

## COMMENTS

### **“THE FORGOTTEN CHILD OF OUR CONSTITUTION”:<sup>1</sup> THE PARENTAL FREE EXERCISE RIGHT TO DIRECT THE EDUCATION AND RELIGIOUS UPBRINGING OF CHILDREN**

#### INTRODUCTION

A school system sponsors a program to pass out colored condoms to fifteen year olds.<sup>2</sup> The school board sponsors a school-wide assembly where high school students are told, “[y]ou are not having enough orgasms.”<sup>3</sup> Parents are

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<sup>1</sup> Robert P. George, *Statement on Free Exercise of Religion in Public Schools* (Spring 1999), at <http://www.fed-soc.org/Publications/practicegroupnewsletter/religious%20liberties/statement-religiousv3i1.htm>. George is Professor of Jurisprudence at Princeton University and served on the U.S. Commission on Civil Rights from 1993 to 1998. He states: “I encourage public school officials to take the right to free exercise of religion as seriously as they take other civil rights, and to no longer treat it as the forgotten child of our Constitution.” *Id.*

<sup>2</sup> This fact pattern is based on *Brown v. Hot, Sexy & Safer Products, Inc.*, 68 F.3d 525 (1st Cir. 1995). In another similar scenario, two Georgia parents were shocked to find that during school hours, a counselor drove their thirteen and fifteen year old daughters to a county health clinic. The children received pap smears, AIDS tests, condoms, and birth control pills. The school counselor did not seek the parents’ permission before the trip, and the parents were not given notice of the health clinic visit. Upon contacting the school board and the public clinic, the parents were informed that the information was protected by patient confidentiality. Drew Lindsay, *Telling Tales Out of School*, 15 EDUC. WK. 26, 27–31 (1996).

<sup>3</sup> During the speech, the speaker in *Brown* allegedly:

- 1) told the students that they were going to have a “group sexual experience, with audience participation;”
- 2) used profane, lewd, and lascivious language to describe body parts and excretory functions;
- 3) advocated and approved oral sex, masturbation, homosexual activity, and condom use during premarital sex;
- 4) simulated masturbation;
- 5) characterized the loose pants worn by one minor as “erection wear;”
- 6) referred to being in “deep shit” after anal sex;
- 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor’s entire head and blow it up;
- 8) encouraged a male minor to display his “orgasm face” with her for the camera;
- 9) informed a male minor that he was not having enough orgasms;
- 10) closely inspected a minor and told him he had a “nice butt;” and
- 11) made eighteen references to orgasms, six references to male genitalia, and eight references to female genitals.

*Brown*, 68 F.3d at 529.

not given notice or a chance to opt their children out of a lewd and explicit ninety-minute sexuality presentation. The parents, offended because the presentation undermines their authority to instill religious values in their children, sue the school board.<sup>4</sup> Holding that the school board may enact any legislation rationally related to any legitimate state interest, the court dismisses the free exercise claim.<sup>5</sup>

In a neighboring jurisdiction, another school board enacts a mandatory uniform policy.<sup>6</sup> One parent wants to bring an action to exempt her child from the general policy, because she believes that uniformity is a “characteristic of the Anti-Christ.” Holding that the state must assert a compelling interest for the uniform policy, and that the policy must be narrowly tailored to that interest, the court finds for the parent.<sup>7</sup>

Several policy issues are implicated here: whether and to what extent religious individuals should be required to conform to majority sentiment if they choose to educate their children in the public schools; whether and to what extent the public school board should conform to individual parental requests for religious accommodation; whether and to what extent a decision may affect minorities and low income persons; and whether and to what extent the majority should be forced to pay the costs for individual religious accommodations.

These two cases highlight an inconsistency in the lower courts resulting from the Supreme Court’s First Amendment jurisprudence. With regard to the parental right to direct the religious education of children, confusion in and misapplication of Supreme Court precedent has led to three problems: (1) the parental right to direct the religious upbringing and education of children is not being consistently protected;<sup>8</sup> (2) the circuit courts have split over the

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<sup>4</sup> Scholars note that some of the most controversial free exercise debates occur over the issue of religion (or lack thereof) in the public schools. See, e.g., FRANKLYN S. HAIMAN, RELIGIOUS EXPRESSION AND THE AMERICAN CONSTITUTION 43 (2003) (stating that because the “shaping of young minds is at stake,” the concern is widespread that taxpayer money spent on public education should not be used to extend or impair religious values instilled within the family). Sex education has become a huge topic with the *Brown* facts, touching the outer edges of what has been deemed acceptable. See Karl J. Sanders, *Kids and Condoms: Constitutional Challenges to the Distribution of Condoms in Public Schools*, 61 U. CIN. L. REV. 1479 (1993).

<sup>5</sup> This is the rational basis test. See Part I *infra*.

<sup>6</sup> This fact pattern is based on *Hicks v. Halifax County Board of Education*, 93 F. Supp. 2d 649 (E.D.N.C. 1999).

<sup>7</sup> This is the compelling interest test, also called strict scrutiny. See Part I *infra*.

<sup>8</sup> A specialist in defending school districts and school officials against claims of violated parental rights agrees. See Eric W. Schulze, *The Constitutional Right of Parents To Direct the Education of Their Children*,

appropriate standard of review in these cases; and (3) the ambiguity in Supreme Court precedent has relinquished to the lower courts and state legislatures the task of defining the contours of the constitutional free exercise right.<sup>9</sup> This Comment addresses and attempts to resolve these three problems by synthesizing Supreme Court precedent and analyzing its application in the lower courts. More specifically, this Comment examines the applicable standard of review for free exercise and parental rights claims as they relate to the education of minor children.

Part I of this Comment offers a brief overview of the applicable standards of review in First Amendment jurisprudence. Part II traces the early Supreme Court cases on parental rights and free exercise, which employed an unspecified but heightened standard of review. In Part III, this Comment addresses the Supreme Court precedent in *Sherbert v. Verner*<sup>10</sup> and subsequent cases. In *Sherbert*, the Court articulated a compelling interest (or strict scrutiny) standard of review for all free exercise claims. Part III further discusses the application of this compelling interest test in the case of *Wisconsin v. Yoder*,<sup>11</sup> where the Court specifically addressed the issue of free exercise and parental rights.

Part IV discusses the Supreme Court's decision in *Employment Division v. Smith*,<sup>12</sup> where the Court retracted *Sherbert* and mandated a rational basis

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138 EDUC. L. REP. 583, 595 (1999). “[T]he contours of the constitutional right [of parents to direct the education of children] remain unclear. The federal courts have yet to determine either the current constitutional source of the right or the proper analysis and standard of judicial review when examining that right.” *Id.* Schulze continues,

When faced with hybrid claims asserting violations of both parental and religious constitutional rights, another layer of inconsistency and confusion is added to the judicial mix . . . . Until further guidance is provided from the Supreme Court, the lower courts will continue to have a difficult time attempting to analyze the constitutional right of parents to direct the education of their children.

*Id.*

<sup>9</sup> Some states have responded to this ambiguity by interpreting their own state constitutions more liberally, allowing a compelling interest test when free exercise violations are grounded in state law. Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 251–61 (1998). While state protection of free exercise rights is better than no protection at all, hit and miss state protection cannot replace the need for consistent protection of free exercise rights. No valid rationale exists for protecting free exercise rights in one state or jurisdiction with a compelling interest test, while applying a rational basis test in another state or jurisdiction, and certainly a uniform national rule is preferable over a “splotchy state-by-state approach.” *Id.* at 273.

<sup>10</sup> 374 U.S. 398 (1963).

<sup>11</sup> 406 U.S. 205 (1972).

<sup>12</sup> 494 U.S. 872 (1990).

standard of review for free exercise cases. Further, Part IV investigates the highly debated hybrid rights doctrine, a product conceived from the Court's attempt to distinguish earlier precedent with a reference to "hybrid situation[s]."<sup>13</sup> The hybrid rights doctrine purports to create an exception to the rational basis standard of review for "hybrid situations," which involve a free exercise claim asserted in conjunction with another fundamental right. Additionally, Part IV addresses the Supreme Court's most recent parental rights jurisprudence that explores whether parental rights may be deemed fundamental.

Part V discusses lower court application of the hybrid rights doctrine, specifically when claimants allege both a free exercise and parental rights claim. Part V reveals the lower courts' predictable split over the mysterious and misunderstood hybrid rights doctrine. Recognizing the split, Part VI explores some of the policy ramifications of the application, misapplication, or in-application of the hybrid rights doctrine. This Comment concludes by taking the view that free exercise and parental rights claims cannot be dismissed under the bright line rule articulated in *Smith*. Rather, relying on the Court's own jurisprudence and good precedent, this Comment articulates a multi-factor balancing test for determining the validity of parental rights and free exercise claims under a heightened standard of review.

## I. STANDARD OF REVIEW IN FREE EXERCISE CASES

Outlining the applicable standards of review in free exercise cases is a complex challenge<sup>14</sup> because the Supreme Court, in creating and articulating these standards, has not been clear or consistent in how and when to apply them.<sup>15</sup> In general, the "standards of review can be easily contracted or conflated."<sup>16</sup> Nevertheless, an understanding of the basic review standards is essential for the purpose of this Comment, or any study of constitutional law.

Under rational basis review (low-level scrutiny), the challenged law is deemed valid when: (1) the law is enacted in pursuit of a legitimate governmental interest; and (2) it is reasonably related to that interest. Under

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<sup>13</sup> *Id.* at 882. With a reference to this "hybrid situation," the majority in *Smith* handily dismissed at least twenty-seven years of Supreme Court jurisprudence and precedent. *Id.* at 891 (O'Connor, J., concurring).

<sup>14</sup> JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 121–22 (2000).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 122.

this standard of review, the legislature is accorded great deference, and the courts are hesitant to overturn government legislation or declare a government action unconstitutional. Generally, this means that rational basis review is less protective of individual rights and liberties.<sup>17</sup> If this standard of review applies, the parent is extremely likely to lose on her free exercise claim.<sup>18</sup> This is true because “rational basis scrutiny will validate all but the most irrational legislation.”<sup>19</sup>

Historically, and even under the Court’s more recent policy of legislative deference, the Court has recognized that alleged violations of fundamental rights merit a more critical review.<sup>20</sup> These fundamental rights are accorded a heightened standard of review.<sup>21</sup> Under a compelling interest review (high-level or strict scrutiny) the challenged law is valid only when: (1) the law is enacted in pursuit of a compelling or overriding governmental interest; and (2) that law is narrowly tailored to achieve that interest, without intruding on the claimants’ rights any more than absolutely necessary.<sup>22</sup> Under this standard of review, a parent will probably win in almost all cases because strict scrutiny is likely to be “fatal in fact” to the legislation.<sup>23</sup>

Finally, intermediate scrutiny, the compromise between the two standards of review, generally applies to gender discrimination cases.<sup>24</sup> This standard accords less deference to the legislature than rational basis review, but is not quite as critical of laws as compelling interest review. Under this standard, a court upholds the law when: (1) the law is enacted in pursuit of an important or significant governmental interest; and (2) the law is substantially related to that interest.<sup>25</sup>

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<sup>17</sup> CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 644 (2001).

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

<sup>19</sup> *Id.*

<sup>20</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 399 (5th ed. 1995).

<sup>21</sup> *Id.* Such fundamental rights include, among others: the First Amendment rights of freedom of speech, religion, and association; the right to vote; the right to travel; the right to fairness in the criminal process; and the right of privacy. *Id.* at 403.

<sup>22</sup> *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

<sup>23</sup> See SHANOR, *supra* note 17, at 644.

<sup>24</sup> This level of review applies in gender discrimination cases. *United States v. Virginia*, 518 U.S. 515, 522–25 (1996); SHANOR, *supra* note 17, at 644.

<sup>25</sup> See SHANOR, *supra* note 17, at 644.

## II. LAYING THE FOUNDATIONS: EARLY SUPREME COURT CASES ADDRESSING PARENTAL AND FREE EXERCISE RIGHTS

Early Supreme Court decisions addressing free exercise of religion and parental rights used an unspecified form of heightened scrutiny. The following section focuses on three early cases: *Meyer v. Nebraska*,<sup>26</sup> *Pierce v. Society of Sisters*,<sup>27</sup> and *Prince v. Massachusetts*.<sup>28</sup>

### A. *Meyer v. Nebraska: Recognizing the Right of Parents To Educate Their Children*

As early as 1923, the Supreme Court recognized the parental right to direct the education of their children.<sup>29</sup> Under a Nebraska law prohibiting teaching in any language other than English, an instructor at Zion Parochial School was convicted of teaching reading in German. Overturning the conviction, the Court relied on the Due Process Clause, stating that while the parameters of the right were not yet defined, it included, at a minimum, the right “to marry, establish a home and bring up children, to worship God according to the dictates of [one’s] own conscience . . . .”<sup>30</sup> Recognizing that legislatures may properly exercise police power, the Court also noted that “it is the natural duty of the parent to give . . . children education.”<sup>31</sup>

The stated purpose of the legislation by the Nebraska legislature was to ensure promulgation of the English language among all American citizens and to promote civic development. “That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.”<sup>32</sup> The Court did not define the fundamental rights at issue or articulate an applicable standard of review. The Court simply said that the “means adopted . . . exceed the limitations upon the power of the [s]tate and conflict with rights assured to the plaintiff . . . . The interference is plain enough and no adequate reason . . . has been shown.”<sup>33</sup> Further, the Court

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<sup>26</sup> 262 U.S. 390 (1923).

<sup>27</sup> 268 U.S. 510 (1925).

<sup>28</sup> 321 U.S. 158 (1944).

<sup>29</sup> *Meyer*, 262 U.S. at 390.

<sup>30</sup> *Id.* at 399.

<sup>31</sup> *Id.* at 400.

<sup>32</sup> *Id.* at 401.

<sup>33</sup> *Id.* at 402.

found that the statute was “arbitrary and without *reasonable relation*” to a valid state purpose.<sup>34</sup>

While the Court did use the “reasonable relation” language, it is clear that the rational basis test,<sup>35</sup> as understood today, was not used in this case.<sup>36</sup> Under the Court’s current rational basis test, the statute at issue in *Meyer* would most likely have been upheld.<sup>37</sup> It seems the Court applied an unspecified form of heightened scrutiny—either intermediate scrutiny or strict scrutiny.<sup>38</sup> The balancing test the Court used favored the fundamental right over the state interest. More importantly, the *Meyer* Court was the first to recognize the fundamental right of parents to direct the education of their children.<sup>39</sup>

#### B. *Pierce v. Society of Sisters: The Child Is Not a Mere Creature of the State*

The *Pierce* Court extended and elaborated on the holding in *Meyer*. In *Pierce*, a private religious school challenged an Oregon law requiring attendance at public schools.<sup>40</sup> The Court, recognizing that the private education of children is “not inherently harmful, but long regarded as useful and meritorious,” noted that the state had shown no failure on the part of the private schools and no “extraordinary” circumstances as the impetus for such law.<sup>41</sup> Relying explicitly on *Meyer*, the Court concluded that the Oregon law “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>42</sup> The *Pierce* Court urged that constitutional guarantees “may not be abridged by legislation which has no *reasonable relation* to some purpose within the competency of the [s]tate.”<sup>43</sup> Further, the Court concluded that the state has no power to “standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who

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<sup>34</sup> *Id.* at 400 (emphasis added).

<sup>35</sup> The rational basis test offers the greatest level of deference to the legislature by upholding laws or state actions as long as they have a rational relationship to any legitimate state interest. *See supra* Part I.

<sup>36</sup> *See SHANOR, supra* note 17, at 644.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.*

<sup>39</sup> *Meyer*, 262 U.S. at 400.

<sup>40</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 534–35.

<sup>43</sup> *Id.* at 535 (emphasis added).

nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>44</sup>

Many law professors and scholars have criticized the language cited above in *Pierce*.<sup>45</sup> Courts “tend generally to treat *Pierce* like a quirky aged relative who, although she is still invited to Thanksgiving dinner, is watched nervously for fear she will embarrass the family and start tossing mashed potatoes.”<sup>46</sup> However, both the language and holding of the case have been continually reaffirmed by the Supreme Court.<sup>47</sup>

*Meyer* and *Pierce* stand today as twin pillars of family law, child law, and religious liberty.<sup>48</sup> While dispute as to the soundness of the judicial reasoning in these cases continues, few would dispute the precedential value of these cases in addressing issues of parental rights, children’s rights, and religious freedom.<sup>49</sup>

C. *Prince v. Massachusetts: Balancing the Interests of God, Caesar, and the Little Children*

*Prince v. Massachusetts* stands for the proposition that the rights of a child can and should be considered when analyzing religious rights and parental rights claims against the state.<sup>50</sup> In *Prince*, a Jehovah’s Witness, Ms. Prince, was convicted of violating Massachusetts labor laws by allowing a nine year old girl under her custody, Betty, to distribute and sell pamphlets on the street. The pamphlets proclaimed Betty’s faith, and the distribution of such materials was an integral part of the religious practice of Jehovah’s Witnesses. The Court concluded that two liberties were at stake: (1) the right of Ms. Prince to

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

<sup>45</sup> See, e.g., Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 125 (2000).

<sup>46</sup> *Id.* at 125–26.

<sup>47</sup> *Id.* The decision and language of *Pierce* was reaffirmed in *Troxel v. Granville*, 530 U.S. 57 (2000). See *infra* Part IV.B.

<sup>48</sup> Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL’Y REV. 169, 186–88 (1996).

<sup>49</sup> See Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997–1001 (1992) (arguing that the traditional view of the child as property articulated in these cases creates dangerous precedent objectifying and silencing the child). But see Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1203 (1997) (suggesting that language in the *Pierce* opinion encourages diversity by rejecting the idea of conformity as the desired norm).

<sup>50</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 162–64 (1944).

raise Betty teaching the elements of the faith; and (2) the right of Betty to practice her faith.

The Court noted that balancing these two liberties along with state powers “always is delicate.”<sup>51</sup> The Court described the religious claim as “obviously earnest,” and noted that parental rights claims are “serious enough when only secular matters are concerned”<sup>52</sup> and “become the more so when an element of religious conviction enters.”<sup>53</sup> Recognizing that the “custody, care and nurture of the child reside first in the parents,” the Court noted, nevertheless, that neither the free exercise right nor parental rights are limitless.<sup>54</sup>

Subsequently, the *Prince* Court recognized the right of the child and the right of the state to act in the child’s interest and concluded that child labor laws are designed to protect children, not hinder religious convictions. The Court observed that children have rights that can and should be limited by both state and parental authority and remained concerned that all such authority should be exercised in the best interest of the child.<sup>55</sup> “Parents may be free to become martyrs themselves. But it does not follow that they are free . . . to make martyrs of their children.”<sup>56</sup> Finally, in upholding the conviction, the Court explicitly limited the ruling to the facts of the case, stating that it did not purport to create a categorical rule in favor of unlimited state authority.<sup>57</sup>

Although the claimant in *Prince* lost, *Prince* does not represent a departure from *Pierce* and *Meyer*.<sup>58</sup> Rather, it represents an expansion of the balancing tests articulated in those cases.<sup>59</sup> In *Prince*, the Court balanced three interests: (1) the parental right to direct the upbringing of her children;<sup>60</sup> (2) the child’s right to freely practice her religion;<sup>61</sup> and (3) the state’s police power to protect

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<sup>51</sup> *Id.* at 165.

<sup>52</sup> *Id.*

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

<sup>54</sup> *Id.* at 166.

<sup>55</sup> *Id.* at 166–69.

<sup>56</sup> *Id.* at 170.

<sup>57</sup> *Id.* at 171.

<sup>58</sup> *Id.* at 166 (relying explicitly on both *Pierce* and *Meyer*).

<sup>59</sup> *See id.* at 166–67.

<sup>60</sup> *Id.* at 164.

<sup>61</sup> The lower court excluded testimony of the child regarding the importance of the religious practice to her religious faith, but the Supreme Court considered the child’s need for the practice in its ruling. *Id.* at 162–63.

the interests of children.<sup>62</sup> These three interests are at issue in all parental rights and free exercise cases, and balancing the three should be the concern of courts addressing these issues.<sup>63</sup>

While the religious claimant lost, the *Prince* case remains valuable as an inquiry into the parental right to direct the religious education of children. *Prince* is the first case to at least implicitly recognize the rights of the child when it comes to interests involving their own welfare.<sup>64</sup> While *Prince* may not have examined the extent to which these rights exist and should be applied, the Supreme Court has continued to steadfastly recognize the rights of children as distinct from the rights of their parents and the state.<sup>65</sup>

### III. REAPING WHAT WAS SOWN: ARTICULATING AND APPLYING THE COMPELLING INTEREST TEST IN *SHERBERT V. VERNER* AND *WISCONSIN V. YODER*

The compelling interest test was first defined in *Sherbert v. Verner*, and applied consistently thereafter in free exercise cases until 1990. This Part explores the formation of the compelling interest standard of review and its subsequent application in a key free exercise and parental rights case, *Wisconsin v. Yoder*.

#### A. *Sherbert v. Verner: Protecting Free Exercise by Applying Strict Scrutiny*

While it is probably true that some form of heightened review applied in parental rights and free exercise cases, the exact standard of review remained ambiguous.<sup>66</sup> The Supreme Court clarified the applicable standard of review for all free exercise cases in *Sherbert v. Verner*.<sup>67</sup> In *Sherbert*, the Court addressed the constitutionality of an unemployment compensation statute that denied benefits to a claimant who refused employment because her religious beliefs prohibited working on Saturdays.<sup>68</sup> Beginning with the proposition that “[t]he door of the Free Exercise Clause stands tightly closed against any

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<sup>62</sup> Woodhouse, *supra* note 49, at 1067–68 (concluding that the rise of the rights of the child, along with the historically rooted parental right and state interest, resulted in a reconceptualization of children and familial rights). This reconceptualization can be seen in the Court’s precedent. See *supra* text accompanying note 59.

<sup>63</sup> See *Prince*, 321 U.S. at 162–63, 165, 170.

<sup>64</sup> See *id.*

<sup>65</sup> DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 32 (2000).

<sup>66</sup> See *Prince*, 321 U.S. at 163–65, 170.

<sup>67</sup> 374 U.S. 398 (1963).

<sup>68</sup> *Id.* at 401–02.

governmental regulation of religious *beliefs*,<sup>69</sup> the Court opined that when conduct or religious practices pose a “substantial threat to public safety, peace or order,” legislative restrictions are constitutional.<sup>70</sup>

In *Sherbert*, the claimant’s religious conviction was “[p]lainly enough” sincere, and therefore the statute could withstand constitutional challenge only if: (1) the statute presented no burden on the claimant’s free exercise rights; or (2) the statute presented only an “incidental burden” on the claimant’s free exercise rights and was justified by a “compelling state interest.”<sup>71</sup> With regard to the first prong, the Court was convinced that forcing a claimant to work in violation of her religious beliefs, or prohibiting a claimant from collecting unemployment benefits for refusal to work on Saturdays, burdened her free exercise rights as much as a fine imposed for “Saturday worship.”<sup>72</sup> With regard to the second question the Court thought it essential “that no showing merely of a *rational relationship* to some colorable state interest would suffice.”<sup>73</sup> Rather, applying the more stringent compelling interest (or strict scrutiny) test, the Court found in favor of the claimant. The state’s fears—that feigned religious objections to Saturday work might dilute the workers compensation fund or present problems for employer scheduling—were insufficient state interests in light of the great burden to the claimant’s free exercise rights.<sup>74</sup> This formulation of the compelling interest test was explained, expanded, and generally applied in all free exercise claims, including claims where the parental right to direct the religious education of children was at stake.<sup>75</sup>

#### *B. Wisconsin v. Yoder: Applying Strict Scrutiny to the Parental Right To Direct the Religious Upbringing of Children*

In *Wisconsin v. Yoder*,<sup>76</sup> the Court applied the general compelling interest standard in a case specifically addressing both free exercise and parental

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<sup>69</sup> *Id.* at 402 (emphasis in original).

<sup>70</sup> *Id.* at 403.

<sup>71</sup> *Id.* This test is the strict scrutiny or compelling interest test. *See id.*

<sup>72</sup> *Id.* at 404.

<sup>73</sup> *Id.* at 406 (emphasis added).

<sup>74</sup> *Id.* at 407–08.

<sup>75</sup> *See infra* text accompanying note 88.

<sup>76</sup> 406 U.S. 205 (1972).

rights.<sup>77</sup> In *Yoder*, the members of the Old Order Amish religion were convicted for violating Wisconsin's compulsory school attendance laws. The Amish community made it a practice to pull their children from the public educational system after the eighth grade, but Wisconsin law required attendance at public or private school until the age of sixteen. The Amish community's rationale was that its children needed basic education to be good citizens but that the conflicting influence of public high school would threaten the Amish community's way of life and have detrimental psychological consequences for their children.<sup>78</sup> The Court noted that the state has "a high responsibility for education of its citizens, [and the power] to impose reasonable regulations for the control and duration of basic education."<sup>79</sup> This interest in education, however, is not "free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause . . . and the traditional interest of parents with respect to the religious upbringing of their children."<sup>80</sup>

Balancing these interests, the Court found that: (1) the fundamental commandment of the Amish religious conviction was that they not be conformed to the world; (2) this sincere religious conviction was severely threatened by the compulsory school attendance law; and (3) the state had a legitimate interest in ensuring education of its citizenry.<sup>81</sup> Applying a balancing test that weighed free exercise and parental rights against the state interest, the Court concluded that the state's claim in the interest of educating the child as *parens patriae*<sup>82</sup> could not be sustained against the Amish community's free exercise rights. The Amish claimants showed that foregoing two years of compulsory education would not impair the child's "physical or mental health . . . or result in [the child's] inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any way materially detract from the welfare of society."<sup>83</sup> Thus, the state claim to an

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<sup>77</sup> MARTIN S. SHEFFER, *GOD VERSUS CAESAR: BELIEF, WORSHIP, AND PROSELYTIZING UNDER THE FIRST AMENDMENT* 47–49 (1999) (stating that the Supreme Court's decision in *Yoder* is "a reiteration (in modern dress) of the initial holdings in the *Meyer* and *Pierce* cases").

<sup>78</sup> *Yoder*, 406 U.S. at 207–12.

<sup>79</sup> *Id.* at 213.

<sup>80</sup> *Id.* at 214.

<sup>81</sup> *Id.* at 214–19.

<sup>82</sup> *Parens patriae* is a doctrine that allows the state, as a function of its police power, to restrict parental rights in order to protect the child's interest. See BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). The state functionally steps into the shoes of the parent when the parent is not acting in the child's best interest. *Id.*

<sup>83</sup> *Yoder*, 406 U.S. at 234.

educated citizenry was outweighed by the parental right to direct the religious education of their children.<sup>84</sup>

Even while broadly interpreting the parental right to direct the religious upbringing of children, the Court recognized that this right may be limited when “parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”<sup>85</sup> The Court concluded by noting that “courts must move with *great circumspection* in performing the sensitive and delicate task of weighing a [s]tate’s legitimate social concern when faced with religious claims for exemption from generally applicable education requirements.”<sup>86</sup>

After *Sherbert*, the Supreme Court applied the strict scrutiny test in ten cases between 1963 and 1990, with the religious claimant winning in six of ten.<sup>87</sup> Moreover, a review of the lower court case law between 1963 and 1990 shows that, in cases specifically addressing the issue of the parental right to direct the religious education of children, lower courts consistently applied the compelling interest test of *Sherbert*.<sup>88</sup> Lower courts took care to move with “great circumspection” in analyzing these claims, understanding the seriousness of balancing the interests of the state, the parent, and the child under strict scrutiny.<sup>89</sup> However, in 1990, the Court radically changed the nature and extent of the free exercise right.<sup>90</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 233–34.

<sup>86</sup> *Id.* at 235 (emphasis added).

<sup>87</sup> WITTE, *supra* note 14, at 123.

<sup>88</sup> *See, e.g.*, *Murphy v. Arkansas*, 852 F.2d 1039, 1041 (8th Cir. 1988); *Griffin High Sch. v. Ill. High Sch. Ass’n*, 822 F.2d 671, 674–75 (7th Cir. 1987); *Duro v. Dist. Attorney*, 712 F.2d 96, 97–98 (4th Cir. 1983); *Debra P. v. Turlington*, 644 F.2d 397, 403 (5th Cir. 1981); *Sheridan Rd. Baptist Church v. Dept. of Educ.*, 348 N.W.2d 263, 269–71 (Mich. Ct. App. 1984); *State v. Anderson*, 427 N.W.2d 316, 322 (N.D. 1988); *State v. Melin*, 428 N.W.2d 227, 229 (N.D. 1988); *State v. Shaver*, 294 N.W.2d 883, 897–98 (N.D. 1980); *State v. Kasuboski*, 275 N.W.2d 101, 105 (Wis. Ct. App. 1978); *see also Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1456–57 (E.D. Mich. 1989).

<sup>89</sup> *See supra* cases cited in note 88.

<sup>90</sup> Generally, the response to *Employment Division v. Smith*, 494 U.S. 872 (1990), was critical. *See, e.g.*, John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 71 (1991); Michael P. Farris & Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65 (1995); Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Chris Day, Note, *Employment Division v. Smith: Free Exercise Clause Loses Balance on Peyote*, 43 BAYLOR L. REV. 577 (1991). *But see* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Ernest P. Fronzuto, III, Comment, *An Endorsement for the Test of General Applicability:*

IV. GETTING LOST IN THE DESERT: THE DEMISE OF THE FREE EXERCISE  
CLAUSE IN *EMPLOYMENT DIVISION V. SMITH*

In *Employment Division v. Smith*,<sup>91</sup> the Court created a categorical rule applying rational basis, rather than strict scrutiny, to all free exercise claims based on neutral, generally applicable laws. The Court addressed the question of whether application of Oregon drug use laws to the ceremonial ingestion of peyote is prohibited by the Free Exercise Clause and, if not, whether states can deny claimants unemployment compensation for work-related misconduct based on the use of the drug. The Free Exercise Clause permits a state to deny unemployment benefits in this case, because the “right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes.)’”<sup>92</sup> Thus, the Court determined that a rational basis test applies in free exercise cases generally.<sup>93</sup>

In creating this categorical rule, the Court distinguished previous First Amendment jurisprudence stating that the “only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.”<sup>94</sup> The Court called this a “hybrid situation,” where a free exercise claim is connected to “any communicative activity or parental right.”<sup>95</sup> This proposition formed the basis of the much contested, generally misunderstood, and highly debated hybrid rights doctrine.<sup>96</sup> The Court distinguished successful free exercise cases judged under a strict scrutiny standard on this ground.<sup>97</sup> The hybrid situation is one where the free exercise

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Smith II, *Justice Scalia, and the Conflict Between Neutral Laws and the Free Exercise of Religion*, 6 SETON HALL CONST. L.J. 713 (1996).

<sup>91</sup> 494 U.S. 872 (1990).

<sup>92</sup> *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 881.

<sup>95</sup> *Id.* at 882.

<sup>96</sup> See *infra* note 147 and accompanying text.

<sup>97</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (supporting the rights of parents to direct the religious education of their children); *Follett v. McCormick*, 321 U.S. 573 (1944) (involving licensing for religious and charitable solicitations); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (involving an issue of free speech and press); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (involving the right of parents to direct the education of their children).

claim is connected to a communicative activity or parental right.<sup>98</sup> The hybrid rights doctrine was created in *Smith* precisely for the purpose of distinguishing, *not overruling*, earlier precedent.<sup>99</sup> Thus, while *Smith* requires a rational basis test in most situations, it implicitly requires a separate test, some form of heightened review, for hybrid situations.<sup>100</sup> In articulating a bright line rule, the Court did not overrule previous precedent. Rather, the Court made explicitly clear that its previous free exercise jurisprudence remained in force.<sup>101</sup>

Critics of the decision express two forceful reasons for rejecting the majority's decision. First, Justice O'Connor insisted that the majority decision "dramatically depart[ed] from well-settled First Amendment jurisprudence . . . and [was] incompatible with our Nation's fundamental commitment to individual religious liberty."<sup>102</sup> O'Connor noted that the Court's decision reduced the free exercise privilege to a general principle of upholding laws if neutral in force, even if not neutral in effect.<sup>103</sup> Rather than protect free exercise claims against neutral laws, as was the effect of the second-prong of the *Sherbert* test, this new rule allows laws that are neutral to remain in force, even if they devastate an individual's free exercise rights.<sup>104</sup>

Second, Justice O'Connor pointed out that the *Smith* majority acknowledged only the Court's well-established precedent.<sup>105</sup> In distinguishing *Cantwell*, *Yoder*, *Meyer*, and *Pierce* as "hybrid situations," the majority ignored a long line of precedent where the compelling interest test

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Justice O'Connor writes, in her *Smith* concurrence, that the Court failed to distinguish the unsuccessful free exercise cases where a compelling interest test was used. See *Smith*, 494 U.S. at 896 (O'Connor, J., concurring) (citing *United States v. Lee*, 455 U.S. 252, 258–59 (1982); *Gillette v. United States*, 401 U.S. 462, 462 (1971); *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961); *Prince v. Massachusetts*, 321 U.S. 158, 168–70 (1944)). O'Connor states, "[I]t is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us." *Id.* at 897.

<sup>98</sup> *Id.* at 882.

<sup>99</sup> John J. Coughlin, *Common Sense in Formation for the Common Good—Justice White's Dissents in the Parochial School Aid Cases: Patron of Lost Causes or Precursor of Good News*, 66 ST. JOHN'S L. REV. 261, 287 (1992). But see William L. Esser, IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 243 (1998) (arguing that "[t]he hybrid claim is no more than a smoke screen under which the Court hides the wreck of the rapidly sinking Free Exercise Clause").

<sup>100</sup> *Smith*, 494 U.S. at 881–82.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 891 (O'Connor, J., concurring).

<sup>103</sup> *Id.* at 892–93.

<sup>104</sup> *Id.* at 893.

<sup>105</sup> *Id.* at 896–97.

applied, but where the religious claimant lost only after a careful analysis of the competing interests.<sup>106</sup> Thus, in creating a new categorical rule, the Court chose to acknowledge only the precedent where the free exercise claimant won and to diminish the significance of the Court's departure from precedent by dubbing the previous free exercise wins "hybrid situations."<sup>107</sup> Drastically departing from well-settled precedent without explicitly overruling it created controversy and has led to continued confusion.<sup>108</sup>

A. *Smith: Death in the Religious Freedom Restoration Act of 1993 and Resurrection in City of Boerne v. Flores*

The *Smith* decision to apply the rational basis test was bombarded with criticism by scholars and practitioners from the day the opinion was rendered,<sup>109</sup> and almost immediately a bipartisan movement in the legislature sought to overturn the precedent.<sup>110</sup> After several attempts, Congress finally enacted the Religious Freedom Restoration Act of 1993 ("RFRA") to reinstate the compelling interest test in all free exercise cases.<sup>111</sup> The stated purpose of RFRA was to protect free exercise of religion. Finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and that the *Smith* decision "virtually eliminated the requirements that the government justify burdens on religious exercise," the legislature reinstated the compelling interest (strict scrutiny) *Sherbert* test.<sup>112</sup>

RFRA was a short-lived victory for the religious rights proponents. In 1997, the Court declared RFRA unconstitutional as applied to the states in *City of Boerne v. Flores*.<sup>113</sup> A majority of the Court concluded that Congress exceeded its power in applying RFRA to the states through the Fourteenth Amendment.<sup>114</sup> The Court concluded that applying RFRA in that manner

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<sup>106</sup> *Id.* at 896.

<sup>107</sup> *Id.*

<sup>108</sup> *See supra* note 90 and accompanying text.

<sup>109</sup> *Id.*

<sup>110</sup> The Religious Freedom Restoration Act was first introduced in Congress in 1990 immediately following *Smith*. James J. Musial, *Free Exercise in the 90s: In the Wake of Employment Div., Dep't of Human Resources v. Smith*, 4 TEMP. POL. & CIV. RTS. L. REV. 15, 51 n.300 (1994).

<sup>111</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2000)), *overruled as applied to state and local governments*, *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>112</sup> 42 U.S.C. § 2000bb-1(a)-(b).

<sup>113</sup> 521 U.S. 507 (1997).

<sup>114</sup> *Id.* at 536.

“contradicts vital principles necessary to maintain separation of powers and the federal balance.”<sup>115</sup>

*Boerne* restored the *Smith* rational basis standard of review in all cases involving free exercise issues related to state and local governments.<sup>116</sup> With the overruling of RFRA, the hybrid rights doctrine once again became important as the potential savior of at least some free exercise claims. While it is clear after *Boerne* that the rational basis test applies generally in most free exercise cases, it remains unclear whether the hybrid situation requires a heightened standard of review, and if so, whether intermediate scrutiny or the compelling interest test should apply. *Meyer*, *Pierce*, and *Prince*<sup>117</sup> militate toward applying a heightened standard of review, but do not indicate which one.

Supreme Court jurisprudence fails to specify the exact standard of review that applies in parental rights cases.<sup>118</sup> Thus, without a clear standard of review for hybrid free exercise claims and without a clear standard of review for parental rights claims, it remains unclear which standard of review should apply in cases where a free exercise claim is asserted along with the parental right to direct the religious education and upbringing of children. The problem is compounded by the Supreme Court’s “ample vacillations” in its free exercise jurisprudence.<sup>119</sup> The next section analyzes the Supreme Court’s most recent parental rights jurisprudence, looking for guidance on the applicable standard of review for parental rights claims.

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<sup>115</sup> *Id.*

<sup>116</sup> The RFRA still applies in federal jurisdictions, such as military bases. However, because education is the province of local and state governments, for the purposes of this Comment, the RFRA is generally inapplicable.

<sup>117</sup> *Prince* was not one of the cases salvaged explicitly by the hybrid rights exception, but logically, if the hybrid rights situation language means anything, it must apply to all communicative activity or parental rights jurisprudence—both the wins and the losses. See *Employment Div. v. Smith*, 494 U.S. 872, 896–97 (1990) (O’Connor J., concurring). Further, the Supreme Court has rejected the contention that “other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. [Rather, lower courts should follow the case which directly controls, leaving to the Supreme Court] the prerogative of overruling its own decisions.” *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal citation omitted).

<sup>118</sup> The Supreme Court plurality opinion, the dissents, and the concurrences fail to articulate a consistent standard of review in *Troxel v. Granville*, 530 U.S. 57 (2000). See *infra* Part IV.B.

<sup>119</sup> WITTE, *supra* note 14, at 217.

*B. Dim Light in the Dark Wilderness: Troxel v. Granville and Parental Rights Jurisprudence*

Before turning to the lower courts' application of *Smith's* hybrid situation, a brief excursion into the field of parental rights is necessary and useful. In the Supreme Court's most recent parental rights decision, *Troxel v. Granville*,<sup>120</sup> the Court affirmed that parents have a fundamental liberty interest to "direct the upbringing and education of children under their control."<sup>121</sup> Further, the Court found that the Due Process Clause of the Fourteenth Amendment, in which this right is vested, "provides heightened protection against government interference."<sup>122</sup> The Court reaffirmed that "the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children."<sup>123</sup> In this fractured opinion, the fundamental right of parents is the solid foundation agreed upon by eight of the nine Justices.<sup>124</sup>

However, Justice Thomas, concurring in the judgment, noted that while the opinions of the plurality, Justice Kennedy, and Justice Souter appropriately find that parents have this fundamental right, "curiously none of them articulates the appropriate standard of review."<sup>125</sup> Justice Thomas stated that strict scrutiny should apply in parental rights cases where a fundamental right is allegedly violated.<sup>126</sup>

The other Justices are less clear about the applicable standard of review.<sup>127</sup> Justice O'Connor, writing for the plurality, cites approvingly to a case applying the compelling interest test,<sup>128</sup> but a few sentences later states that if a parental

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<sup>120</sup> 530 U.S. 57 (2000).

<sup>121</sup> *Id.* at 65 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925)).

<sup>122</sup> *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

<sup>123</sup> *Id.* at 66 (quoting *Glucksberg*, 521 U.S. at 720).

<sup>124</sup> Justice Scalia agrees that "a right of parents to direct the upbringing of their children is among the 'unalienable Rights.'" *Id.* at 91 (Scalia, J., dissenting). However, he argues that the scope and breadth of this "unenumerated right" should be decided by the legislature. *Id.* at 91–93. Scalia's dissent depends on carving out and distinguishing earlier precedent including *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder*. Scalia concludes that these cases have "small claim to *stare decisis* protection" and intimates that all should be overturned. *Id.* at 92–93.

<sup>125</sup> *Id.* at 80.

<sup>126</sup> *Id.*

<sup>127</sup> Unfortunately, the clarity scholars and litigators hoped for remains elusive. See Schulze, *supra* note 8, at 596 (arguing in 1999 that "[u]ntil further guidance is provided from the Supreme Court, the lower courts will continue to have a difficult time attempting to analyze the constitutional right of parents to direct the education of their children").

<sup>128</sup> *Troxel*, 530 U.S. at 70 (citing *Hoff v. Berg*, 595 N.W.2d 285, 291–92 (N.D. 1999)).

right “becomes subject to judicial review, the court must accord at least some special weight to the parent’s own determination,”<sup>129</sup> thus implying a less rigid standard of review—perhaps intermediate scrutiny.<sup>130</sup> Justice O’Connor does not explain exactly what she means by the phrase “at least some special weight.” Justices Kennedy and Souter make no mention of an applicable standard of review. Nevertheless, given the plurality opinion, coupled with Justice Thomas’s concurrence—at least five of the Justices favor at least intermediate scrutiny when a fundamental parental right is at issue.<sup>131</sup>

In light of the hybrid rights exception to *Smith*, combined with the fundamental parental right to direct the upbringing of children, the logical conclusion is that in cases where the free exercise claim is combined with a parental interest in directing the upbringing of children, a higher standard of review than rational basis should apply.<sup>132</sup> Mathematically this would be expressed as:

A heightened standard of review + a heightened standard of review is  
 $\geq$  an intermediate standard of review.<sup>133</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> Ira Bloom, *The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice*, 32 J.L. & EDUC. 139, 174 (2003) (stating that the standard of review for parental rights claims “range from the plurality opinion’s presumption in favor of a parental decision, to Justice Thomas’s desire to apply strict scrutiny”); Stephen G. Gilles, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69, 123–26 (2001) (stating that the proper standard of review in parental rights cases under *Troxel* is intermediate scrutiny).

<sup>131</sup> Christopher J. Klicka, *Decisions of the United States Supreme Court Upholding Parental Rights as “Fundamental”*, Home School Legal Defense Association (Oct. 27, 2003), available at <http://www.hslda.org/docs/nche/000000/00000075.asp> (concluding that post-*Troxel* parental rights have reached the highest level of protection and are deserving of compelling interest review). *But see* Gilles, *supra* note 130, at 124–25 (arguing that the ambiguity of the language in the plurality opinion leaves the lower courts free to apply any standard of scrutiny).

<sup>132</sup> See Bloom, *supra* note 130, at 174–75; Gilles, *supra* note 130, at 123–26; Ralph D. Mawdsley, *Parental Rights and Home Schooling: Current Home School Litigation*, 135 ED. L. REP. 313, 327 (1999) (stating that the “obvious choice” between compelling interest and rational basis test post-*Smith* is the compelling interest test).

<sup>133</sup> One commentator has explained the hybrid-rights exception as follows:

“Clearly, what the Court must have meant is that a less than sufficient free exercise claim, plus a less than sufficient claim arising under a different part of the Constitution, together trigger the compelling interest test.” In other words, the cumulative effect of two or more partial constitutional rights equals one sufficient constitutional claim. Put simply, two losers equals one winner.

Esser, *supra* note 99, at 218–19 (quoting Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 930 (1998)).

It is difficult to believe that the combination of the two rights would lower the standard of review.<sup>134</sup> Similarly, it is difficult to conclude that when a parental right is lodged with a free exercise right, the parental right becomes less fundamental or vice versa.<sup>135</sup>

The question is not whether a heightened standard of review should apply but which heightened form applies: intermediate or strict scrutiny. Presumably strict scrutiny should apply, but at the very least, intermediate scrutiny should be used.<sup>136</sup> A review of the lower court decisions from 1990<sup>137</sup> to the present reveals that many courts apply a rational basis test in the hybrid situation. This is especially disconcerting in the realm of the parental rights to direct the religious upbringing of their children. The next Part explores the standard of review through this lens.

#### V. STRUGGLING IN THE WILDERNESS: LOWER COURT ATTEMPTS TO APPLY SUPREME COURT FREE EXERCISE AND PARENTAL RIGHTS JURISPRUDENCE

Supreme Court precedent is unclear and lower court attempts to apply that precedent have been inconsistent. This Part first looks at two state court decisions handed down shortly after *Smith*. Then, this Part surveys federal court decisions where the courts have applied strict scrutiny. Finally, this Part explores lower court decisions that have rejected the hybrid rights doctrine and applied the blanket rational basis test to all free exercise claims.

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<sup>134</sup> See *supra* notes 132–33 and accompanying text.

<sup>135</sup> *Id.*; see also SHEFFER, *supra* note 77, at 50 (indicating that Supreme Court precedent reveals a continued pattern of “increased liberality” with regard to parental rights, free exercise and education).

<sup>136</sup> See *supra* note 133 and accompanying text.

<sup>137</sup> Although *Troxel* was not decided until 2000, the parental right to direct the upbringing of children is well established in constitutional jurisprudence and was well-established long before 1990. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (stating that “[o]ur jurisprudence historically has reflected Western civilization concepts of . . . broad parental authority over minor children [and] [o]ur cases have consistently followed that course”). Additionally, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), were well-established precedent long before *Smith* and still remain in effect.

A. *Finding the Light: Applying Heightened Scrutiny to Free Exercise and Parental Rights Claims in the Lower Courts*

1. *Applying Heightened Scrutiny to Free Exercise Claims in State Courts*

Immediately following *Smith* and before RFRA was passed, the Vermont Supreme Court applied the hybrid rights doctrine in *State v. DeLabruere*.<sup>138</sup> This case involved a criminal prosecution of parents for violation of a truancy law that requires all students to attend a school that meets Vermont's minimum requirements.<sup>139</sup> The court relegated *Smith* to a footnote, stating, "We do not believe that . . . the right of parents to direct the education of their children is changed by the . . . opinion in . . . *Smith*."<sup>140</sup> From there, the court analyzed the case using the compelling interest test balancing four factors:

- (1) Whether plaintiffs challenge is motivated by a sincerely held religious belief;
- (2) Whether plaintiffs free exercise of religion is burdened by the challenged government action;
- (3) Whether the challenged government conduct serves a compelling state interest; and, if so
- (4) Whether the government has proven that the challenged conduct is essential to achieving, or is the least restrictive means to achieving, that compelling state interest.<sup>141</sup>

This is an application of the pre-*Smith*, *Sherbert* compelling interest test.

Similarly, the Michigan Supreme Court applied strict scrutiny to a free exercise and parental rights case shortly after *Smith*, in *People v. DeJonge*.<sup>142</sup> Home schooling parents were convicted for failing to comply with the state's mandatory certification policy for home school teachers.<sup>143</sup> The DeJonges decided to teach their children at home because they wanted to provide their children with a "Christ centered education."<sup>144</sup> Their belief was that "the major purpose of education is to show a student how to face God, not just show him how to face the world."<sup>145</sup> The court first traced free exercise jurisprudence, establishing the Free Exercise Clause historically as a mandate to government for the protection of and not mere toleration of religious

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<sup>138</sup> 577 A.2d 254 (Vt. 1990).

<sup>139</sup> *Id.* at 256–57.

<sup>140</sup> *Id.* at 261 n.8.

<sup>141</sup> *Id.* at 261.

<sup>142</sup> 501 N.W.2d 127 (Mich. 1993).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 130.

<sup>145</sup> *Id.* (internal quotation marks omitted).

liberty.<sup>146</sup> Relying on the hybrid rights language in *Smith*,<sup>147</sup> the court applied the compelling interest test and concluded that a mandatory certification requirement was outweighed by the DeJonges' free exercise and parental rights.<sup>148</sup> The state's interest was in certifying teachers of children—not in ensuring the adequate education of children—and such a “narrow interest,”<sup>149</sup> is outweighed by the fundamental free exercise right.<sup>150</sup> While casting this case as a hybrid rights case of parental and free exercise rights, the court analyzed it generally as a free exercise case: The most compelling claim for this court was the free exercise claim, not the parental rights claim.<sup>151</sup>

These free exercise and parental rights cases in state courts reveal how courts can apply a balancing test that adequately recognizes the rights of the child, the rights of the parent, and the legitimate interests of the state. However, the federal courts have not been as consistent with the hybrid rights claims.

## 2. *Applying Heightened Scrutiny to Free Exercise Claims in Federal Courts*

In *Hicks v. Halifax County Board of Education*,<sup>152</sup> Ms. Hicks, a great-grandmother with legal custody of her great-grandson brought an action against the school board and school officials claiming that adoption and implementation of a mandatory school uniform policy violated both her and her great-grandson's constitutional rights. Specifically, she claimed violation of the free exercise rights of both herself and her great-grandson, as well as a violation of her parental rights to direct her great-grandson's religious

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<sup>146</sup> *Id.* at 133–34.

<sup>147</sup> The *Smith* Court never actually used the language of hybrid rights, but referred to the “hybrid situation.” *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990). The hybrid rights doctrine as it has come to be known was derived from this language. See *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1147 (9th Cir. 2000) (O'Scannlain, J., concurring) (“The court begins its opinion by stating that this is a case in search of a controversy. One wonders, rather, whether this is a court afraid of a case. No court would eagerly enter the jurisprudential thicket surrounding the intersection of First Amendment free exercise concerns and [claims of other federal rights]. Thus we postpone, perhaps serendipitously, but ineluctably, definitive application of [*Smith*], and its newly developed hybrid rights doctrine . . . . *Smith* itself is fraught with complexity both in doctrine and in practice.”) (internal citation omitted); Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 131–32 (2000).

<sup>148</sup> *DeJonge*, 501 N.W.2d at 144.

<sup>149</sup> *Id.* at 139.

<sup>150</sup> *Id.* at 139–44.

<sup>151</sup> See *id.* at 133–44.

<sup>152</sup> 93 F. Supp. 2d 649 (E.D.N.C. 1999). This case was discussed in the Introduction to this Comment. See *supra* note 6 and accompanying text.

upbringing. Ms. Hicks believed that uniformity in dress is an “allegiance to the spirit of the anti-Christ, a being that requires uniformity, sameness, enforced conformity, and the absence of diversity.”<sup>153</sup> Uniformity is characteristic of the last days, and Ms. Hick’s religion requires her to oppose characteristics of the “coming of the Anti-Christ.”<sup>154</sup>

After analyzing the *Smith* precedent as well as previous parental rights precedent, the court concluded that strict scrutiny was appropriate, relying explicitly on both *Smith* and *Yoder*.<sup>155</sup> Under strict scrutiny, the court declined to dismiss the claims on summary judgment.<sup>156</sup>

Support for opt-out provisions in public education is not new.<sup>157</sup> Scholars and members of the Court have long urged that compelled exposure to religiously offensive teaching can violate the Free Exercise Clause.<sup>158</sup>

Shortly after the RFRA was declared unconstitutional by *Boerne*, the Ninth Circuit addressed the issue in *Peterson v. Minidoka County School District No. 331*.<sup>159</sup> Mr. Peterson was principal of Paul Elementary School and the father of twelve children. Peterson and his wife, who was a homemaker, sought to homeschool their children under the school district’s policy of allowing homeschooling as long as the children receive comparable instruction to that which they would receive at a public or private school.<sup>160</sup> The Petersons’ rationale for homeschooling was “to educate [their] kids with an aspect of God being the creator in all of the classes that they would teach.”<sup>161</sup> When the rumor spread through the school district that Mr. Peterson was considering homeschooling his children, parents and teachers issued complaints from which the Superintendent’s office drew an inference that homeschooling would

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<sup>153</sup> *Id.* at 653.

<sup>154</sup> *Id.* at 653–54.

<sup>155</sup> *Id.* at 662–63.

<sup>156</sup> *Id.* at 663.

<sup>157</sup> See *Lee v. Weisman*, 505 U.S. 577, 578–79 (1992) (holding school sponsored prayer unconstitutional); *Bd. of Educ. v. Barnett*, 319 U.S. 624, 642 (1943) (holding a mandatory flag salute unconstitutional); George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 717–23 (1993) (addressing the similarity of Establishment Clause cases and Free Exercise cases and concluding that students who are exposed to concepts hostile to their religious faith experience a coercion to renounce their faith as surely as those who are coerced openly to adopt a particular religious belief).

<sup>158</sup> See *supra* sources cited in note 157; see also *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

<sup>159</sup> 118 F.3d 1351 (9th Cir. 1997).

<sup>160</sup> *Id.* at 1354.

<sup>161</sup> *Id.* at 1355.

“engender a loss of confidence in the principal as a leader at his school.”<sup>162</sup> The school district took action against Mr. Peterson, informing him that in light of his decision to homeschool his children, they would reassign him from principal to an elementary teaching position.<sup>163</sup> Mr. Peterson refused the reassignment and sought employment in three other school districts, but was offered no positions. Eventually, Mr. Peterson brought an action against the school district and school officials alleging, among other claims, that his free exercise right and his parental right to direct the upbringing of his children were violated. The district court granted Mr. Peterson summary judgment on both claims.<sup>164</sup>

On appeal, the Ninth Circuit upheld the ruling. First analyzing the free exercise claim, the court approved subjecting the school district’s action to strict scrutiny, without addressing the precedent in *Smith*.<sup>165</sup> The court simply relied on *Yoder*, and determined that the free exercise of Peterson’s religion could only be burdened when outweighed by a compelling state interest.<sup>166</sup> The Ninth Circuit agreed with the district court, concluding that Mr. Peterson’s free exercise rights far outweighed the school district’s interest in alleviating concerns about the principal’s allegiance to and faith in the school system.<sup>167</sup>

The Ninth Circuit also analyzed the parental rights claim without mentioning, citing, or relying on *Smith*.<sup>168</sup> It upheld the district court’s grant of summary judgment on the parental rights claim using the same strict scrutiny standard applied to the free exercise claim.<sup>169</sup> Assuming without stating that parental rights are fundamental, the court simply relied on the analysis it set out in the free exercise claim.<sup>170</sup> In two short paragraphs, citing to *Pierce* and *Yoder*, the court applied a strict scrutiny standard and upheld summary judgment in favor of Mr. Peterson.<sup>171</sup>

The Ninth Circuit’s reasoning is mysterious and thought provoking for several reasons. The court does not even allude to or address the *Smith* precedent. It simply relies on older precedent as outlined in *Yoder* and *Pierce*.

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<sup>162</sup> *Id.* at 1354

<sup>163</sup> *Id.* at 1355.

<sup>164</sup> *Id.* at 1356.

<sup>165</sup> *Id.* at 1356–57.

<sup>166</sup> *Id.* at 1356.

<sup>167</sup> *Id.* at 1356–57.

<sup>168</sup> *Id.* at 1357–58.

<sup>169</sup> *Id.* at 1358.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

At least one commentator suggests that this approach is an alternative paradigm for dealing with religious homeschooling cases.<sup>172</sup> However, the Ninth Circuit in *Peterson*, in coming to its conclusion, did not employ optimal reasoning, because it failed to address the “elephant in the room.” That is, the Court did not address the *Smith* decision, which post-1990, seems essential for any free exercise analysis. What this case does reveal is that at least one circuit has found the *Smith* precedent so unreliable or incoherent that it simply chose to ignore the case.<sup>173</sup> In contrast, and as this Comment shows below, circuits at the other extreme are applying the *Smith* rational basis test generally to all free exercise cases and completely ignoring, or simply rejecting, the hybrid situation language.

*B. Lost in the Darkness: Lowered Scrutiny and Losses for Free Exercise and Parental Rights in the Lower Courts*

This section explores lower court decisions rejecting the hybrid rights doctrine and applying rational basis review to claims where parental rights are asserted along with free exercise claims.

In a recent free exercise hybrid rights case in the Second Circuit, *Leebaert v. Harrington*,<sup>174</sup> Turk Leebaert, the father of seventh-grade student, Corky Leebaert, alleged violations of his constitutional right to direct the religious upbringing of his child. Leebaert requested that his son be excused from mandatory health education classes at his public school. The school district refused to meet this request, and when Corky did not attend the mandatory classes, he failed the course. Leebaert sued the school superintendent and the school district, arguing that his right to direct the religious education of his child is “fundamental” and therefore the validity of the mandatory health education classes is subject to strict scrutiny. Conversely, the defendant Superintendent argued that the mandatory health education curriculum is subject to rational basis review, because Leebaert’s right to direct the religious education of his child is not fundamental.<sup>175</sup> The Second Circuit agreed with the Superintendent, concluding that parental rights to direct the religious upbringing of their children are not fundamental.

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<sup>172</sup> Michael E. Chaplin, Comment, *Peterson v. Minidoka County School: Home Education, Free Exercise, and Parental Rights*, 75 NOTRE DAME L. REV. 663 (1999).

<sup>173</sup> See *Peterson*, 118 F.3d at 1351.

<sup>174</sup> 332 F.3d 134 (2d Cir. 2003).

<sup>175</sup> Leebaert did not dispute that the mandatory health curriculum would satisfy the rational basis test. His only argument was that strict scrutiny should apply. *Id.* at 139.

Mr. Leebaert believed it was his right under the law and responsibility under his religion to impart religious, moral, and ethical values to his children.<sup>176</sup> Mr. Leebaert stated:

The basis of my religious beliefs is Christian . . . . I take an orthodox religious view on moral and ethical issues . . . . I do not believe that drugs and tobacco are proper subjects that I want my son's school to teach. My view is that children should be taught [not to engage] in drugs or tobacco. Similarly, my religious view on sex before marriage is . . . abstention . . . . [S]ex should be reserved for marriage when it is appropriate . . . . The basis of my religious beliefs is the Golden Rule as taught by Christ and the Ten Commandments . . . .<sup>177</sup>

Leebaert contended that the following aspects of the mandatory program, among others, were a violation of his free exercise and parental rights: discussions about drinking alcohol, discussions about the habits of highly effective people, discussions about the qualities of successful people, discussions defining self-esteem, and discussions about grieving and feelings about death.<sup>178</sup>

Specifically at issue in the case was Mr. Leebaert's contention that because his free exercise claim was combined with his parental right's claim, under the decision in *Smith*, strict scrutiny should apply. The Second Circuit disagreed: "Several circuits have stated that *Smith* mandates stricter scrutiny for hybrid situations than for a free exercise claim standing alone, but, as far as we are able to tell, no circuit has yet actually applied strict scrutiny based on this theory."<sup>179</sup> The Second Circuit refused to adopt the strict scrutiny standard and, instead, reinforced and extended the Sixth Circuit's holding in *Kissinger v. Board of Trustees of the Ohio State University, College of Veterinary Medicine*,<sup>180</sup> explaining that the court could "not see how a state regulation would violate the [F]ree Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights."<sup>181</sup>

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<sup>176</sup> *Id.* at 138.

<sup>177</sup> *Id.* at 137.

<sup>178</sup> *Id.* at 138.

<sup>179</sup> *Id.* at 143.

<sup>180</sup> 5 F.3d 177, 180 (6th Cir. 1993) (rejecting the hybrid rights doctrine categorically when addressing the issue of whether the hybrid claim of free speech plus free exercise requires a heightened standard of review).

<sup>181</sup> *Leebaert*, 332 F.3d at 144 (quoting *Kissinger v. Bd. of Trs. of Ohio State Coll. of Vet. Med.*, 5 F.3d 177, 180 (6th Cir. 1993) (internal quotation marks omitted; bracketed material present in original)).

After concluding that the hybrid rights doctrine is inapplicable to this case, the court proceeded to discuss the case in light of *Wisconsin v. Yoder*.<sup>182</sup> The court distinguished this case from *Yoder* by concluding that *Yoder* is limited to distinct claims. For *Yoder* to apply, the claim must be

[a]ided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society. For example, the Amish . . . convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization . . . .<sup>183</sup>

Applying *Yoder* to this case, the court concluded that *Leebaert* did not adequately state a free exercise claim on the merits.<sup>184</sup> This application of *Yoder* effectively limited it to cases applying only to the Amish community.<sup>185</sup> As such, the Second Circuit construction of *Yoder* impedes the Court's effort to define the contours of parental rights and free exercise rights.<sup>186</sup>

The *Leebaert* court analyzes the parental rights claim separately from the free exercise claim.<sup>187</sup> Deciding the issue of whether *Leebaert* had a fundamental right to excuse his son from mandatory public school, the court found that the precedent in *Meyer, Pierce*, "and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught."<sup>188</sup> Similarly, the Second Circuit dismissed the precedent in *Troxel*, stating that nothing in that case would compel the conclusion that parents have a fundamental right that "includes the right to tell public schools what to teach or what not to teach."<sup>189</sup>

The Second Circuit did not agree that the parental right to direct the religious education of children is a hybrid situation that should not be analyzed separately as a religious right and then a parental right. However, analyzing it solely as a religious right compromises the importance of the fact that the religious claim is asserted by the parent of the child. Likewise, analyzing the

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972)).

<sup>184</sup> *Id.* at 144–45.

<sup>185</sup> *See id.*

<sup>186</sup> *See id.*

<sup>187</sup> *Id.* at 141–42.

<sup>188</sup> *Id.* at 141.

<sup>189</sup> *Id.* at 142.

claim separately as a parental right diminishes the value of the claim as a religiously motivated petition for parental authority. Using a “divide and conquer” form of analysis undermines the hybrid right.

However, the Second Circuit is not alone in this interpretation of Supreme Court precedent; the Fifth Circuit similarly has diminished the value of the *Smith* hybrid situation. In *Littlefield v. Forney Independent School District*,<sup>190</sup> the Fifth Circuit addressed the question of whether a mandatory school uniform policy was a violation of the parental right to direct the upbringing of children. The Forney School District instituted a mandatory uniform policy to promote school spirit and school values and “to promote decorum (and thereby the notion that the school is a place of order and work), to promote respect for authority, to decrease socioeconomic tensions, to increase attendance, and to reduce drop out rates.”<sup>191</sup> The uniform policy required all students to wear polo-type or oxford-type shirts or collared blouses in one of four colors and blue or khaki pants, shorts, or skirts.<sup>192</sup> The policy contained an opt-out provision that allowed parents with “bona fide” religious or philosophical objections to apply for an exception.<sup>193</sup> The application for exemption was designed to test the sincerity of the religious beliefs, and most of the time exceptions were not granted because the student had worn some type of uniform in the past, leading the committee to assume that the religious belief was insincere.<sup>194</sup> Of the seventy-two applications for exemptions, only twelve were granted.<sup>195</sup>

The Fifth Circuit upheld the district court’s grant of summary judgment in favor of the school district.<sup>196</sup> The district court rejected the parent’s request for heightened scrutiny under *Smith*’s hybrid rights doctrine. The Fifth Circuit did not address the potential for heightened scrutiny under the hybrid rights doctrine,<sup>197</sup> and the court dealt with the parental rights claim and the free exercise claims separately. With regard to the parental rights claim, interpreting *Troxel*, the Fifth Circuit stated that the issue was “whether the sweeping statements of the plurality opinion in *Troxel* regarding the ‘fundamental’ ‘interest of parents in the care, custody, and control of their

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<sup>190</sup> 268 F.3d 275 (5th Cir. 2001).

<sup>191</sup> *Id.* at 280.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 281.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 279.

<sup>197</sup> *Id.* at 293 n.27.

children,’ mandate a strict standard of scrutiny.”<sup>198</sup> The court thought otherwise and applied a rational basis standard for the parental rights claim, stating that the court was following “almost eighty years of precedent.”<sup>199</sup>

Next, addressing the free exercise issue, the court again applied a rational basis test.<sup>200</sup> Citing *Smith*, the court found that because the uniform policy was a “neutral, generally applicable governmental regulation” it withstood the free exercise challenge because it was “reasonably related to a legitimate state interest.”<sup>201</sup> Without saying more, the Fifth Circuit affirmed the district court’s grant of summary judgment applying a rational basis test to both issues.

More recently, however, the Fifth Circuit decided the case of *Barrow v. Greenville Independent School District*,<sup>202</sup> which overturned the lower court’s explicit reliance on *Littlefield*’s rational basis test (but did not overrule *Littlefield*).<sup>203</sup> *Barrow* addressed the issue of whether a school district policy requiring children of all public school principals and administrators to attend public school was constitutional.<sup>204</sup> *Barrow* alleged that both her parental rights and free exercise rights were violated when she was denied consideration for an assistant principal position based on the fact that her children were enrolled in private school.<sup>205</sup> Rather than analyze the case under *Smith* and *Littlefield*, the Fifth Circuit applied two parental rights precedents, concluding that the constitutional right of public school employees to select private school education for their children is well-established.<sup>206</sup>

Interestingly, the Fifth Circuit recognized the state’s “legitimate and important”<sup>207</sup> interest in encouraging confidence in the public schools, but concluded that the policy was unconstitutional.<sup>208</sup> In the final footnote of the

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<sup>198</sup> *Id.* at 289 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 293.

<sup>201</sup> *Id.* at 292.

<sup>202</sup> 332 F.3d 844 (5th Cir.), *cert. denied sub nom.*, *Smith v. Barrow*, 540 U.S. 1005 (2003).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 846.

<sup>205</sup> *Id.* at 846–47.

<sup>206</sup> *Id.* at 847. The court relied on *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990) (holding that public school employee’s transfer of daughter to private all-white school was protected under the First Amendment and the familial privacy rights), and *Brantley v. Surlis*, 718 F.2d 1354 (5th Cir. 1983) (holding that firing a public school employee for enrolling her son in private school was unconstitutional unless the act substantially interfered with operation of the effectiveness of the education program at the school). *Id.* The Court does not mention or cite to the Ninth Circuit opinion in *Peterson*.

<sup>207</sup> *Barrow*, 332 F.3d at 848.

<sup>208</sup> *Id.* at 849.

case, the Fifth Circuit mysteriously states: “[W]e express no opinion on the particular degree of scrutiny a state action must undergo to withstand a challenge to its constitutionality in a case like this one.”<sup>209</sup> The court continued, “we simply recognize that the state cannot strip its school employees of the right to choose a private-school education for their children without proving that the unfettered exercise of this right will undermine a state interest.”<sup>210</sup> The court found that because the school board brought forth no proof that Barrow’s act would undermine a state interest, the “policy fails irrespective of the degree of scrutiny applied.”<sup>211</sup>

The *Barrow* court’s own footnote seems to contradict its analysis. If the court were truly judging this case under the rational basis test, as the footnote implies that it is, then, the school board should have won, not lost.<sup>212</sup> The court recognized that the school board identified a “legitimate and important” interest, but then concluded that it was not undermined by the free exercise right. The court’s own conclusion indicates that it applied a heightened standard of review in this case—if not strict scrutiny, then possibly intermediate scrutiny—otherwise, the school board would have won for having articulated a “rational” basis.<sup>213</sup> Thus, even those circuits that have rejected the hybrid rights doctrine feel compelled to raise the level of review in at least some hybrid cases.<sup>214</sup> A more integrated approach to parental rights and free exercise claims would apply heightened review to all cases and balance the interest of the child, the state, and the parents to achieve a just outcome.

The First Circuit addressed the issue in *Brown v. Hot, Sexy and Safer Productions, Inc.*<sup>215</sup> Parents brought claims against school officials alleging that required attendance at a sexually explicit AIDS awareness assembly violated their parental and free exercise rights. The parents claimed the compelled attendance at the program impinged on their religious beliefs in chastity and morality. In this pre-*Troxel* case, the parents claimed that the right to direct the religious education of their children was a fundamental right and thus could only be infringed by a compelling state interest that could not be achieved by less restrictive means. The First Circuit disagreed. First,

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<sup>209</sup> *Id.* at 849 n.20.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See SHANOR, *supra* note 17, at 644.

<sup>213</sup> *Id.*

<sup>214</sup> *Barrow*, 332 F.3d at 847–49.

<sup>215</sup> 68 F.3d 525 (1st Cir. 1995). The facts of this case were discussed in the Introduction to this Comment.

analyzing the parental right, the court traced the Supreme Court's jurisprudence, distinguished *Meyer* and *Pierce*, and concluded that the parents in the case failed to show a violation of "constitutional magnitude."<sup>216</sup> The court refused to rule on whether parental rights are fundamental.<sup>217</sup>

The court found "that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools."<sup>218</sup> Thus, the First Circuit upheld the district court's dismissal of the claim. In so finding, the court sidestepped the issue of what standard of review should apply across the board. The court intimated that strict scrutiny should not apply because the parental right is not fundamental, but the court failed to articulate any alternative standard of scrutiny before proceeding to the merits of the claim.<sup>219</sup>

Subsequently, analyzing the free exercise claim under *Smith*,<sup>220</sup> the court turned to the hybrid rights doctrine.<sup>221</sup> Again, without addressing the standard of review, the court simply distinguished *Brown* from *Yoder*, concluding that one-time compulsory attendance at a ninety-minute program did not pose a threat to "an entire way of life," as was the case in *Yoder*.<sup>222</sup> The court concluded that the free exercise claim was properly dismissed.<sup>223</sup>

The Tenth Circuit followed suit in *Swanson v. Guthrie Independent School District No. 1-L*.<sup>224</sup> A religious, homeschooled student's parents sought to enroll their daughter in public school for foreign language, vocal music, and science classes in which the public school instruction was superior to that which they could offer their daughter at home.<sup>225</sup> The school district agreed to allow the student to attend, but problems began when a new Superintendent refused to allow the part-time attendance.<sup>226</sup> Shortly thereafter, the school

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<sup>216</sup> *Id.* at 533.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 534.

<sup>219</sup> *Id.* at 533–34.

<sup>220</sup> The court concluded that although RFRA was in effect at the time of the case, it could not be applied retroactively to the program which occurred in 1992. Therefore the court analyzed the free exercise claim under *Smith*, not RFRA. *Id.* at 536–38.

<sup>221</sup> *Id.* at 539.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> 135 F.3d 694 (10th Cir. 1998).

<sup>225</sup> *Id.* at 696.

<sup>226</sup> *Id.*

board adopted a policy that prohibited part-time attendance.<sup>227</sup> Mr. Swanson was given a chance to voice his religious and parental concerns at a school board meeting, after which the school district amended the policy, stating that if part-time students were counted for state aid purposes the school board would reconsider the policy.<sup>228</sup> The Swansons challenged the school board policy as a violation of their free exercise and parental rights.<sup>229</sup>

First analyzing the free exercise claim, the court applied the *Smith* test and concluded that the “policy is neutral and of general application,” and therefore does not violate the Free Exercise Clause.<sup>230</sup> Addressing the hybrid rights claim, the court noted that simply raising parental rights and free exercise claims together was insufficient to invoke strict scrutiny; each claim must be “colorable” and genuine.<sup>231</sup> After reviewing the case law, the court concluded that while parents have a constitutional right to direct their children’s education, the “parents simply do not have a constitutional right to control each and every aspect of their children’s education and oust the state’s authority over that subject.”<sup>232</sup> The court found that the Swansons’ desire to pick and choose the classes that their daughter would attend is not a constitutionally protected right.<sup>233</sup> Because the Swansons did not articulate a “colorable” free exercise claim, the court held that the school board was not required to demonstrate a compelling interest.<sup>234</sup> Citing *Yoder*, the court reiterated that hybrid rights theory “at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one’s child.”<sup>235</sup> Thus, the Court concluded this case was “not a hybrid-rights case.”<sup>236</sup>

The “colorable claim” doctrine does not undermine the validity of the hybrid rights doctrine. Rather, it simply states that when the parents have proffered no legitimate religious interest, the free exercise claim should be dismissed, thus removing the case from the realm of the hybrid rights doctrine. However, the colorable claim doctrine does seem somewhat inconsistent with

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<sup>227</sup> *Id.* at 696–97.

<sup>228</sup> *Id.* at 697.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 698.

<sup>231</sup> *Id.* at 699–700.

<sup>232</sup> *Id.* at 699.

<sup>233</sup> *Id.* at 700.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

the plurality opinion in *Smith*: “It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.”<sup>237</sup>

Finally, in *Jensen v. Reeves*,<sup>238</sup> parents brought an action against a public school district and school officials after their child was suspended for disciplinary reasons. The court dismissed the action, holding that the parents did not state a viable hybrid rights claim under *Smith*, which would subject the case to strict scrutiny.<sup>239</sup> The student in *Jensen* defied school authorities on a regular basis and physically harmed other students on at least three occasions.<sup>240</sup> For these reasons, the student was questioned in the presence of his classmates and then suspended.<sup>241</sup> His parents alleged that this violated their fundamental right to direct the upbringing of their child as well as their free exercise rights.

First addressing the parental rights claim, the court applied the rational basis test, relying on Supreme Court precedent in *San Antonio Independent School District v. Rodriguez*<sup>242</sup> and stating that “[e]xcept when a religious element has been raised, the Supreme Court has declared that the parents’ liberty interest in directing their children’s schooling is a lesser right and the test is whether the challenged state action is rationally related to a legitimate state purpose.”<sup>243</sup> The court analyzed the case under this test, finding that the school district and officials’ actions were all rationally related to the legitimate interest of disciplining an unruly student.<sup>244</sup>

Analyzing the free exercise claim, the court noted that when a claim for a violation of the parental right to control the upbringing of children is coupled with a free exercise claim, “the rational basis test cannot be used.”<sup>245</sup> However, the court concluded that the free exercise claim was not based on a legitimate religious belief and was instead a pretext for seeking a heightened

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<sup>237</sup> *Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990).

<sup>238</sup> 45 F. Supp. 2d 1265 (D. Utah 1999).

<sup>239</sup> *Id.* at 1274–75.

<sup>240</sup> *Id.* at 1268–70.

<sup>241</sup> *Id.*

<sup>242</sup> 411 U.S. 1 (1973).

<sup>243</sup> *Jensen*, 45 F. Supp. 2d at 1273.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 1274.

standard of scrutiny.<sup>246</sup> Therefore, the court concluded that the free exercise claim should be dismissed.

The court continued however, and stated that even if the free exercise claim was based on a legitimate religious belief, and a valid hybrid rights claim was alleged, the case should still be dismissed.<sup>247</sup> The court distinguished this case from *Yoder* and went on to analyze it under a principle of neutrality.<sup>248</sup> The court found: “The state action in question here is based on a purely secular consideration that does not single out a particular religion or ability of particular persons to exercise legitimate religious beliefs. The school’s disciplinary policies and procedures are content neutral and were implemented in a reasonable manner.”<sup>249</sup> The Court continued, “Consequently, even if plaintiffs sufficiently alleged a ‘hybrid’ claim, deserving of heightened scrutiny, defendants’ actions did not unreasonably interfere with plaintiffs’ exercise of their religious beliefs.”<sup>250</sup>

The court’s analysis reveals the continued confusion created by the hybrid rights doctrine. The court’s finding of fact that the free exercise claim was illegitimate<sup>251</sup> should not have precluded a strict scrutiny analysis but instead should have been a factor in the balancing test.<sup>252</sup> Additionally, the hypothetical application of strict scrutiny review actually seems to be an application of rational basis review.<sup>253</sup> The language used by the court, including “content neutral” and “implemented in a reasonable manner,” is rational basis language rather than strict scrutiny language.<sup>254</sup> Strict scrutiny would require the state action be narrowly tailored to a compelling state interest.<sup>255</sup> Regardless of whether this case would have turned out differently had the hybrid right been analyzed under the format outlined above, the case is illustrative of the puzzled jurisprudence surrounding the hybrid rights doctrine.

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<sup>246</sup> *Id.* at 1274–75. However, the court did intimate that the hybrid rights doctrine would apply where the free exercise right is legitimate. *Id.*

<sup>247</sup> *Id.* at 1275.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1274–75.

<sup>252</sup> *Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990).

<sup>253</sup> See SHANOR, *supra* note 17, at 644.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

### C. *Summary and Synthesis of the Cases*

As the first half of this Comment reveals, the Supreme Court has failed to articulate a consistent and coherent framework in its First Amendment jurisprudence.<sup>256</sup> This Comment focuses on a particular collection of free exercise rights—parental rights in education and upbringing—and argues that the Supreme Court’s jurisprudence with respect to this issue is not inconsistent but, rather, is ambiguous. Even as the standards of review in other free exercise cases continue to shift, the standard of review in parental rights and free exercise cases seems to have remained at some unspecified form of heightened review. Given the precedents in *Meyer*, *Pierce*, *Prince*, and *Yoder*, combined with the hybrid exception to *Smith*, it seems that the standard of review that should apply in hybrid parental rights cases is a heightened standard. The Supreme Court’s recent decision in *Troxel*, upholding parental rights as fundamental, lends added credence to this conclusion.

However, as revealed by the analysis of lower court cases in the second half of this Comment, the circuits have split on the issue of what standard of review is appropriate in these types of cases. Both the Ninth and Fourth Circuits find that a compelling interest test is appropriate, while the First, Second, Fifth, and Tenth Circuits mandate application of only the rational basis standard of review. Compounding the issue, the two state supreme courts (Michigan and Vermont) have both used the compelling interest test in analyzing hybrid free exercise and parental rights cases.

The split is not a product of the Supreme Court’s inconsistency as much as it is the product of the Court’s ambiguity in singling out the “hybrid situation” without explicitly defining its contours. In *Smith*, the Court created an exception to its general rational basis review while giving little guidance for an application of the exception and, in *Troxel*, the Court decided that parental rights are fundamental without articulating a standard of review.

Accounting for these inconsistencies, the next Part briefly explores some of the policy arguments that establish a rationale for using a heightened standard of review when a free exercise claim is lodged alongside a parental rights claim, as in the case of the parental right to direct the religious education of children.

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<sup>256</sup> WITTE, *supra* note 14, at 217.

## VI. POLICY ARGUMENTS

This Part explores some of the policy arguments in favor of protecting the parental right to direct the religious education of children by applying a heightened standard of review.

A. *Helping the Least of These: The Rational Basis Test Has an Unfair and Negative Effect on Persons of Lower Socio-Economic Status*<sup>257</sup>

Under rational basis review, a parent who loses her free exercise case generally has three options: (1) she can send the child to public school to participate in a program or activity that she feels violates both her and her child's beliefs; (2) she can send the child to a private school that is more in line with her philosophical and religious ideals; or (3) she can homeschool her child.<sup>258</sup> Option one is clearly unattractive. Option two is only available to those few in American society who are able to afford private school in addition to paying for a public school system that is subsidized by American tax dollars.<sup>259</sup> Finally, option three requires a parent to give up working or work only part-time to focus on educating a child at home. This option is only open to those of higher economic status and almost completely impossible for single parent families. Thus, applying a rational basis standard of review harms those of lower economic status.<sup>260</sup> While general policy does not urge that local governments respond to every whim of the religious believer, general policy would dictate that, when possible, the local government should respond to the desires of the religious believer with reasonable accommodation.<sup>261</sup>

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<sup>257</sup> See STEPHEN V. MONSMA, POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING 230–32 (1993); Coughlin, *supra* note 99, at 280–87. *But see* Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1472–75 (2003). Professor Chemerinsky argues for a requirement that all students attend public schools through high school. He relies on the argument that even under a strict scrutiny standard, the parental interest and free exercise rights should be subject to the state's compelling interest in creating an equal educational system. *Id.*

<sup>258</sup> See Ralph D. Mawdsley, *The Changing Face of Parents' Rights*, 2003 BYU EDUC. & L.J. 165, 176–77.

<sup>259</sup> MONSMA, *supra* note 257, at 231.

<sup>260</sup> *Cf. Hicks v. Halifax County Bd. of Educ.*, 93 F. Supp. 2d 649, 654 (E.D.N.C. 1999).

<sup>261</sup> See MONSMA, *supra* note 257, at 231.

*B. Sheltering the Family: Rational Basis Test Subjects the Parents' Authority Over the Education of Their Children to the State's Authority*

A rational basis test is unjust because it subjects the parents' right and responsibility to care for the child to the state's interest in an educated citizenry.<sup>262</sup> Under a rational basis standard of review, absent overt discrimination, the religious claimant will lose every time.<sup>263</sup> Thus, the school system, not the parent, is allowed to choose the moral and religious foundation that the child learns.<sup>264</sup> While it is certainly true that states have an interest in creating a morally educated citizenry, it is not true that the state interest outweighs the parental interest in moral and religious education every time.<sup>265</sup>

This observation is compounded by the unjust effect the rational basis test has on persons of lower economic status, as those who are economically well-off have the luxury of choosing the morals that are taught to their children, while those of lower economic status remain subject to the state's mandates of moral authority.<sup>266</sup>

*C. Understanding Our Brothers and Sisters: The Need for an Educational System that Fosters Respect for Diversity and Tolerance in a Pluralistic Society*

Finally, it is important to note that the fundamental purpose behind the Free Exercise Clause is to promote tolerance and diversity in our pluralistic society.<sup>267</sup> Because children are the future of our society, it is important that they learn tolerance and appreciation of diversity in their most important social setting: the public and private schools.<sup>268</sup> Under a rational basis standard of review, the educational system is not encouraged to promote diversity or tolerance of competing religious claims. Rather, the local government is given

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<sup>262</sup> Coughlin, *supra* note 99, at 269–82.

<sup>263</sup> SHANOR, *supra* note 17, at 644.

<sup>264</sup> Garnett, *supra* note 45, at 113–14; *see also* Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149, 187–90 (1999) (stating that there is nothing “anomalous” about permitting parents, rather than the State, to balance children’s spiritual and worldly interests).

<sup>265</sup> Garnett, *supra* note 45, at 114. Indeed, Garnett argues that the only time a state should “meddle” with the parent’s authority is to prevent “very carefully defined” harm to the child. *Id.*

<sup>266</sup> MONSMA, *supra* note 257, at 231.

<sup>267</sup> WITTE, *supra* note 14, at 44–48.

<sup>268</sup> *See* Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1307–08 (2002).

the authority to teach majority views, while silencing minority voices.<sup>269</sup> In cases where accommodation of a religious objection would be possible, the rational basis test gives the local government no incentive to accommodate the religious parent's desires regarding her child's education. Thus, in the public education system, this means that the child and parent's views become effectively silenced or that the child simply disappears from the mainstream into the private educational realm.<sup>270</sup> The upside is that the child and parent are free to exercise their beliefs, but the downside is that those same beliefs become hidden from both majority understanding and critique. Such a system certainly cannot be said to promote diversity and tolerance. Instead, the rational basis test creates a system where the majority view is "sacred," and the minority view is "sacrilege," without effective communication or cooperation among the two competing claims to promote mutual respect.

### CONCLUSION

"The Court has tended to rely too heavily on its mechanical tests of free exercise and establishment and to use these tests as substitutes, rather than guides, to legal analysis."<sup>271</sup> Professor Witte's statement is equally applicable to lower courts as it is to the Supreme Court. The hybrid situation exception to *Smith* is not a doctrine but confirmation of the Court's recognition that the implementation of rational basis review was inconsistent with its own precedent.<sup>272</sup> Given the lower courts' continued inconsistency in applying the exception, it is time for the Court to reassess its free exercise jurisprudence and articulate a better guide for the lower courts. Considering the Court's past precedent and recent lower court decisions addressing parental and religious rights, the only unambiguous theme is that the applicable standard of review is perpetually ambiguous. Thus, rather than stick to the bright line standard of review articulated in the *Smith* opinion or the ambiguous standard of review articulated in the hybrid situation doctrine, the Court should offer an alternative model with which the lower courts can address this issue. This is especially imperative because of the increasing number of parental right and free exercise claims brought in lower courts.<sup>273</sup> Despite this need, the Court is

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<sup>269</sup> *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390, 400–02 (1923).

<sup>270</sup> *See Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 400–02.

<sup>271</sup> WITTE, *supra* note 14, at 217.

<sup>272</sup> *Employment Div. v. Smith*, 494 U.S. 872, 896–97 (1990) (O'Connor, J., concurring).

<sup>273</sup> Schulze, *supra* note 8, at 595.

unlikely to clear up the ambiguity any time soon. Thus, working with the precedent the Court has rendered, one thing seems clear: When a parental right to direct the religious education of children is asserted, it is inappropriate to apply the rational basis test.

Rather, some form of heightened review should apply. Additionally, applying a balancing test for deciding such cases is both consistent with past precedent and necessary for proper adjudication of free exercise and parental rights cases. The following factors should be considered: (1) the legitimacy and urgency of the interest of the state; (2) efforts by the state to create reasonable accommodations; (3) the cost to the state of granting the religious claimant's request; (4) secondary issues of disestablishment; (5) the best interests of the child; (6) the right of the child to practice his or her faith; (7) the right of the parent to practice his or her faith; (8) whether and to what extent other constitutional rights are implicated; and (9) whether and to what extent equality of religious expression is affected.

Free exercise claims are too complex to reduce to a simple principle of neutrality.<sup>274</sup> Parental right claims are also incapable of being reduced to a single principle of parental rights over state rights or vice versa. Free exercise claims combined with parental rights claims become more complex, not less, and the lower courts desperately need guidance from the Supreme Court to deal with these claims. The aforementioned test is imperfect for at least two reasons. First, its amorphous language will be difficult to apply. Second, there is no clear hierarchy or guidance for the weighting of factors. Nevertheless, an imperfect balancing test that recognizes historically fundamental rights could produce better results than a bright line rule that categorically denies the free exercise rights upon which this country was founded. Using a heightened form of review, along with the aforementioned balancing test, provides protection for parental and free exercise rights while remaining true to Supreme Court precedent and our nation's historical foundations.

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<sup>274</sup> See WITTE, *supra* note 14, at 217; see also MONSMA, *supra* note 257, *passim*.

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