11; Sanders, supra note 11.
\textsuperscript{37} See Powell, supra note 11.
\textsuperscript{38} Id.
\textsuperscript{39} See id.; Sanders, supra note 11.
\textsuperscript{40} Powell, supra note 11; see also Ayres, supra note 24; Sanders, supra note 11.
Thus, the perception of each individual multiple is no longer based on views of his or her twin or multiple, but rather upon the individual multiple’s actual interactions with the teachers and students.41

Aside from the added potential for individual growth, there is a highly functional advantage to having multiples in the same classroom. It becomes much easier for teachers and classmates to readily identify each multiple.42 To encourage a sense of self among multiples, experts suggest that parents not group their children via names such as “the twins.”43 When teachers and students do so, it damages multiples’ self-identity.44 Encouraging educators and classmates to interact fully with multiples will put an end to this common pitfall.45

Though many schools and teachers are not backing down from their twin-splitting policies, some certainly are. There is currently a push toward a more flexible policy, allowing parents much more input in the process.46 The reasoning, as put forth by one professor of education, is easy to follow: “Each set of multiples is really unique in their own relationship. Policies that do not consider the needs of each set of siblings will not adequately work for them and their school needs.”47 In essence, multiples have special needs, and parents are best equipped to understand the dynamic between their multiples and to make informed classroom placement decisions.48

III. TWIN LEGISLATION

Though organizations supporting the causes of multiples are quite common, efforts to pass twin legislation, which aims to allow parents to choose whether their twins will be in separate classrooms, have been driven by grassroots campaigns.49 For example, one mother of twins,

41. Powell, supra note 11; see also Ayres, supra note 24; Sanders, supra note 11.
42. Powell, supra note 11.
43. Glidden, supra note 35; Sanders, supra note 11.
44. See Glidden, supra note 35; Sanders, supra note 11.
45. Powell, supra note 11; see also Ayers, supra note 24; Sanders, supra note 11.
46. Bellafante, supra note 12; Davenport, supra note 24; Cindy Stauffer, Explosion of Twins, LANCASTER NEW ERA (Lancaster, Pa.), Apr. 3, 2006, at A1; Powell, supra note 11.
47. Powell, supra note 11 (quoting John Mascazine, Associate Professor of Education, Ohio Dominican University).
48. See Segal, supra note 13, at 410; Segal & Russell, supra note 11, at 69; Sanders, supra note 11.
Kathy Dolan, began a crusade to pass legislation in many states similar to the recently passed Minnesota legislation. Dolan started a website and a web petition for many states. Those interested can still find the petitions on the Internet. Whether these petitions have had a direct effect is unclear, but there have been noticeable efforts in several states recently to draft and pass twin legislation.

In 2005, Minnesota became the first state to pass twin legislation, and several states have recently made efforts to do the same. Only two states, Texas and Georgia, have succeeded thus far. The legislation initially drafted in most states was nearly identical to the Minnesota statute, with primary differences being only in the way in which certain words or phrases were arranged. In short, the Minnesota statute (and early drafts of legislation considered in other states) allows a parent or guardian of a twin or other higher order multiple to request “that the children be placed in the same classroom or in separate classrooms.” The school, however, can make recommendations to the parents and may provide professional education advice as well. Typically, the

50. Powell, supra note 11; TwinsLaw.com, supra note 19.
55. TEX. EDUC. CODE ANN. § 25.043 (Vernon 2007); Ga. S.B. 123.
58. MINN. STAT. § 120A.38(a); accord Ala. H.B. 161; Mass. H.B. 469; N.H. S.B. 78; N.J.
legislation requires that the parent or guardian make the classroom placement request "no later than 14 days after the first day of each school year or 14 days after the first day of attendance of the children during a school year if the children are enrolled in the school after the school year commences."\(^{59}\)

Though this type of legislation seems to give parents and guardians all of the control, most legislatures have built in a method to preserve school control over the educational process of each district.\(^{60}\) Usually, after the first grading period, the school principal may meet with the children's classroom teacher to determine if the placement is disruptive to the school.\(^{61}\) If the placement is disruptive to the school, then the principal may request that the school board determine the children's placement.\(^{62}\)

As Minnesota's statute was the first successful attempt at passing twin legislation, it became the foundation upon which other states built their versions of the legislation.\(^{63}\) Once legislators became more familiar with the basic notions behind the legislation, they often crafted additional provisions to address local needs and concerns. Texas's first attempt at twin legislation, for example, virtually mirrored Minnesota's statute.\(^{64}\) The version that ultimately passed, however, featured several unique aspects. For instance, the Texas legislature initially stated that if the multiple student was disruptive in school, the principal was required to meet with the classroom teacher and make a request to the district
board of trustees, which had ultimate authority in placement decisions. The final version, though, gave final placement authority to the principal. In addition, the statute required that the initial placement request be in writing, added an appeal procedure for parents, and provided for exceptions to parental choice.

Texas was not the only state to tweak Minnesota's formulation of twin legislation. Both Missouri and Massachusetts' twin legislation bills are even more simplistic than the Minnesota statute. Neither provides a method by which teachers or administrators can override parental choice. The trend among states, though, is to draft more complicated legislation rather than more simplistic legislation.

Georgia, Alabama, and New Hampshire have inserted uncommon language into their twin legislation. In Georgia, a school must honor a parent's placement selection if the children "meet the eligibility requirements of the class," among other things. This language would prevent a parent from using the legislation to force a school into placing a multiple into a class for which the school would otherwise deem her or him ineligible. Additionally, the school does not have to honor the parent's request if "factual performance evidence shows proof that these specific students should be separated." This evidence requirement prevents the arbitrary splitting of multiples, but grants the school

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67. TEX. EDUC. CODE ANN. § 25.043(b).
68. Id. at § 25.043(e). New Hampshire and Pennsylvania have followed suit. N.H. S.B. 78; Pa. H.B. 65.
69. For example, the Texas legislature has exempted schools from the statute if compliance would require the building of an additional classroom. TEX. EDUC. CODE ANN. § 25.043(g). The statute also notes that it does not affect any rights or obligations under the federal Individuals with Disabilities Education Act, nor does it prevent a teacher from removing a student from his or her classroom. Id. § 25.043(h). Other states have similar provisions. See, e.g., S.B. 2675, 212th Leg., Reg. Sess. (N.J. 2007) (noting that the bill does not apply to school districts with only one classroom for the grade level of the multiple); Pa. H.B. 65 (noting that the bill would not apply if compliance would require the school district to add a class); H.B. 4251, 94th Gen. Assemb., Reg. Sess. (Ill. 2006) (noting that the bill would not affect the placement of individuals with disabilities).
72. Id.
flexibility to separate twins when necessary. In Alabama and New Hampshire, legislators allow schools to disregard parents' choices if the principal determines the placement is "not in the best interest of the children." This language is broader than the "disruptive to the school" requirement found in most legislation. Because the language is broad, a school is essentially given wide discretion in its placement decisions, and parents would have a more difficult time challenging the decision in front of school boards.

IV. ARE THERE OTHER MEANS OF ACHIEVING THE SAME GOAL?

The current push toward flexible policies, as well as continued resistance from schools using conventional policies, has led to the introduction of twin legislation. Many parents of multiples, feeling that their children are being slighted and disadvantaged by conventional policies, have been great advocates for twin legislation.

Though legislation is one way to address the issue, is there another way to force schools to recognize parental discretion in the classroom placement of multiples? Essentially, there are two primary legal claims a parent could make in court: (1) violation of the Equal Protection Clause, or (2) violation of a "fundamental" right. This part of the Comment analyzes each of these potential claims.

A. Equal Protection for Twins and Other Multiples

In general, an Equal Protection analysis begins with three questions: (1) What is the classification or distinction made by the law or government action in question?; (2) What is the appropriate level of scrutiny to apply to the present analysis?; and (3) Does the law or government action meet that level of scrutiny?

This analysis must be employed to assess whether the Equal Protection Clause would provide a remedy for parents whose twins or multiples were forced to separate. First, one must identify the discriminatory classification or distinction. In this case, the class being discriminated against is composed of those students who are multiples.

75. Bellafante, supra note 12; Powell, supra note 11.
76. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 618-22 (2d ed. 2005).
Those students who are not multiples are treated differently in that they are not forced to separate from other students in the same manner that twins and other multiples are. Multiples are specifically singled out as the targets of this policy. Thus, the general policy is facially discriminatory.

The next step of the analysis requires a determination as to the appropriate level of scrutiny to apply to the policy. There are three primary types of scrutiny, though there is debate over the existence of a fourth. The three traditionally accepted levels of scrutiny are strict scrutiny, intermediate scrutiny, and rational basis review. The fourth type, rational basis "with a bite," has never been formally recognized, though a strong argument can be made that the Supreme Court has applied it in limited instances.

77. Id. at 619-20.
78. For a law or government action to pass strict scrutiny, it must be “necessary to achieve a compelling [government] purpose.” Id. at 619. It can be neither overinclusive nor underinclusive in its effects, and there cannot be a less restrictive way to accomplish the same purpose. See, e.g., Kramer v. Union Free Sch. Dist., 395 U.S. 621, 632-33 (1969). Courts apply strict scrutiny when the law is discriminatory towards a “discrete and insular minorit[y]” or when it infringes upon fundamental rights. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).
80. Under rational basis review, the law or government action need only be “rationally related to a legitimate state interest.” City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Few laws or actions have been found to violate the Equal Protection Clause under rational basis review due to its extremely deferential nature.
81. Under this test, a court purports to use rational basis scrutiny, but in actuality applies a standard that seems not nearly deferential enough to be truly rational basis review. See, e.g., Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). Courts have applied this type of review when the sole discernible reason for the particular law or government action is animus toward the group discriminated against. Romer, 517 U.S. at 632; Cleburne, 473 U.S. at 450. However, the Supreme Court has used this test before and essentially made the argument that the government’s purpose was not rational enough. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 535-36 (1973) (holding that the Court “still could not agree with the Government's conclusion that the denial of essential federal food assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns”) (emphasis omitted).
82. See Romer, 517 U.S. at 632-33 (finding that a Colorado constitutional amendment precluding all laws prohibiting discrimination on the basis of sexual orientation failed rational basis scrutiny due to underlying animus); Cleburne, 473 U.S. at 450 (finding that a zoning ordinance requiring the refusal of a special permit for a group home for the mentally retarded failed rational basis scrutiny because the ordinance rested on an "irrational prejudice against the mentally retarded"); Moreno, 413 U.S. at 536-37 (finding that an amendment to the Food
1. What Is the Appropriate Standard for Multiples Under an Equal Protection Analysis?

An advocate for multiples would certainly argue that multiples are "discrete and insular" minorities within the meaning of United States v. Carolene Products Co., but this argument probably would not withstand judicial analysis. For a class of individuals to qualify as discrete and insular minorities, the members usually must have immutable characteristics that are readily observable.

Certainly, the characteristics that define a multiple are immutable. Either one is a multiple or one is not, and nothing can change that fact. However, being a multiple is not necessarily readily observable. While there are identical multiples, fraternal multiples do not look alike and may actually be different sexes. If one were to meet fraternal multiples, it would certainly be unlikely that one would know the pair to be related. Because being a multiple is not readily identifiable, a court may hesitate to classify multiples as a class worthy of the protections of strict scrutiny.

Furthermore, one of the true rationales behind the protection for discrete and insular minorities is that the class discriminated against may not have sufficient access to the political system. In this regard, multiples almost surely lose. They have equal access to the political system, and no history of past discrimination exists that would equal that of those classes protected by strict scrutiny. In fact, the existence of "twin" legislation means that this argument is almost certainly destined to fail. Therefore, a court would probably not apply strict scrutiny to an Equal Protection claim by multiples.

Multiples may next push for an intermediate standard of review akin to that provided for laws based on gender difference. This argument, too, seems likely to fail. Unlike women, multiples have not been obviously discriminated against in the past. If they have been, they would need to show through significant statistical evidence that that was
the case. Under this standard, a court may also consider the burden that would be placed upon those attempting to pass laws. For those classes that do not warrant strict scrutiny protection, a court may prefer to allow for some policy flexibility in the achievement of the desired goals.

Most likely, laws allegedly discriminating against multiples as a class would be examined under rational basis review. Though being a multiple occasionally may cause some form of discrimination, multiples have neither been widely discriminated against in the past nor been denied access to the political process. For the sake of Equal Protection analysis, being a multiple is akin in most regards to being elderly. Thus, multiples are unlikely to receive protected status. Age discrimination occurs, and age is an immutable and easily observable characteristic. However, the Supreme Court has applied only rational basis review to laws based on age because there is no history of discrimination or denial of the political process.

It is possible that multiples may argue for rational basis "with bite," but multiple-splitting policies do not seem to be enacted with any sort of malice or animus that is characteristic of those cases that receive this slightly heightened level of scrutiny. The only claim that may be persuasive to a court is that, unlike old age, not everyone ultimately experiences membership in this class. In that regard, multiples are more similar to the disabled or mentally retarded, and the Supreme Court has extended rational basis "with bite" to these groups on occasion. However, even when rational basis "with bite" was extended to these groups, the law in question tended to also be based on animus toward that group, something that is not present with multiples.

90. Id.; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). Though rational basis review was used in Cleburne, the Supreme Court noted the need for policy flexibility and a desire to not chill Congress's remedial legislation. Id. at 445. In doing so, the Court ultimately found the law at issue failed rational basis scrutiny, something that rarely happens. Id. at 450. This seems to imply that a slightly higher standard, or rational basis "with bite," was actually applied.
92. Id.
93. Id. ("[Old age] marks a stage that each of us will reach if we live out our normal span.").
94. Cleburne, 473 U.S. at 450.
95. Id.
2. Would a Multiple-Splitting Policy Be Upheld Under Rational Basis Scrutiny?

Very few laws are struck down as violating the Equal Protection Clause when rational basis is the standard. As previously stated, the exception to this rule seems to apply only when the allegedly discriminatory law was motivated by animus toward the group discriminated against. Since the present, multiple-splitting policy is usually enacted for the supposed educational and social benefit of the multiples, a court is likely to give extreme deference to the body creating such rules. Hence, the rule would most likely be upheld against an Equal Protection claim.

Because an Equal Protection claim would probably prove fruitless, multiples and their parents may consider turning to another alternative—alleging a violation of fundamental rights.

B. Twins and Fundamental Rights

Fundamental rights contained within the United States Constitution cannot usually be abridged without an extremely good reason, as laws curtailing them are subjected to strict scrutiny by the courts. In the context of separating twins, two potential claims of the violation of fundamental rights exist: (1) parents’ rights to control the upbringing of their children and (2) education of their children and their rights to intimate association. Courts have recognized the former right for many years, though its applicability in this context is questionable. The latter right, though new, may give parents a viable claim to force schools to allow parents to make decisions regarding separation.

1. Right of Parents to Direct Their Children’s Education

Two cases have historically been cited for the proposition that parents have a right to direct their children’s educations: Meyer v. Nebraska and Pierce v. Society of Sisters. For many years, the courts

96. Id.
97. CHEMERINSKY, supra note 76, at 815.
98. For a detailed discussion of both a parent’s right to direct the upbringing of his or her child and the right of intimate association, see Dean, supra note 11.
99. Id. at 468–76.
100. 262 U.S. 390 (1923). In Meyer, a Nebraska statute required that children be taught only in English prior to eighth grade. Id. at 397. A teacher instructed a child in German and was prosecuted. Id. After discussing the longstanding right of parents to control their children’s upbringing, the Court struck down the law as unconstitutional. Id. at 400–03.
101. 268 U.S. 510 (1925). In Pierce, an Oregon statute compelled public school
viewed these two cases as establishing a broad parental right of control over the upbringing of their own children, but as time progressed, holdings limited the applicability of both Meyer and Pierce, allowing reasonable government regulation to stand. Furthermore, upon closer examination, a parent's choice to separate multiples or keep them together does not involve the right to direct the child's education, either in content or location, but is merely a decision that the parents would prefer to make rather than the school. A school's desire for administrative ease is probably sufficient reason for a blanket twin-splitting policy, particularly when the policy in question arguably infringes on a questionable extension of a fundamental right. Consequently, parents may not want to rest their claim for the power to control the classroom placement of their multiples squarely on the shoulders of this precedent.

2. Right of Intimate Association

The right of intimate association, which is a hybrid right originating in both the Due Process Clause of the Fourteenth Amendment and in the First Amendment right to freedom of association, protects the rights of those in intimate relationships. The level of scrutiny applied to laws infringing upon the intimate relationship varies according to the level of intimacy within the relationship or association. For example, a parent-child relationship would receive a high level of scrutiny while the relationship between corporate entities would receive a very low level of scrutiny. As the relationship at issue in separating twins is that of parent-child, a very high level of scrutiny would most likely apply.

There is some precedent in courts protecting a right of intimate association that indicates that a violation may occur when the State

attendance by all children between the ages of eight and sixteen. Id. at 530–31. This effectively would have put the private school run by the Society of Sisters out of business. Id. at 531–32. Citing Meyer, the Court stated that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534–35. Consequently, the statute was held unconstitutional. Id. at 535–36.

102. Dean, supra note 11, at 463.
103. Runyon v. McCrory, 427 U.S. 160, 178 (1976); Dean, supra note 11, at 469–70.
104. Dean, supra note 11, at 476–77.
105. See id. at 478.
106. Id. at 480.
107. Id. at 481.
108. See id.
109. See id. at 487.
removes a parent or guardian’s choice in regard to the best welfare of the child. In the case of separating twins, the State is disturbing the parent’s or guardian’s ability to make decisions for the best welfare of the child. If this mandated separation implicated strict scrutiny, the State’s reasons for separation—promoting individuality and aiding teachers in telling the multiples apart, among others—would not be compelling enough to meet the stringent standard. Neither reason directly involves the health or welfare of the child, so the State’s interest would probably not outweigh that of the parents and the right of intimate association.

In short, it is possible that a right of intimate association claim may successfully prevent the State from separating twins against the wishes of parents and guardians. However, only one circuit court and no Supreme Court cases have indicated that such a right may be found in the context of multiples. Consequently, attempting to force schools into compliance with the parent’s or guardian’s desires using this method would be expensive, time-consuming, and potentially fruitless.

V. ADVANTAGES AND DISADVANTAGES OF TWIN LEGISLATION

As it is unlikely that parents and guardians of multiples would prevail in a lawsuit to force schools to comply with their demands regarding the placement of multiples, twin legislation is most likely necessary for this group. However, there are both advantages and disadvantages to its enactment for the children, parents, and school systems.

The burden placed upon public schools would likely be very minimal, as no additional costs are involved in classroom placement—the multiple would be attending school regardless. For those states worried about having to build additional classrooms to accommodate multiples, legislation should be drafted that recognizes an exception to parental choice, as was done in Texas, Pennsylvania, and New Jersey. Generally, the only real burden falls on the efficiency of the school, as the ultimate disposition of the students in each classroom remains in

110. See Ortiz v. Burgos, 807 F.2d 6, 8 (1st Cir. 1986); Dean, supra note 11, at 488–89.
111. See Dean, supra note 11, at 489.
112. Id. at 490.
113. Id. at 491.
114. See Ortiz, 807 F.2d at 7–8.
doubt for fourteen days after the school year begins. Until that time, a parent may request that the multiple be placed in a different classroom than the one to which he or she was first assigned. This delay may cause some classes to have more students than others, but the effect of this imbalance should be small, particularly considering that, based upon the percentage of multiples in the population, the chance of more than one or two students switching into or out of a class is small. Furthermore, if this uncertainty is a major concern, legislation can be drafted requiring parents to notify schools a certain number of days before school begins, as was done in Georgia (five days) and New Hampshire (sixty days).

Another possible downside to enacting such legislation is that the new rules could give parents and guardians too much control over the education of their children. Though schools encourage parents to be involved in their children's educations, there is a point at which parents must trust the school system to do what is best for the child. Allowing parents and guardians of multiples to micromanage their children's education in this way may provide a slippery slope for other parents to argue for special rights for their children. This argument may also hold true for the separation of multiples. Some may argue that it is better for the school to decide. However, many parents are upset that schools adopt an arbitrary policy, and they may be willing to accept a case-by-case analysis if performed by the school. Perhaps such a


118. The percentage of twins born in 2004, as a point of reference, was 3.22%. Multiple Birth Statistics, supra note 10. The percentage of higher order multiples in 2004 was 0.177%. Id.


121. See Dean, supra note 11, at 477.

122. Id.

123. See Powell, supra note 11.
middle ground could be found in states that do not want to pass twin legislation.\textsuperscript{124}

The advantages to twin legislation are many, but none is more important than that such legislation allows parents and guardians, who know their children best, to decide the proper educational atmosphere for their multiples. Each set of multiples has different needs, and allowing parents to make the decision enhances the child’s well-being.\textsuperscript{125} Furthermore, these laws remove conflict from the public school system, as the legislature has placed power into the hands of the parents and guardians. No longer will they have to fight conventional twin-splitting policies. And finally, the multiples themselves should benefit from the legislation. Hopefully, each multiple will end up in the educational environment best suited to his or her personal growth.

VI. CONCLUSION

Ultimately, no better means than the current legislative movement exist for parents and guardians of multiples to assert their right to determine the classroom placement of their multiples. The burden on public schools is minimal, while the potential gains to parents and multiples are much greater. Hence, even though only a small percentage of the population could utilize twin legislation, it is an effective way for a state to put the debate to rest and to let parents decide what type of educational experience is best for their children.

SPENCER H. LARCHE

\textsuperscript{124} Though New Hampshire’s legislation allows parents to choose subject to the principal’s approval, it also mandates that “[n]o school board shall adopt a policy of automatically separating or placing together twins or other multiples.” N.H. S.B. 78. If states were to adopt this provision alone and allow parents a cause of action for its violation, it may provide an answer to the problem while limiting administrative burdens.

\textsuperscript{125} See Dean, supra note 11, at 455; Bellafante, supra note 12; Sanders, supra note 11.