Who Knows Best? The Appropriate Level of Judicial Scrutiny on Compulsory Education Laws Regarding Home Schooling

Linda Wang
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THE APPROPRIATE LEVEL OF JUDICIAL SCRUTINY ON COMPULSORY EDUCATION LAWS REGARDING HOME SCHOOLING

LINDA WANG*

Brian Rohrbough remembers the promise he and other anxious parents made on April 20th as they stood outside Columbine High School waiting to see if their children had made it out alive.

“People were saying, if my child is O.K., he or she will never set foot in that school again,” Mr. Rohrbough said.

Although his 15-year-old son, Daniel, was among the 13 murdered in the school that day, Mr. Rohrbough wants other parents to make good on that promise. “It’s amazing that people have already forgotten the terror,” he said.

To Mr. Rohrbough and many others who recently attended “Education Options,” a seminar here sponsored by local home-school groups, public schools no longer represent a haven for their children.1

INTRODUCTION

Many parents are concerned with the environment schools provide their children—fearing school violence, drugs, and the negative impact of peer pressure.2 Many parents are also dissatisfied with the quality of the

*J.D., St. John’s University School of Law, 2010. The author would like to dedicate this Note to her late father.
2 See id. (noting that several weeks after the Columbine incident, inquiries to groups that work with home schoolers increased); see also Scott W. Somerville, The Politics of Survival: Home Schoolers and the Law, http://www.hslda.org/docs/nche/000010/politicsofsurvival.asp (last visited Sept. 22, 2010) (showing how quickly home education caught on with the general public in the aftermath of Columbine).
academic instruction provided by their local schools. These concerns and dissatisfactions, together with parents’ growing desire to provide religious or moral instruction, have contributed to an increase in home schooling. Approximately 1.1 million children were being home-schooled in the United States in 2003—a twenty-nine percent increase from the estimated 850,000 children who were being home-schooled in 1999.

In addition to the increase in home schooling, numerous studies have revealed that home-schooled children are excelling in their academic performance. A recent survey showed home-schooled children outperforming their public school counterparts, reaching and exceeding the 80th percentile on national exams. These results have been attributed to the high level of dedication and commitment of home schooling parents, smaller class sizes, and the parents’ ability to tailor the curriculum to their individual child’s needs.

Home schooling is not a novel practice; rather, it has “played a significant role in the early years of American education.” George Washington, in addition to many of our early Presidents—John Madison, John Adams, and John Quincy Adams—were home-schooled during the late colonial era when few public schools existed. During this time, education

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3 See Gregory J. Millman, Home Is Where the School Is, WASH. POST, Mar. 23, 2008, at B1 (noting that teachers at a local school possessed low expectations for their students); see also Matthew E. Milliken, Summit Focuses on Low Expectations; Teach For America Leaders, Alumni Gather in Durham, HERALD SUN, Mar. 7 2010, at C1 (explaining that low expectations held by primary school teachers hurt low-performing students).


5 Princiotta Et Al., supra note 4; see also Milton Gaither, Home Schooling Goes Mainstream, 9 EDUC. NEXT 1, available at http://educationnext.org/home-schooling-goes-mainstream/ (quoting statistics which demonstrate the growth of home schooling).


9 See Charles Francis Adams, The Works of John Adams, Second President of the United States 12 (1856) (stating that, before entering college, John Adams was taught by a local
was generally provided at home out of necessity until public schools were later established for children of the poor.\textsuperscript{10} By 1671, almost all of the New England colonies had adopted some form of compulsory education and had established schools that would provide instruction in reading, writing, and Bible study.\textsuperscript{11} Despite the fact that home schooling predates the states' undertaking to provide education to the young, the parents' ability to return to the practice of home schooling, as an alternative to institutional education, is not without constraint.

Although the reasons for choosing to home school are well-founded, and home-schooled children have been shown to thrive academically, the ability to home school is nevertheless subject to state regulations. Compulsory attendance statutes exist in all fifty states, containing varying provisions for home school instruction.\textsuperscript{12} Regulations on home schooling include: parental notifications to local school boards that a child will be home-schooled, state mandated subject requirements or curriculum approval, prerequisite teaching qualifications of the parent, and standardized testing of the home-schooled student.\textsuperscript{13} Parents who fail to
comply with these laws may face criminal sanctions, including, but not limited to, a misdemeanor conviction.14

As compulsory education laws increased in popularity, so did the tension between the parents and the States.15 Parents began challenging state constitutions, asserting that laws pertaining to home schooling interfered with their rights to determine and direct the education of their children.16 Challenges to these regulations are generally raised under two types of claims: (1) parents who allege that state regulations violate their right to direct the education of their child raise their claim pursuant to the Fourteenth Amendment’s Due Process Clause, and (2) parents who have chosen to home school for religious purposes raise their claim under the First Amendment’s Free Exercise Clause.17

Due to the different interpretations of the Supreme Court cases regarding the parental right to direct the upbringing and education of one’s child and free exercise claims challenging religion-neutral, generally applicable compulsory education laws, the standards of judicial scrutiny applied by federal courts to these cases vary greatly.18 To complicate matters more, the Supreme Court has not offered further guidance on how to address these claims.

Federal courts have posed different factors in determining the level of

14 See State v. Rivera, 497 N.W.2d 878, 879 (Iowa 1993) (explaining the defendants’ conviction of a misdemeanor for failure to furnish a home schooling report as required by Iowa state law); GORDON, supra note 8, at 7 (stating that parents’ failure to comply with compulsory education laws can result in criminal prosecution and misdemeanor conviction).

15 See GORDON, supra note 8, at 8 (noting that compulsory attendance laws create tension between public and home schooling because they intrude upon a parent’s right to control the education of his or her children); Khianna Bartholomew, Note, Avoiding Implicit Acceptance of Bigotry: An Argument for Standardized Testing of Home-Schooled Children, 92 CORNELL L. REV. 1177, 1180 (2007) (asserting that the advent of compulsory attendance laws generated tension between parental rights and the state’s interest).

16 See GORDON, supra note 8, at 8 (commenting that, by their nature, compulsory attendance laws interfere with parental rights to determine and direct the education of their children); see also Robin Cheryl Miller, Annotation, Validity, Construction, and Application of Statute, Regulation, or Policy Governing Home Schooling or Affecting Rights of Home-Schooled Students, 70 A.L.R. 5th 169, *2 (1999) (indicating that most litigation challenging home school regulations involves constitutional claims).

17 See KLICKA, supra note 6, at 27 (asserting that home schooling is protected by the First and Fourteenth Amendments); see also William L. Campbell, Jr., Moving Against the Tide: An Analysis of Home School Regulation in Alabama, 52 ALA. L. REV. 649, 650-651 (2001) (reporting that statutory schemes for regulating home schools typically involve constitutional issues, especially issues involving the First and Fourteenth Amendments).

18 See Miller, supra note 16, at 2b (citing the different scrutiny tests applied to questions of the right to home schooling); see also Campbell, supra note 17, at 655 (noting that the question of what level of scrutiny to apply is largely unsettled).
judicial scrutiny required for each type of claim. Ultimately, for parental rights and free exercise claims, the determining factor rests on the reviewing court’s interpretation of qualifying rights. The standard of judicial review on claims under the Fourteenth Amendment is dependent on whether the reviewing court recognizes that the parental right to direct a child’s education is a fundamental one. On claims pursuant to the Free Exercise Clause of the First Amendment, the standard of review applied by the courts rests on whether the circuit acknowledges “hybrid claims”—where a free exercise claim is brought in conjunction with another constitutional claim—and if so, whether the two claims must be independently viable in order to be afforded heightened review.

This Note argues that the parental right to direct the education of one’s child is a fundamental liberty, and, therefore, deference should be given to the parent. In addition, this Note contends that circuit courts should recognize hybrid claims, which require an independently viable claim of a constitutional violation in addition to a viable free exercise claim. Part I analyzes the interests and rights of the parent and the State with respect to education, and the Supreme Court’s interpretations of these interests and rights in cases regarding education and parental control. In addition, Part I surveys the current standards of judicial review utilized by the different federal circuits on parental claims under the Fourteenth Amendment and argues that courts should pay deference to the parents’ decisions regarding the education of their child by applying a heightened level of review. Part II contends that an intermediate level of judicial scrutiny is the most appropriate level of review in claims brought under the Fourteenth Amendment. Part II also proposes several factors that must be weighed against a state’s regulation in determining whether the challenged regulation substantially furthers its interest in education. Part III addresses the claim of free exercise of religion, where the challenged state regulation is alleged to have impeded the parents’ right to freely exercise their religion by choosing to home school their child. Furthermore, Part III outlines the Supreme Court’s decisions on what constitutes a valid free exercise claim against state regulations, and presents the current interpretations of the Court’s decisions by the federal circuits. Finally, Part IV demonstrates the Supreme Court’s intent that a valid hybrid claim, which warrants strict scrutiny review, requires a free exercise claim brought in conjunction with another independently viable constitutional claim.
I. PARENTAL RIGHT TO DIRECT THE EDUCATION OF ONE’S CHILD UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

A child has two “parents”—the biological parent or guardian and the State. Both “parents” seek to raise a child who will possess a good moral character, be provided the opportunity to be self-reliant and independent in thought, and who will engage in his or her community in hopes of perpetuating the values of democracy and civic virtues. Each “parent” has a different basis for its intent. On the one hand, the parental right of the biological parent or guardian to make decisions regarding the education of his or her children is deeply rooted in “the history and culture of the Western civilization.” 19 On the other hand, the State’s police power and its constitutional mandate obligate it to provide a basic education. Who prevails?

A. The Interests and Rights of the Parent

While the majority of parents who home school are motivated by moral or religious reasons, 20 other concerns have been cited in deciding to home school. 21 Some of the more popular concerns include the lack of safety in schools, dissatisfaction in the quality of education provided, and the inability to accommodate children with special needs. The recent tragedies of Columbine H.S. and Virginia Tech have also prompted many parents to contemplate alternatives to institutional education, such as home schooling. 22 For parents who were already home schooling their children, 19 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

20 See GORDON, supra note 8, at 5; see also NAT’L CTR. FOR EDUC. STATISTICS, ISSUE BRIEF: 1.5 MILLION HOMESCHOoled STUDENTS IN THE UNITED STATES IN 2007, at 1-3 (2008), http://nces.ed.gov/pubs2009/2009030.pdf [hereinafter ISSUE BRIEF] (reporting that a plurality of parents choose to home school their children to provide religious and moral instruction).

21 PRINCIOTTA ET AL., supra note 4, at 13. In a 2003 survey conducted by the National Household Education Surveys Program (NHES), parents expressed the most important reason behind their choice of home schooling: concerns about the environment (31.2%); dissatisfaction with academic instruction (16.5%); to provide religious and moral instruction (29.8%); child has a physical or mental problem (6.5%); child has special needs (7.2%); other reasons (8.8%). Id.; see also ISSUE BRIEF, supra note 20, at 2. In a 2007 survey conducted by the National Household Education Surveys Program (NHES), parents expressed their most important reasons behind their choice of home schooling: concerns about the school environment (88%); a desire to provide religious or moral instruction (83%); a dissatisfaction with academic instruction at other schools (73%); nontraditional approach to child’s education (65%); child has special needs (21%); child has a physical or mental health problem (11%); other reasons (32%). Id.

22 Daniel Golden, Class of Their Own: Home-Schooled Pupils Are Making Colleges Sit up and Take Notice—They’re Among Top Scorers On the SAT, and They Defy Certain Stereotypes—The Twins’
the news was a reaffirmation of their decision to home school. As justified as these concerns may be, the parent’s ability to make decisions regarding his or her child’s education is not absolute.

The Supreme Court has recognized that the parent’s right to direct the education of his or her child is a “liberty” interest protected under the Constitution. In the seminal case of *Meyer v. Nebraska*, the Court addressed the concept of “liberty” guaranteed by the Fourteenth Amendment of the Constitution.23 The Court proclaimed that liberty, beyond what is enumerated in the Constitution, “denotes . . . the right . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”24 Liberty, as defined by the Court, encompasses family autonomy, which includes the “natural duty” of the parent to educate his or her children.25 This right was later reaffirmed in *Pierce v. Society of Sisters*, when the Court found unconstitutional a state statute that inhibited parents’ right to choose between public and private schools for their children.26 Then in 2000, in *Troxel v. Granville*, the Court held that a mother’s decision to limit the visitation rights of her child’s grandparents must be protected, and it reiterated that the liberty interest of parents “in the care, custody, and control of their children—is perhaps the oldest fundamental liberty interest recognized by [the] Court.”27

The Court, in recognizing family autonomy in *Meyer*, *Pierce*, and in *Troxel*, declared that a parent has a constitutional right to direct the upbringing and education of their child that is protected under the Fourteenth Amendment Due Process Clause.28 This right derives from the legal doctrine of substantive due process—the Court’s recognition that certain “liberties” are so fundamental that the Constitution embodies them even though they are not enumerated.29 When a law infringes upon an

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24 *Id.* at 399.
25 *Id.* at 400.
individual’s fundamental right, it can only be justified by a showing of a compelling governmental interest and that the law was narrowly tailored to achieve that interest. i.e., the courts will apply strict scrutiny review. Unfortunately, the federal courts have not applied this level of judicial review to cases regarding the parental right to direct the education of one’s child.

B. The Interests and Rights of the State

The State has a compelling interest in developing the civic virtues and the autonomy of children, which are necessary to perpetuate a liberal democracy. One of the ways to best meet these interests is through the State’s regulation of education. For at least sixty years, education has been recognized as “perhaps the most important function of state and local governments.” Moreover, the Supreme Court has conceded “that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence . . . . [E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.”

Although the right to education is not granted by the U.S. Constitution, it is explicitly granted by all 50 state constitutions. The mandated state obligations vary from state to state, but ultimately provide the right to free public education. The state’s authority is derived from the Tenth Amendment, which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Within these reserved powers is the State’s police power to regulate activities concerning the health, safety,

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30 See Troxel v. Granville, 530 U.S. at 72-73 (applying strict scrutiny to a statute regulating the ability of parents to determine third party visitations); id. at 80 (Thomas J., concurring opinion) (noting that strict scrutiny should be applied to infringements of fundamental rights).


36 U.S. CONST. amend. X.
welfare, and morals of its citizens. Compulsory education laws fall within the State's police power to ensure the welfare and morality of its citizens by providing children with a basic education. These laws further "demonstrate our recognition of the importance of education to our democratic society . . . . It is required in the performance of our most basic public responsibilities . . . [and] is the very foundation of good citizenship."

C. Disparity in the Standard of Judicial Review Applied by Federal Courts in Parental Rights Claims Under the Fourteenth Amendment

Parental claims alleging that the State's compulsory education laws violate their right to direct the education of their child under the Fourteenth Amendment's Due Process Clause have produced disparate results in the federal courts. Most circuit courts have held that challenges to state compulsory education laws require a rational basis review, which provides that the law is valid so long as it is reasonably or rationally related to a legitimate state objective. The Second Circuit, the Fourth Circuit, the Sixth Circuit, and the Eighth Circuit have upheld state compulsory education laws that have met rational basis review. The District of Columbia Circuit, however, has applied intermediate scrutiny in cases

37 Champion v. Ames, 188 U.S. 321, 364-65 (1903) (Fuller, J., dissenting) (noting a state's power to impose regulations concerning the public's well being); In re Rahrer, 140 U.S. 545, 554 (1891) (discussing State's power to promote "public health, good order and prosperity").

38 See Yoder, 406 U.S. at 213 (noting the power of the state "to impose reasonable regulations for the control and duration of basic education"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (acknowledging the State's power to regulate schools).

39 Yoder, 406 U.S. at 213; see Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (noting that knowledge is essential to good government and that education should be diligently promoted).


41 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38, 55 (1973) (rejecting education as a fundamental liberty that requires a state's educational system to bear anything higher than some rational relationship to a legitimate state purpose); Immediato, 73 F.3d at 462 (implementing rational basis review).

42 Gilles, supra note 40, at 115 (comparing Supreme Court dicta and the circuit courts' refusal to adopt a heightened scrutiny level of analysis for parental childrearing rights).

43 Herdon v. Chapel Hill-Carrboro Bd. of Ed., 89 F.3d 174, 179 (4th Cir. 1996) (holding that a school's requirement that a student perform fifty hours of community service to graduate is rationally related to the school's interest in teaching students the value of service).

44 Ohio Ass'n of Indep. Sch. v. Goff, 92 F.3d 419, 424 (6th Cir. 1996) (deciding plaintiffs failed to demonstrate there was no reasonable basis for the school's action of utilizing a testing requirement to ensure that students from both public and private schools meet certain basic standards).

45 Murphy v. Arkansas, 852 F.2d 1039, 1044 (8th Cir. 1988) (ruling a state policy subjecting home schooling students to regulatory requirements was reasonably related to state's interest to educate its citizenry).
regarding the parental right to direct and control the upbringing of one's child, and the Ninth Circuit has applied a heightened scrutiny in reviewing cases regarding parental right claims under the Fourteenth Amendment.

The disparity in interpretation and judicial scrutiny stems from the confusion created by the Supreme Court's repeated use of the phrase "reasonable relation" when describing valid state regulations on education and, at the same time, referring to the parental right as "fundamental."

The language used by the Court is problematic because the requisite level of judicial scrutiny is vastly different between the two categories.

In cases alleging a violation of a constitutional right, the level of judicial scrutiny applied depends on whether the status of the right is "fundamental" under the U.S. Constitution. While a right may have a constitutional source, interference of a constitutional right generally only requires the State to show a rational basis in the regulation. However, if the right is deemed fundamental by the Court, a valid interference by the State requires a showing of a compelling government interest and that the regulation is narrowly tailored to further that interest. The Court's usage of conflicting language, therefore, has made it difficult for the lower courts to ascertain whether the parental right to direct the education of one's child is a fundamental right, deserving of strict scrutiny review.

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46 Hutchins v. District of Columbia, 188 F.3d 531, 541 (D.C. Cir. 1999) (applying intermediate scrutiny to the Juvenile Curfew Act of 1995, which barred juveniles 16 and under from being in a public place unaccompanied by a parent or without equivalent supervision from 11:00 p.m. on Sunday through Thursday to 6:00 a.m. on the following day and from midnight to 6:00 a.m. on Saturday and Sunday).

47 Peterson v. Minidoka City Sch. Dist., 118 F.3d 1351, 1385 (9th Cir. 1997) (claiming the government needed a compelling interest to interfere with a parent's religious freedom to home-school his children according to his religious beliefs).

48 Eric W. Schultze, The Constitutional Right of Parents to Direct the Education of Their Children, 138 Ed. Law. Rep. 583, 588 (1999) (noting that confusion still exists as to whether a parental right is fundamental); see also Pierce v. Soc'y of Sisters, 268 U.S. 510, 530 (1925) (failing to give compelling reasons for governmental interference when referring to a parental constitutional right); Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) (stating that individuals have certain fundamental rights but not specifically identifying the parental right as fundamental).

49 See Schultze, supra note 48 (describing the framework of analysis for infringements on constitutional liberties); see also Herdon v. Chapel Hill-Carrboro Bd. of Ed., 89 F.3d 174, 177 (4th Cir. 1996) (explaining the legal analysis regarding infringements on constitutional liberties).

50 See Schultze, supra note 48 (citing the judicial scrutiny of a state's interference of a non-fundamental right is a reasonable basis); see also Herdon, 89 F.3d at 177 (stating the judicial scrutiny of a state's encroachment of a right considered less than fundamental is the state's action must bear a rational relationship to legitimate state purposes).

51 See Schultze, supra note 48 (stating government interference with a fundamental right must be justified by a compelling interest); see also Herdon, 89 F.3d at 177 (holding that government infringements on liberties deemed constitutionally fundamental are held to a heightened or strict level of judicial scrutiny).
D. Giving Deference to the Parent

An infringement upon a fundamental right requires a state to prove that the regulation is narrowly tailored to serve a compelling state interest, that is, the regulation would only be deemed valid if it withstands strict scrutiny review.\textsuperscript{52} How can we reconcile the differences in the Court’s language?

a. The Balancing Act

A state’s power to regulate education does not control all parental decisions regarding their children’s education. In \textit{Yoder}, the Court asserted: “There is no doubt as to the power of a State, having a high responsibility for the education of its citizens, to impose reasonable regulations for control and duration of basic education . . . , [however,] the values of parental direction of the religious upbringing and education of their children in the early formative years have a high place in our society.”\textsuperscript{53}

Nevertheless, the Court, in discussing the balance between the rights of parents and the compelling interest of the State, has on numerous occasions expressed that fundamental liberties are not absolute. The Court made it clear in \textit{Pierce} that the parental right to direct the education of one’s child is not without limitations:

No question is raised concerning the power of the State to reasonably regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to public welfare.\textsuperscript{54}

The State’s police power, however, does not presumptively preempt the fundamental rights of parents. In \textit{Meyer}, the Court articulated “that the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, morally, is clear; but the individual has certain fundamental rights which must be respected.”\textsuperscript{55} The State, in its


\textsuperscript{53} Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (holding that a state’s interest in a child’s education must be weighed against the religious interest of their parents).

\textsuperscript{54} Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925).

\textsuperscript{55} Meyer v. Nebraska, 262 U.S. 390, 401 (1923).
enforcement of education regulations, cannot supplant a fundamental right without justification of an "overriding interest." 56 This was made evident in the Court’s oft-quoted opinion from Pierce: "The child is not a mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 57

Moreover, in Parham v. J.R, the Court maintained its long recognition of the "natural bonds of affection" between a parent and child, and acknowledged the presumption that a parent "acts in the best interests of their children." 58 In addressing the question of how much due process is accorded to a child whose parent decided to commit him to a mental institution (which was validated by professionals), the Court opined, "[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course." 59 The Court then proceeds to cite Prince, Meyer, Pierce and Yoder to illustrate its deference to the decisions made by parents regarding their children. 60 Therefore, federal courts should follow suit.

b. Deference to the Parent

The parental right to direct his or her child is a natural right. The Court, in defining "liberty" under the Fourteenth Amendment, has held that certain rights are the "very essence of a scheme of ordered liberty . . . [and] [t]o abolish them [would] violate a 'principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.'" 61 One of these liberty interests is the right to "bring up children . . . [.] long recognized at common law as essential to the orderly pursuit of happiness." 62 The parental right is not a newly created liberty interest by

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56 See Dale R. Agthe, Annotation, Validity of State Regulation of Curriculum and Instruction in Private and Parochial Schools, 18 A.L.R.4th 649 (explaining that the state can require certification of teachers even if it denies the free exercise of religion, because the state has an overriding interest in seeing that its children are thought be capable persons); Cf. NOWAK & ROTUNDA, supra note 29, at 926-27 (noting that in the context of terminations in parent-child relationships, the Court has "clearly indicated that regulations of these types of relationships must be justified by an overriding state interest").

57 Pierce, 268 U.S. at 535.


59 Id.

60 Id.


the Court, but rather a common law right older than the state constitutions. It is one based on the concept of natural law, the relationship between parent and child, and it "exists in every society whether through social contract or divine intervention... in which [t]he state cannot intrude... without justification."64

Furthermore, the "reasonable relation" language in the Supreme Court's prior opinions is not determinative of a rational basis standard of review in parental claims under the Fourteenth Amendment. Although the Court, in Meyer and in Pierce, used the blanket term "reasonable relation" in describing valid state regulations on education,65 the Court's usage of "reasonable relation," does not resemble the Court's current application of "rational basis review."66 Rather, the Court's opinions in these cases made evident a more searching scrutiny; an analysis resembling current day rational basis review with "bite."67 Moreover, Meyer and Pierce "were decided before the development the Court's modern day demarcation of levels of scrutiny in substantive due process."68

Proponents of the view that the State's compelling interest should prevail in determinations regarding the validity of compulsory education laws will probably cite to Board of Education of Central School District v. Allen, arguing that the State can regulate against home schooling if it derogates from the State's interest. Here, the Court explicitly stated that the State has

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63 Erik M. Zimmerman, Note, Defending the Parental Right to Direct Education: Meyer and Peirce as Bulwarks Against State Indoctrination, 17 REGENT U.L. REV. 311, 313 (2004-05) (examining the origins of the parental right to direct their children's education); see Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests, 81 MICH. L. REV. 463, 572 (1983) (noting that the right of parental authority was not created "out of whole constitutional cloth").

64 ROSEMARY C. SALOMONE, VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION 77 (2000); see NOWAK & ROTUNDA, supra note 29, at § 11.1 (discussing the doctrine of "vested rights").

65 See Meyer, 262 U.S. at 403 ("We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."); see also Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) ("[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of the parents and guardians to direct the upbringing and education of children under their control... rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.").

66 See Joseph W. Ozmer II, Who's Raising the Kids: The Exclusion of Parental Authority in Condom Distribution in Public Schools, 30 GA. L. REV. 887, 915 (1996) (noting that the "reasonableness" standard applied in substantive due process cases during the Lochner era, although mimicked the language of modern day rational basis review, was a stricter scrutiny); see also NOWAK & ROTUNDA, supra note 29, at §11.3 (noting that while the "test" might sound mild, independent judicial review of such legislation made the constitutionality of these laws dependent on the Justices' individual views).

67 Ozmer, supra note 66, at 915 (describing the stricter application of rational basis review during the Lochner era); ROTUNDA & NOWAK, supra note 29, at § 18.3(b).

68 Brown v. Hot, Sexy & Safer Prods. 68 F.3d 525, 533 (1st Cir. 1995); Eichner, supra note 31, at 1381.
the power to refuse to allow instruction at home.  

Although at first glance it would seem that the Court is condoning the State’s ability to refuse home schooling altogether, it is arguable that the Court, in expressing the importance of state regulations in education, was describing the very outer limits of state power. The Court’s dicta implicate the necessity to balance the interest of the State and the parents’ rights, not the State’s ability to invariably abridge the parents’ rights to home school their child. Moreover, the Court has held that “however strong the State’s interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.”

The decisions in Meyer and its progeny substantiate the Court giving great deference to the parent in claims against government regulation. It is without a doubt that the State’s interest is compelling. Governance of the community, especially when those interests involve the welfare of children, is necessary to enforce public safety, peace, and order. Yet, when a State’s compulsory education law infringes on the fundamental right of the parent to direct the education of his or her child, the courts should defer to the parent’s decision when weighing these claims by imposing a heightened scrutiny.

c. The Exception

The presumption that a parent’s decision is always in the best interest of his or her child can be rebutted under certain circumstances. In Prince v. Massachusetts, the Court upheld Massachusetts’ child labor laws by determining that the State’s compelling interest in preventing child exploitation, and other harms that may impact the child’s welfare, overrode the parent’s decision to have his or her child solicit on the street pursuant to their religion’s doctrines. Here, the case turned on the potential of a real threat to the health and safety of the child due to the parent’s decision.

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69 Bd. of Ed. v. Allen, 392 U.S. 236, 246-47 (1968) (noting that assuring educational standards are met is a sufficient reason for a state’s refusal to allow home schooling).
72 See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 569 (1993) (discussing the government’s interest in promoting public safety); see also Yoder, 406 U.S at 215-216 (pointing out that ordered liberty precludes allowing every person to set standards on matters of conduct in which society as a whole has important interests).
73 321 U.S. 158, 166, 170 (1944) ("Acting to guard the general interest in youth’s well being, the state as parens patriae may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.").
Accordingly, deference should be given to the parent’s decisions regarding
education when juxtaposed with the state’s compelling interest unless the
decision may threaten the health or safety of the child.

The presumption that courts should defer to the decisions of the parent is
further noted in the Court’s opinion in *Parham*. In addressing the State’s
argument that regulations were necessary to protect children from some
parents who may not act in the child’s best interest, the Court stated:

That some parents may at times be acting against the interest of
their children . . . creates a basis of caution, but is hardly a
reason to discard wholesale those pages of human experience that
Teach that parents generally do act in the child’s best interests.
The statist notion that government power should supersede
parental authority in all cases because some parents abuse and
neglect children is repugnant to American tradition.74

The parental right in the care, custody, and control of a child is not lost
because a few are not model parents.

II. PROPOSED JUDICIAL SCRUTINY AND ITS APPLICATION ON HOME
SCHOOLING REGULATIONS

Both the parent and the State, in addressing education, are appealing to
the same fundamental public policy—the well-being of the child.75 Parents
seek to strengthen the emotional bonds of the family and of the community,
to bestow religious beliefs, to reinforce ethnic ties, and to further cultivate a
child’s moral values.76 For many, home schooling, would provide a better
quality education through a safer and more nurturing environment.77 The
State, on the other hand, has an interest and responsibility in education so
that it can “develop civic virtues and a national character through a shared
set of values . . . [and to] create citizens who could respect each other’s

1047-48 (E.D. Pa. 1975)) (internal quotations and citations omitted).
75 Prince, 321 U.S. at 166 (upholding the conviction of a Massachusetts woman for violating the
state labor laws by making her child street preach); State v. Bailey, 61 N.E. 730, 732 (Ind. 1901)
(finding that no parent can deprive his child of the right to education).
76 See Salomone, supra note 64, at 17 (discussing the prospective that common schooling
“created communal and intergenerational alienation.”); Mindy Sink, Shootings Intensify Interest in
Home Schooling, N.Y. TIMES, Aug. 11, 1999, at B7 (listing recent school shootings among the reasons
why parents choose to home school their children).
77 See Bartholomew, supra note 15, at 1183-84 (noting that home schooling allows parents “to
mold the material to fit the unique characteristics of the child” such that “home schooling will better
serve their children’s academic and social needs”); Princiotta ET AL., supra note 4, at 14,
http://www.nces.ed.gov/pubs2006/2006042.pdf (listing the most frequently cited reasons for
homeschooling).
differences while sharing a common ethos of what it means to be American." \(^7^8\)

When both parties are attempting to advance their interests and an impingement of a constitutional right occurs through the exercise of valid state power, the courts are confronted with the question of what is the appropriate level of judicial review. In other words, whose rights and interests should be given greater weight?

**A. Current State Regulations on Home Schooling**

Regulations regarding home schooling are derived from state statutes that either directly authorize and regulate home schooling, or address home schooling as an exemption to its compulsory education law. \(^7^9\) These regulations vary in degree from state to state. \(^8^0\) Six states have strict regulations requiring parents to send notification of the intent to home school, submit achievement test scores and/or professional evaluation, plus other requirements (e.g., curriculum approval by the state, subjects that must be taught, teacher certification of parents, or home visits by state officials). \(^8^1\) Twenty-one states (including the District of Columbia) have moderate regulations requiring parents to send notification, test scores, and/or professional evaluations of student progress. \(^8^2\) Fourteen states have

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\(^7^8\) See Salomone, supra note 64, at 2.


\(^8^0\) See Summary of Laws, supra note 79, at iv-v (summarizing and contrasting varying state regulations on home-schooling); sources cited infra note 82 (listing a selection of state statutes regulating home schooling).


\(^8^2\) Home School Map, supra note 81 (identifying states with moderate regulation of home schooling, namely AR, CO, DC, FL, GA, HI, IA, LA, MD, ME, MN, NC, NH, OH, OR, SC, SD, TN, VA, WA, WV); e.g., Ark. Code Ann. § 6-15-503 (2010)(a)(4) (mandating that parents deliver written notice in person to the superintendent of their local school district); Colo. Rev. Stat. § 22-33-104.5(3)(f) (2010) (requiring each child participating in a nonpublic home-based educational program to be evaluated when such child reaches grades three, five, seven, and nine).
even less stringent regulations requiring only that the parent submit a notice of the intent to home school, and ten states do not require any notice.83

The components of the regulations themselves also vary substantially. Notice requirements range from sending a "notice of intent" to the local superintendent, to submitting an affidavit for approval.84 Curriculum requirements may range from requiring parents to teach specified subjects to adhering to the public school curriculum in their state.85 A more lenient version of this requirement is the submission of the intended curriculum by a parent seeking approval from the superintendent to home school.86 Prerequisite qualifications of the parent vary from being "capable of teaching" to requiring that the parent hold a teaching certificate or at least be supervised by a certified teacher.87 Finally, academic evaluation requirements range from an evaluation by a "qualified person" under the statute, who is selected by the parent, to taking a standardized exam with students in the public schools.88

83 Home School Map, supra note 81 (contrasting states that require a low level of notice, including: AL, AZ, CA, DE, KS, KY, MS, MT, NE, NM, NV, UT, WI, WY, with those states that have no notice requirements, including: AK, CT, ID, IL, IN, MI, MO, NJ, OK, TX); e.g., Ala. Code § 16-28-7 (2001) (amended 2009) (mandating specific notice requirements for all public schools, private schools, private tutors, and church schools).

84 See Colo. Rev. Stat. § 22-33-104.5(3)(e) (2009) ("Any parent establishing a nonpublic home-based educational program shall provide written notification of the establishment of said program to a school district within the state fourteen days prior to the establishment of said program and each year thereafter if the program is maintained. The parent in charge and in control of a nonpublic home-based educational program shall certify, in writing, only a statement containing the name, age, place of residence, and number of hours of attendance of each child enrolled in said program."); 24 Pa. Cons. Stat. Ann. § 13-1327.1(b)(1) (West 2009) ("A notarized affidavit of the parent or guardian or other person having legal custody of the child or children, filed . . . with the superintendent of the school district of residence and which sets forth: the name of the supervisor of the home education program who shall be responsible for the provision of instruction, the name and age of each child who shall participate in the home education program; the address and telephone number of the home education program site . . . ").

85 See Summary of Laws, supra note 79; N.Y. Educ. Law § 3204(2) (Consol. 2010) ("Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.") (emphasis added); N.D. Cent. Code § 15.1-23-04 (2010) (mandating that all home education include curriculum “include instruction in those subjects required by law to be taught to public school students”).

86 See Ohio Admin. Code 3301:34-03(A) (2010) ("A parent who elects to provide home education shall supply . . . [a] [b]rief outline of the intended curriculum for the current year."); Va. Code Ann. § 22.1-254.1 (2010) ("Any parent who elects to provide home instruction in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum to be followed for the coming year . . . .")

87 Summary of Laws, supra note 79, at v; e.g., Minn. Stat. Ann. § 120A.22(10)(2) (2010) (providing a list of requirements for instructors, among them being direct supervision by a person holding a Minnesota teaching license).

88 E.g., Wash. Rev. Code § 28A.200.010(1)(c) (2010) ("Each parent whose child is receiving home-based instruction . . . shall have the duty to . . . [e]nsure that a standardized achievement test approved by the state board of education is administered annually to the child by a qualified individual . . . ."); see also Summary of Laws, supra note 79.
Critics of home schooling have raised concerns about states relinquishing their supervisory role in education by affirmatively allowing home schooling parents to take complete control over their child's education. Some of these concerns include the inadequacy of the child's education,\(^9\) the lack of socialization provided in a home school environment,\(^9\) the loss of the safety function provided by public education such as monitoring vaccinations and child abuse prevention,\(^9\) and the inability of a home schooling parent to prepare the child for citizenry.\(^9\)

**B. The Appropriate Standard of Judicial Review on Parental Rights Claims Under the Fourteenth Amendment**

An intermediate level scrutiny would be the most appropriate standard of judicial review on parental claims advanced under the Fourteenth Amendment. This represents a compromise that would further two undoubtedly important interests of the parent and State. This level of scrutiny would not only protect the sanctity of family autonomy, but it would also allow the State to uphold its responsibilities of ensuring that the child receives a civic education and that the child possesses the autonomy needed to make life decisions independently.\(^9\)

\(^9\) *See* Nat'l Educ. Ass'n, 2009-2010 NEA Resolutions 37 (2009) ("The National Education Association believes that home schooling programs based on parental choice cannot provide the student with a comprehensive education experience."); Home Schooling, Education Week, Sept. 21, 2004, http://www.edweek.org/ew/issues/home-schooling/ ("Opponents of the movement worry that there is no way to assure that all home-schooled students receive a quality education. In the eyes of some public school teachers and administrators, this lack of quality control makes home schooling a dangerously deregulated enterprise.").

\(^9\) *See* Bartholomew, supra note 15, at 1185; *see also* Heather M. Good, "The Forgotten Child of Our Constitution": The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children, 54 Emory L.J. 641, 677-78 (2005) (arguing for an educational system that fosters respect for diversity).

\(^9\) *Stephanie M. Tabone, Home-Schooling In Pennsylvania: A Prayer For Parental Autonomy in Education, 21 St. John's J. Legal Comment 371, 386 (2006) (discussing the critique that homeschooling removes the "safety-net function" provided by public schools in the area of child protection); Timothy Brandon Waddell, Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Regulation of Homeschooling, 63 Vand. L. Rev. 541, 557 (2010) (arguing that lack of regulation in homeschooling undermines the states' ability to enforce compliance with compulsory immunization laws and child abuse laws).*

\(^9\) *Eichner, supra, note 31 at 1351. Parents are disadvantaged compared to the state because they are more likely to focus on the individual interests of the parent and not society's long-term interest. Id. Moreover, the parent's views may prevent children from developing the capacity to think for themselves; autonomy which is implicated in civic education. Id. at 1367; Elizabeth Reilly, Symposium: Education and the Constitution: Shaping Each Other and the Next Century, 34 Akron L. Rev. 1, 1-2 (2000). Public education is necessary to prepare the citizenry for self-government and education is the very foundation of citizenship in a democratic society.*

\(^9\) *Perry L. Glanzer, Rethinking the Boundaries and Burdens of Parental Authority Over Education: A Response to Rob Reich's Case Study of Homeschooling, 58 Educ. Theory 1, Jan. 1, 2008, 8-9 (discussing Reich's opinion on the State's main interests in education); Rob Reich, On Regulating Homeschooling: A Reply to Glanzer, 58 Educ. Theory 17, Jan. 1, 2008, 1, (discussing the
Intermediate scrutiny entails a greater balancing of the rights and interests of the parties, which inherently is a more searching analysis by the reviewing court. This level of review does not provide the State as much deference as rational basis review, yet it is easier to meet than strict scrutiny review. The Supreme Court has formally adopted intermediate scrutiny in cases involving gender discrimination\textsuperscript{94} and illegitimacy.\textsuperscript{95} This standard of review requires that the State has an important interest and that the regulation in question is substantially related to furthering that interest.\textsuperscript{96} The State's important interest in compulsory education laws will generally be easy to satisfy\textsuperscript{97} because the Supreme Court has stated that the State's interest in education is "compelling," let alone "important." However, the focus here is whether the regulation, in addressing a particular concern regarding education, justifies overriding the parental right. Additionally, in determining whether the regulation is substantially related to serving that interest, there must be a nexus between the motive behind the regulation and its intended result.

To ensure that the parent's interests and rights in directing the education of his or her child are safeguarded, several factors must be considered in addition to the heightened scrutiny. First, does the regulation, in practice, obtain results that reflect the State's interest of ensuring that the child is receiving an adequate education? Second, does the regulation allow parents to make decisions for their child? Third, is the regulation result oriented or process oriented? Lastly, has the parent been provided a neutral arbitrator in determinations regarding compliance?

a. Whether the regulation, in practice, obtains results that reflect the State's interest of ensuring that the child is receiving a basic education.

State regulations on education must be for the purpose of regulating real tripartite interests at stake in the education of children: interests of the child, the parents, and the state).


\textsuperscript{96} See Clark, 486 U.S. at 461 (laying out the intermediate scrutiny standard); Craig, 429 U.S. at 197 (stating the government's burden under intermediate scrutiny).

\textsuperscript{97} See Ambach v. Norwich, 441 U.S. 68, 76 (1979) (noting the importance of public education); Gilles, supra note 40, at 126-27 (suggesting that courts will usually agree with state assertions that improving the welfare of children is an important governmental interest).
and substantiated threats to the State's interests or to that of the child's welfare. In addition, the State must provide clear standards and measures demonstrating the purpose of the regulation in addressing a particularized problem. Requiring the State to demonstrate a need for home school regulation is one of the best ways to meet these concerns.

In Meyer, the Court enunciated limitations on the scope of State power in reference to the parental right, when it stated that "[t]he established doctrine is that this liberty may not be interfered with, under the guise of protecting public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." What is within the competency of the State is its ability to regulate, without disregard to the parent's rights, those actions that would contravene the State's interest in promoting and enforcing education. Moreover, as discussed above, the "reasonable relation" language does not denote the same meaning as current day "rational basis," but, rather, it possesses a heightened level of scrutiny by way of the Court's analysis. To satisfy this heightened level of scrutiny, the effect of the regulation must substantially further the State's interest in an educated citizenry.

A regulation requiring parents to hold teaching certificates in order to qualify for homeschooling will be held under greater scrutiny by the courts. It lacks justification on how it can further the State's interest in ensuring that the child is being provided a basic education. Studies have shown that there is no correlation between credentialed parents and the successful performance of home-schooled children on national exams. The

98 Glanzer, supra note 93, at 7 (arguing that state regulations should not be imposed on vague and imaginary threats); cf. Karen Alyssa Nalle, Comment, Whose Child Is It Anyway?: The Unconstitutionality of the Texas Grandparent Visitation Statute, 51 BAYLOR L. REV. 721, 741 (1999) (discussing that the State has no compelling interest in mandating third party visitation where no harm or threat to the child's well-being is present).

99 Glanzer, supra note 93, at 7-8 (calling for the state to provide clear standards and measures that show that homeschoolers are not meeting the educational needs of their children); see Mark Murphy, A Constitutional Analysis of Compulsory School Attendance Laws In The Southeast: Do They Unlawfully Interfere With Alternatives To Public Education?, 8 GA. ST. U. L. REV. 457, 472 (1992) (noting that the state must show it has a clear interest in assuring children are sufficiently educated so that they can effectively participate in our political system and avoid criminal liability in violating vague statutes).

100 See Glanzer, supra note 93, at 7-8 (asserting that states should have the burden of demonstrating a need for home schooling regulation); Page, Jr., supra note 7, at 206 (arguing that court-provided justifications for the State education regulation show that such regulations "actually run counter to the very educational goals the state seeks to achieve").


102 Chris Klicka, The Myth of Teacher Qualifications, HOME SCH. LEGAL DEF. ASS'N, http://www.hslda.org/docs/nche/000002/00000214.asp (summarizing the results of a study demonstrating little correlation between a teacher's qualifications and her student's performance); Page, Jr., supra note 7, at 198-99. In furthering the argument that such a requirement does not ensure the state's interest, "a tragic number of students graduate . . . having studied under credentialed and degreed teachers, while having failed to receive rudimentary education." Id.
National Center for Educational Statistics reveals that more than twenty-five percent of home schooling parents have a high school degree or less,\textsuperscript{103} yet home-school children are exceeding the 80th percentile on national exams. This demonstrates that such a requirement by the State may be extreme, and, therefore, is not substantially related to the State's important interest. Furthermore, other methods to gauge and ensure teacher competency can be utilized, such as periodic assessments through standardized exams.\textsuperscript{104}

Conversely, notice requirements are necessary not only to satisfy the State's interest in education, but also to afford the State the ability to monitor the health and safety of the child.\textsuperscript{105} By mandating parents to notify the school board of their intent to home school, it provides the State information regarding the existence of the child in a particular district and it allows the State to keep tabs on the child, ensuring that he or she is receiving a basic education. This requirement would also provide the State the ability to receive information on whether requisite health requirements are being satisfied, and, if not, that those services are provided by the parent through State enforcement.\textsuperscript{106}

b. Whether the regulation allows parents to make decisions for their child.

To ensure that the parental right is protected, the regulation should not prevent parents from making decisions for their child.\textsuperscript{107} In following the Court's assent to the importance of family autonomy, the \textit{Parham} Court articulated that the parent knows what is in the best interest of his or her

\textsuperscript{103} PRINCIOTTA \textit{et al.}, \textit{supra} note 4, at 6 (describing some of the characteristics of home-schooled students and their families including: race, ethnicity, income level, educational attainment of students' parents, and home-schooled student performance in comparison to traditional public school education); KLICKA, \textit{supra} note 6, at 1 (analyzing academic statistics on homeschooling).


\textsuperscript{105} \textit{See} Tabone, \textit{supra} note 91, at 402 (discussing the importance of notice requirements in reference to Pennsylvania's compulsory education law); \textit{see} Jeffrey P. Sexton, \textit{Home Schooling Away From Home: Improving Military Policy Toward Home Education}, 182 MIL. L. REV. 50, 92 (2004) (explaining that the military's notice requirement of home-schooled children is intended to focus on accountability and safety issues in case of emergencies, rather than addressing education issues).

\textsuperscript{106} \textit{See} Tabone, \textit{supra} note 91, at 402 (arguing that a notification policy can prevent students from "fall[ing] through the cracks" and failing to receive necessary medical treatment).

\textsuperscript{107} \textit{See Murphy, supra} note 99, at 472 (noting that parents have a liberty interest under the Fourteenth Amendment due process clause to make decisions regarding their children's education); \textit{see also} Troxel v. Granville, 530 U.S. 57, 65 (2000) (stating that the Supreme Court has long recognized parents' liberty interest in making decisions for their children, including in the realm of education).
child. Although there is an interest in the child’s autonomy to choose his or her own life path, "[t]he law’s concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions." Opponents argue that the mere existence of those parents who may not act in the best interest of the child is sufficient reason for State control; however, the Court has stated that for this to justify overriding the parental right in all cases would be “repugnant to American tradition.” Instead, the state can address this through remedial regulations, entailing narrower state action. Accordingly, presumptive weight must be given to the parent’s judgment.

With respect to curriculum submission and course requirements, deference should be given to the parent. The State must be afforded some say as to what courses should be taught; promoting basic skills in reading, writing, and math are unquestionably required in a minimal education. Furthermore, courses such as U.S. history and government, science, and current events would further the State’s interest in providing a civic education. However, the parents, who are better equipped in catering to the individual needs of the child, should determine what course studies are to be taught in the home school.

Nevertheless, critics of home schooling have raised concerns regarding, what is in their view, the shortcomings of home schooling and the need for

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108 Parham v. J.R., 442 U.S. 584, 602 (1979) (explaining that historically the law has been based on the belief that the natural bond between parent and child will lead parents to make those decisions that are in the best interest of the child; see Murphy, supra note 99, at 472 (advocating that parents should make decisions on behalf of their child until the child reaches “educational emancipation”).

109 Eichner, supra note 31, at 1367 (stating that children’s autonomy interest in education relates to the growth of their capacity to make decisions about their own futures); see Lee E. Teitelbaum, Children’s Rights and the Problem of Equal Respect, 27 HOFSTRA L. REV. 799, 810-812 (1999) (outlining the multitude of areas of law in which the Supreme Court has recognized rights claims for children where those same rights are considered autonomy-based when recognized for adults).

110 Parham, 442 U.S. at 602.

111 Id. at 603.

112 See Judith G. McMullen, Behind Closed Doors: Should States Regulate Homeschooling?, 54 S.C. L. REV. 75, 99 (2002) (asserting that Strict regulations on home schooling could actually result in limiting the amount of time parents are able to spend educating their children because they are busy fulfilling bureaucratic requirements instead); Page, Jr., supra note 7, at 202 (proposing that the problem of the few students who will inevitably fail to meet minimum standards can be rectified by remedial state action rather than addressing the fear of inadequate home schooling by imposing a blanket requirement that parents be certified to teach).

113 Gilles, supra note 40, at 125-26 (noting that in Troxel the plurality emphasizes that judgment of a parent must be given presumptive weight); cf. Solangel Maldonado, When Father (or Mother) Doesn’t Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville, 88 IOWA L. REV. 865, 870 (2003) (arguing that in the case of third party visitation, most courts have held that even evidence that a parent’s refusal to allow such visitation was wrong does not rebut the presumption that a parent was acting in the best interest of the child).
the State to regulate the parents’ choices on home school curricula. One of
these concerns is the inadequacy of the home environment in providing the
child the appropriate level of socialization needed to foster an appreciation
for diversity, tolerance, and a sense of autonomy. Moreover, proponents of
home school regulations also argue that curriculum submission
requirements are necessary to ensure that the home school environment
provides exposure to values and beliefs other than those of the parents.\footnote{114 ROB REICH, BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION 169
(2002) (proffering that “the educational environment of the home [must fit] somewhere within the
ambit of the liberal multicultural educational environment . . .”); see Bartholomew, supra note 15, at
1177 (discussing Lynx and Lamb Gaede, 14 year old twins who are being taught during homeschooling
in California that the Roman Empire fell due to over-mixing of races and that the Holocaust may have
never happened because their mother is a neo-Nazi white supremacist who is currently free to teach
them the curriculum she chooses).}

Despite the fears of under-socialization, researchers have found that not
only are home-schooled children socially well adjusted, but they also
appear to be more mature and have a better self-concept, both of which are
related to socialization.\footnote{115 Brian D. Ray, What About Socialization, PERCIPION,
http://www.percipion.com/topics/getting_started/articles/socialization.htm (“[Home-schooled children have an]
academic -self concept, at the 72 percentile . . . above the national average . . . [and] above self-esteem, in multiple studies. They are ‘not
isolated but active, contributing members of society, even in childhood . . . [and] involved in other
activities that require interfacing with various ages and settings.’”); Isabel Shaw, The Debate,
who interacts with parents and siblings more than with peers displays self-confidence, self-respect, and self-
worth. She knows she’s a part of a family unit that needs, wants, and depends on her. The result is an
independent thinker who isn’t influenced by peers and is self-directed in her actions and thoughts.”).}

Despite popular belief that home-schooled
children do not have opportunities to socialize, home-schooling parents
generally have their children involved in community activities and events,
visiting museums, participating in recreational activities, and many are also
enrolled in art, dance, drama, language, and music classes.\footnote{116 Chris Klicka, Socialization: Homeschoolers Are in the Real World, HOME SCH. LEGAL DEF.
(finding that home schooled students are involved in more social activities than the average middle
student); Shaw, supra note 115 (stating that homeschoolers participate in myriad activities, including
music, drama, and dance classes).}

Contrary to
what is experienced in public schools, home-schooled children are not
restricted to environments that consist of largely same-aged children, which
studies have shown to foster peer pressure and insecurities.\footnote{117 American Homeschool Association Homeschooling FAQ, http://americanhomeschool
association.org/faq/ (“Socialization, [at schools], becomes submitting one’s will to that of the group.”); Shaw, supra note 115 (“Peer pressure is enormous . . . [k]ids feel like they need to look and sound like
everyone else.”).}

Requirements that home school curriculums must include teachings of
other cultures and religious beliefs in order to foster diversity and tolerance
is commendable, however, “[t]olerance as a central liberal virtue guiding
public policy is often misunderstood, overstated, and expected to deliver
more than any reasonable definition would permit." Such requirements may impede on the choices made by parents, and, although the State may argue that it is substantially related to its interest, other methods may be equally or more effective. This impediment is especially obstructive if the state-mandated curriculum specifies what materials are to be used. Instead, curriculum requirements should suggest studies of international history and events or even allow parents to "diversify" their children through other chosen means of socialization. To illustrate, activities in which home-schooled children already engage in, as described above, may provide a greater lesson in understanding diversity through their interactions with others of different backgrounds and religious beliefs.

How a parent chooses to instruct his or her child should not be limited to what the State believes to be the only "right" way. The State may advance the argument that by promoting the appreciation of diversity, it will further its interest in achieving an equitable democracy. However, an equitable democracy may be furthered not only by focusing on racial or ethnic differences, but rather, on shared values of the community. "Common values ideally should emerge through deliberations on policy choices establishing the shared identities and self-definition that enable community members to engage in yet further debate and discussion." This is the very essence of a liberal democratic society.

The State, in regulating education, should choose a method that furthers its interests without imposing unnecessary restraints on the teaching method utilized by the parent. For instance, through the usage of

118 SALOMONE, supra note 64, at 213.
119 See generally Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (holding that a state does not have the power to standardize its children by forcing them to accept instruction from only public teachers); Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923) (discussing the limits of a State in controlling all facets of curriculum).
120 See Michael Dirda, Classrooms and Their Discontents; Multiculturalism vs. Tradition. World Literature vs. the Western Canon. Great Books vs. the Texts of the Oppressed. One Problem with Many Such Debates over What Students Should Read is That They Mask a Larger Question About What Our Society Values—and Why, WASH. POST, Nov. 09, 1997, at W18 (arguing that traditional English curriculums that intended on advancing multiculturalism offered in schools have left students with "experiences" of "distaste" and that the better approach is to use books that work best with the particular students); Gregory Millman, Home Is Where the School Is, WASH. POST, Mar. 23, 2008, at B1 (noting that official school curriculum standards fail outside of the school system and that there are more stimulating ways for children to learn).
121 Golden, supra note 22, at A1 ("Though home-schooling may never be feasible for most families, the data offer little comfort to those who advocate a standardized curriculum as the best hope for improving American education. After all, each home-based pupil follows a unique lesson plan."); Jane Gross, Unhappy in Class, More Are Learning At Home, N.Y. TIMES, Nov. 10, 2003, at A1 ("Without hewing to a public school curriculum, responsible and resourceful parents can cobble together teaching materials that cover all the bases.").
122 SALOMONE, supra note 64, at 232.
standardized exams, the State can grant credit for course studies that it sanctions without preventing parents from teaching other subjects\textsuperscript{123} or inhibiting the parents’ ability to utilize different methods of instruction.

c. Is the regulation result oriented as opposed to process oriented?

State regulations imposed on home schooling parents must avoid dictating \textit{how} a child should be educated or raised. The State’s interest is in the end-result of the child’s education, where the State is essentially “requiring only that the child demonstrate certain skills at certain points in time.”\textsuperscript{124} The process should be left to the parent, and any guidance by the State should be in the least intrusive manner, unless the regulation is to avoid a real threat of physical or mental harm to the child.\textsuperscript{125} In this respect, the State should grant the parents’ decisions presumptive weight, unless there is evidence that the child is not meeting the standards set forth by the State. To demonstrate, in the context of child welfare regulations, current state welfare laws require that governmental intervention must be justified because the arrangements made by parents are presumed satisfactory, unless the state can prove otherwise.\textsuperscript{126} That is, parents are innocent until proven guilty by the State in demonstrating the inadequacy of the parents’ arrangements.\textsuperscript{127}

Parents should first be given the opportunity to educate their children utilizing the methods and materials that they feel best suit their purpose in home schooling. The State can then monitor the academic performance of the children and intervene if results are unfavorable. For example, standardized exams or evaluations by state certified teachers are sufficient means of measuring whether the child is meeting educational requirements. It does not require daily, weekly, or monthly reporting, nor does itmandate

\textsuperscript{123} Bartholomew, \textit{supra} note 15, at 1196 (positing that the State can avoid crediting studies that it does not condone, e.g., racism or prejudicial ideologies, and therefore those studies will not satisfy state educational requirements).

\textsuperscript{124} Page, Jr., \textit{supra} note 7, at 209.

\textsuperscript{125} Prince v. Massachusetts, 321 U.S. 158, 172 (1944) (“[State interference] must fall unless shown to be necessary for or conducive to the child’s protection against some clear and present danger.”); Keith Wiens, Comment, \textit{State v. Parent Termination of Parental Rights: Contradictory Actions by the Ohio Legislature and the Ohio Supreme Court in 1996}, 26 \textit{CAP. U.L. REV.} 673, 675 (“[P]arents have a fundamental right to raise their children without government interference, unless the government has a compelling interest to intervene.”).

\textsuperscript{126} Glanzer, \textit{supra} note 93, at 7 (suggesting that the State’s interests in the child’s welfare do not require parents to report, under current child welfare laws, on how well they are meeting a child’s basic needs of food, shelter, welfare, etc.; see, e.g., Fish v. Fish, 285 Conn. 24, (discussing a Connecticut law which lists the extremely high standard for government intrusion)).

\textsuperscript{127} Glanzer, \textit{supra} note 93, at 7 (indicating that the state bears the burden of proof to demonstrate the inadequacy of parental arrangements); see also In re Juvenile Appeal, 189 Conn. 276, 295 (stating that the burden of proof is on the State as the party that seeks to interfere with a fundamental right).
how the child is to be taught.\textsuperscript{128} As long as the home-schooled child is meeting the State's academic requirements—and national tests results have shown that this is overwhelmingly true—the parent should be given freedom to continue educating their child in the same manner without intrusion by the State. Moreover, remedial efforts can be imposed onto those who have failed to meet the minimum standards of academic achievement. Such a regulation provides parents the opportunity to restructure and rectify areas of weakness in their teaching method, and it simultaneously gives the State the necessary justification to intervene.\textsuperscript{129}

Regulations that determine how the child is to be instructed are generally process-focused. An example of a process-focused regulation is the requirement that a child be instructed for a designated number of hours per day and that evidence of this be provided to the school board.\textsuperscript{130} Another example is the requirement that parents submit portfolios of their child's work and a record of evaluations of the child's academic progress.\textsuperscript{131} Process-focused regulations control the teaching methods of the parent without necessarily furthering pedagogical interests of the State.\textsuperscript{132} These interests are the end result of the child's education.

We can further understand the State's interests by examining what the federal government views as qualities of good citizenry. For example, in testing immigrants for citizenship, the immigration service looks for evidence that the future citizen can demonstrate certain kinds of abilities.\textsuperscript{133} These abilities include being able to communicate in English and having an understanding of U.S. history and government.\textsuperscript{134} In addition, immigrants

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\textsuperscript{128} & \text{See Murphy, supra note 99, at 483 (discussing benefits, for the State and homeschoolers, of implementing a standardized testing program); Donald D. Dorman, Note, Michigan's Teacher Certification Requirement as Applied to Religiously Motivated Home Schools, 23 U. MICH. J.L. REFORM 733, 733 (stating that states have adapted their educational laws to permit home schools).} \\
\textsuperscript{129} & \text{Reich, supra note 114, at 170. Dorman, supra note 128, at 749-54 (listing regulations on parents who home school their child).} \\
\textsuperscript{130} & \text{See Bartholomew, supra note 15, at 1187 (citing Missouri's home schooling statute).} \\
\textsuperscript{131} & \text{Id.} \\
\textsuperscript{132} & \text{See Jon S. Lerner, Comment, Protecting Home Schooling through the Casey Undue Burden Standard, 62 U. CHI. L. REV. 363, 388 (1995) (noting that implementing subject matter requirements, yet leaving the choice of teaching instruments to parents strikes a balance between state monitoring and parental autonomy); Page, Jr., supra note 7, at 209 (discussing process-focused regulation).} \\
\textsuperscript{133} & \text{See Glanzer, supra note 93, at 11 ("A look at the list of what is required for a person to become a U.S. citizen... physical presence or residence requirements, ability to read, write, and speak English; a knowledge and understanding of U.S. history and government; good moral character; attachment to the principles of the U.S. Constitution; and a favorable disposition towards the United States."); UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, THE NATURALIZATION TEST, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=dd77e9dd4a3210VgnVCVM100000b92ca60aRCRD&vgnextchannel=dd77e9dd4a3210VgnVCVM100000b92ca60aRCRD [hereinafter NATURALIZATION TEST].} \\
\textsuperscript{134} & \text{NATURALIZATION TEST, supra note 133.}
\end{align*}
are tested for certain commitments to the United States. "Among these are the recognition of basic rights and freedoms, the rejection of racism and other forms of discrimination as affronts to individual dignity, and the duty of all citizens to uphold institutions that embody a shared sense of justice and the rule of law."135 Once these qualifications are met, an immigrant is granted citizenship without regard to how these abilities and commitments are acquired. Here, the government uses a test—which examines results rather than processes—that is sufficient in gauging qualities of good citizenry. If the U.S. government is willing to grant citizenship to an individual based on his or her test performance, why cannot a home-schooled child be given the same type of examination?

The State must demonstrate that home schooling requirements are, in fact, substantially related to its interest and that such requirements are not based on notions of how a child should be instructed. The State regulation should be end-focused and should avoid process-focused legislation unless such interest cannot be effectively furthered by alternative means that are less intrusive.

d. Whether the parent is provided a neutral arbitrator in determinations regarding compliance.

Due process of law requires that decisions affecting a parent’s fundamental right, such as the right to direct the education of one’s child, be made by a neutral, detached magistrate.136 School superintendents are given the discretion by most—if not all—states to determine if a parent is in compliance with state compulsory education laws.137 Advocates of home schooling argue that superintendents do not qualify as neutral and detached magistrates as mandated by the due process clause.138 The reason is that superintendents have a financial interests in the outcome of whether a home school will be allowed to operate because local school districts receive tax

135 Salomone, supra note 64, at 197-98.
136 See Rotunda & Nowak, supra note 29, at 17.8(g) (indicating that there is always a requirement that government action be fair and impartial, thus calling for a neutral decision maker); Klicka, supra note 6, at 109 (suggesting that, since state superintendents have a financial stake in whether or not a home school is allowed to operate, giving them decision making power as to whether it operates would be unconstitutional); Murphy, supra note 99, at 471 (noting that due process requires an impartial decision maker, and further stating that one federal court has stated that a school superintendent cannot fit such a role).
137 Klicka, supra note 6, at 109; Academic Statistics, supra note 6 (providing statistics to establish the academic excellence of home-schooled children).
138 Klicka, supra note 6, at 109 (stating the reasons for superintendent bias); Lisa M. Lukasik, The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools, 74 N.C. L. Rev. 1913, 1930 (1996) (noting the presumed superiority of public schooling by many superintendents, as well as the financial incentive for superintendents, to favor public schooling).
money for each child attending public school, and a financial loss is realized when a child is approved for home schooling.\textsuperscript{139} In addition, superintendents may also carry philosophical biases against home schooling.\textsuperscript{140}

In order to ensure that the right of the parents to home school is not abridged, the State must provide evidence that a final determination of parental failure to comply with state compulsory laws was made by a neutral and detached magistrate in order to be in line with the principles of due process mandated by the Fourteenth Amendment.\textsuperscript{141}

III. PARENTAL RIGHT TO FREE EXERCISE UNDER THE FIRST AMENDMENT

The parents who choose to home school because they want to provide their children with religious and moral instruction have raised their claims under the Free Exercise Clause of the First Amendment. These parents allege that the state regulations impose undue burdens on their ability to home school and, therefore, inhibit their freedom to exercise their religion. This fundamental right, in the context of education, is met with numerous hurdles before it is deserving of a heightened scrutiny.

A. Rights of the Parent and State under the Free Exercise Clause

When home schooling is religiously motivated, it is only protected under the Free Exercise Clause of the First Amendment if the State regulation is found to be non-secular in its purpose or primary effect.\textsuperscript{142} The Establishment Clause of the First Amendment requires that legislation neither advances religion nor inhibits the free exercise of religion.\textsuperscript{143} In \textit{Sherbert v. Verner}, the Court held that strict scrutiny would be applied to

\textsuperscript{139} KLICKA, supra note 6, at 111, 114. In \textit{Turney v. Ohio}, 273 U.S. 510 (1927), the Supreme Court ruled that financial incentives involved in a Mayor's decision-making concerning a liquor law violated due process and in \textit{Ward v. Monroeville}, 409 U.S. 57, 60 (1972), the Court held that the financial incentives involved need not be personal to be in violation of due process.

\textsuperscript{140} KLICKA, supra note 6, at 109 (noting potential bias among superintendents).

\textsuperscript{141} See U.S. CONST. amend. XIV, § 1. (barring states from depriving any person of life, liberty, or property, without due process of law); see also Campbell, Jr., supra note 17, at 661 (stating that a citizen whose liberty has been infringed is entitled to a neutral decision maker).


\textsuperscript{143} Allen, 392 U.S. at 243 (citing \textit{Everson}, 374 U.S. at 222); see also Elizabeth Scott Pryor, Comment, \textit{Permissible State Aid to Parochial Schools: A Plea For Neutrality}, 33 EMORY L.J 487, 494 (1984).
any law found to burden an individual's free exercise of religion, and it declared unconstitutional the denial of unemployment benefits to a woman after she was discharged for declining to work on her Saturday Sabbath.\textsuperscript{144}

The Court, however, opined that the right to 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... conduct that his religion prescribes...'".\textsuperscript{145} The \textit{Sherbert} ruling was subsequently changed by the Court's determination in \textit{Employment Division v. Smith} when it upheld a statute prohibiting the consumption of peyote, a hallucinogen, despite its required usage by some Native American religions.\textsuperscript{146} The State, as maintained by the Court, has a compelling interest to enforce generally applicable prohibitions of harmful social conduct.\textsuperscript{147} The Court reasoned that if an individual's obligation to obey such a law was contingent on the "law's coincidence with his religious beliefs, except where the State's interest is 'compelling,' it would, in effect, permit him "to become a law unto himself."\textsuperscript{148} In this respect, when the challenged law is "generally applicable" and "religion-neutral," it need not satisfy the exacting standard of review required by the \textit{Sherbert} decision, even though it may impinge upon one's religious practice.\textsuperscript{149} For instance, the Court in \textit{Prince} opined that the state as \textit{parens patriae} "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."\textsuperscript{150} The level of judicial scrutiny under these circumstances requires only a rational basis review.\textsuperscript{151}

Furthermore, the \textit{Smith} Court stated that in prior decisions where the First Amendment effectively bared the application of religion-neutral, generally applicable laws, it involved the claim of a free exercise violation

\textsuperscript{146} Smith, 494 U.S. at 890.
\textsuperscript{147} \textit{Id.} at 885 (recognizing the governments interest in prohibiting harmful conduct); see also Kent Greenawalt, \textit{Child Custody, Religious Practices, and Conscience}, 76 U. COLO. L. REV. 965, 977-978 (2005) (stating that a compelling interest is necessary to allow the government "to impair the free exercise of religion").
\textsuperscript{148} Smith, 494 U.S. at 885 (citing Reynolds v. United States, 98 U.S. 165, 167 (1878)).
\textsuperscript{149} \textit{Id.} at 890; see also Health Servs. Div., Health & Env't Dep't v. Temple Baptist Church, 914 P.2d 130, 134 (N.M. 1991) (following the \textit{Smith} holding).
\textsuperscript{150} Prince v. Massachusetts, 321 U.S. 158, 167 (1944) ("[T]he family itself is not beyond regulations in the public interests against a claim of religious liberty.").
\textsuperscript{151} Smith 494 U.S. at 882 (citing Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)).
in conjunction with another independent constitutional right violation. The Court therefore concluded that such “hybrid situations” are required to justify a heightened scrutiny.

**B. Disparity in the Level of Judicial Review by Federal Courts on Claims of Free Exercise Under the First Amendment**

Federal courts have not consistently accepted or applied the “hybrid claim” requirement on infringement of free exercise claims challenging compulsory education laws. Currently all circuit courts, except for the Second and the Sixth Circuits, recognize hybrid claims when concerning generally applicable, religion-neutral laws as warranting a higher level of scrutiny. These two Circuits refuse to recognize hybrid rights, which would entitle a free exercise claim to greater scrutiny, because they have held that the language in *Smith* was merely dicta. Among the courts that have recognized the existence of hybrid rights, there is a difference in their requirements as to what constitutes a valid hybrid claim. The Ninth and Tenth Circuits require a “colorable showing” of infringement of a recognized and specific constitutional right in addition to the free exercise claim. These courts have stated that “to assert a hybrid-rights claim, ‘a

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152 Id. at 881. The Court lists prior decisions that concerned “hybrid claims,” which included claims of violations in addition to the right to free exercise, the freedom of speech, the press and the parental right to direct the upbringing and education of their children. *Id.*


155 Akers, supra note 154, at 86 (citing Leeber v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003) (discussing that courts have not explained that requirement of strict scrutiny for hybrid situations and have simply relied on the language in Smith); see also Kissinger v. Bd. of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (“[T]he Smith court did not explain how the standards under the Free Exercise Clause would change depending on whether other constitutional rights are implicated”).

156 Miller v. Reed, 176 F.3d 1202, 1204 (9th Cir. 1999) (stating that a hybrid claim is only present when a free exercise claim is supplemented by another colorable constitutional claim); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 696 (10th Cir. 1998) (requiring a colorable showing of infringement of recognized and specific constitutional rights violation under the hybrid rights theory of
free exercise plaintiff must make out a ‘colorable claim’ that a companion right has been violated—that is, a ‘fair probability’ or a ‘likelihood,’ but not a certitude, of success on the merits.” Therefore, the plaintiff cannot merely invoke a free exercise claim and another constitutional right “thereby forc[ing] the government to demonstrate the presence of a compelling interest.” The last position held by the remaining circuit courts, particularly the First and the D.C. Circuits, hold that an independent and viable constitutional claim must be invoked in addition to a free exercise claim to warrant heightened scrutiny.

Circuit courts that recognize hybrid claims have nonetheless struggled with setting a standard of review in determining what constitutes a hybrid claim. Scholars agree that “[federal courts] have done relatively little to clarify when a claim should be regarded as a “hybrid” under Smith, thus triggering strict scrutiny.”

IV. THE APPROPRIATE STANDARD OF JUDICIAL REVIEW ON CLAIMS UNDER THE FREE EXERCISE CLAUSE OF FIRST AMENDMENT

The U.S. Supreme Court has declared that if the statue is a religion-neutral (non-secular in purpose and effect) law of generally applicability, it will be deemed valid if it is rationally related to the State’s legitimate interest in education. Whether the parent’s claim will be subject to standard other than a rational basis review under these circumstances depends on the existence of another independent constitutional violation. So what should be required to satisfy a hybrid free exercise claim and a parental right claim?

First, to properly invoke a free exercise claim, the parent must show that

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*Smith.*

157 *Miller,* 176 F.3d at 1207 (citing Thomas v. Anchorage Equal Rights Comm’n, 165 F.3d 692 at 703, 707 (9th Cir. 1999)), opinion withdrawn, 220 F.3d 1134 (9th Cir. 2000).

158 *Swanson,* 135 F.3d at 700; see generally Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (finding no compelling interest even when several constitutional claims were made).

159 *Hot, Sexy & Safer,* 68 F.3d at 539 (finding that the free exercise challenge must be conjoined with an independently protected constitutional protection; Catholic Univ. of Am., 83 F.3d at 467 (stating that the case presented a “hybrid situation” which led to a rights violation).

160 See *Swanson,* 135 F.3d at 699 (discussing the difficulties of outlining the hybrid-rights theory); Lechlitner, *supra* note 154, at 2226 (citing *Hot, Sexy & Safer,* 68 F3d. 525 (1st Cir. 1995) (highlighting the difficulties in applying a standard for hybrid claims).


162 See Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 882 (1990) (stating that a hybrid situation was not present and thus rational relation was not the appropriate test); Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (noting that more than a relational relation is required when the free exercise claim is combined with the interests of parenthood).
the challenged state regulation impinges on the parent's ability to exercise his or her religion. The claim must be rooted in a *sincere* religious belief, and not a personal or philosophical belief based on secular considerations.

Courts that have rejected free exercise claims relied on the opinion of *Yoder*, which has been considered by many as a high water mark of free exercise protection. In *Yoder*, the Court concluded that the Amish religious faith and mode of life were shown to be "inseparable and interdependent"; its theology was shared by the community for a substantial period of time; and that deviation of those teachings by the State regulation would impose actual harm to the children. Accordingly, the courts that have rejected the free exercise claim concluded that the religious beliefs of the claimants did not possess the "centrality" of the Amish faith. However, as evident in *Smith*, the U.S. Supreme Court has

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163 See NOWAK & ROTUNDA, supra note 29, at 1481 (noting that it would be difficult for the Supreme Court to define religion without intruding into the Establishment Clause, by punishing certain beliefs and granting deference to others); *Smith*, 494 U.S. at 893 (discussing the requirement of a "sincere" religious belief).

164 *Yoder*, 406 U.S. at 215-16 (1972) ("A way of life, no matter how virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based purely on secular considerations: to have the protection of the Religion Clauses, the claims must be rooted in religious belief."). But see *Duro* v. District Attorney, 2d Judicial Dist. of N.C., 712 F.2d 96 (4th Cir. 1983) (deciding that although the parent's decision was motivated by sincere religious beliefs, they refuse to extend the Amish exception of *Yoder*).

165 *Duro*, 712 F.2d at 98-99 (explaining that the present case is factually distinguishable from *Yoder*, and the welfare of the children is paramount and mandates attendance at a public or private school); *Battles* v. Anne Arundel County Bd. of Educ., 904 F. Supp 471, 476 (D. Md. 1995) ("The factual allegations in Battles' complaint . . . claiming that their daughter received equivalent of a first or second grade education . . . is not comparable to the educational level held to satisfy Wisconsin's interest in *Yoder*."); *Burrow* v. State, 282 Ark. 479, 482 (1984) (explaining that the schooling circumstances presented by the defendant lack the unusual considerations that were apparent in *Yoder* to find a violation of his First Amendment right to the free exercise of religion); *Jernigan* v. State, 412 So. 2d 1242, 1245 (Ala. Crim. App. 1982) ("Unlike the Amish in *Yoder*, the defendants have not shown that their entire way of life is inextricable from their religious beliefs or that public schooling would substantially interfere with their religious practices.").


167 *Yoder*, 406 U.S. at 212, 215 ("[C]ompulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also . . . ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today.").

168 See *Brown* v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (noting that the plaintiffs' claims that the one-time mandatory attendance at the Program did not threaten their way of life as was the case in *Yoder*); *Duro*, 712 F.2d at 98 (explaining that the facts in *Duro* are distinguishable from those in *Yoder*, and that unlike the defendants in *Yoder*, who were part of the Amish culture that existed unaltered for almost 300 years, the plaintiffs in *Duro* were not part of a religious community that had a long history of being a prospering, independent, part of American society); *Battles*, 904 F. Supp at 476 (distinguishing the case from *Yoder*).
departed from making determinations regarding the centrality of one's religion. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. Thus, The Court's refusal to judge the centrality of an individual's religion is most notable in cases regarding the availability of unemployment benefits to individuals who were unable to work due to their religious convictions. Thus, determinations regarding whether a parent's ability to exercise his or her religious beliefs through home schooling have been burdened by State regulations should focus on the sincerity of the parent's belief and not on "centrality."

Second, the parental claim must be an independently viable one in order to constitute a hybrid claim. In Church of the Lukumi Babalu Aye v. Hialeah, the Supreme Court invalidated a statute that prohibited animal slaughter in religious practices. Justice Souter, in expressing his disagreement with a hybrid claim exception to challenges against religion-neutral laws of generally applicability, opined:

[I]f a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.

169 Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) ("[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular beliefs or particular litigants' interpretations of those creeds.") (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).


172 See Smith, 494 U.S. at 872 ("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); Thomas, 450 U.S. at 715-16 ("[I]t is not within the judicial function and judicial competence to inquire whether a petitioner or his fellow worker more correctly perceived the commands of their common faith.").

173 Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 539 (1993) ("[T]he subject of regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.")

174 Id. at 567 (Souter, J., concurring in part).
His reasoning not only implicated the Court's intent that the additional claim must be independently viable, but it also raised the issue of how an additional claim to the free exercise claim would accord a heightened scrutiny if the additional claim alone would have provided a greater scrutiny than rational basis.

In ascertaining the effect of a free exercise claim on the judicial scrutiny of a hybrid claim, the only logical conclusion is that the resulting standard of review is a heightened one that is afforded to the additional claim. Hence, a free exercise claim in conjunction with a viable parental rights claim against a state compulsory education law should meet strict scrutiny review. This conclusion is neither novel nor unrecognized, but rather is in line with prior Supreme Court and circuit court decisions.175

In Yoder, the Court addressed the requisite justification a state must provide to withstand a hybrid claim by stating that only “those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”176 Despite the fact that the Court’s decision predominately addressed the free exercise claim, the Court noted in Smith that Yoder was a hybrid claim of parental right and free exercise. Moreover, in Smith, the Court’s hybrid claim rationale, as to the “only bar” against a neutral, generally applicable law, suggests that when such a claim is invoked, the Sherbert test of strict scrutiny applies.177 A hybrid claim is therefore the exception to the Smith Rule.

By requiring the parent to raise a free exercise claim in conjunction with another independently viable constitutional claim, it will ensure that the States apply regulations that are truly for the purpose of protecting the safety and welfare of the public without the fear of infringing upon the beliefs of its citizens, especially in light of our pluralistic society. Conversely, the parent’s right to home school their children because of sincere religious beliefs should be greatly protected given the very foundation of how this nation came to its existence.178

175 See Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (proffering that only interest “of the highest order” can justify impinging on the free exercise of religion); Pierce v. Soc’y of Sisters, 268 U.S. 510, 534-535 (1925) (stating that the “fundamental theory of liberty” excludes the State from forcing children to attend public schools); Murphy v. State of Ark., 852 F.2d 1039 (8th Cir. 1988) (requiring a state to demonstrate that its regulation is the least restrictive means to achieve a compelling governmental interest); Duro v. Dist. Att’y, 2d Judicial Dist. of N.C., 712 F.2d 96 (4th Cir. 1983) (interpreting Yoder to require a interest in compulsory education that is “of sufficient magnitude”).

176 Yoder, 406 U.S. at 215.

177 Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990) (stating the only decisions in which the Court has held that “the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections”).

178 Church of Lukumi Babalu Aye, Inc., 508 U.S. at 576 n.8 (noting the “historical instances of
exercise one's religion is a precious liberty, which should require the 
application of an exacting scrutiny when it is infringed in conjunction with 
another constitutional right.

A curriculum requirement that mandates the teachings of a particular 
religion or methodology of thought may come into conflict with the 
religious beliefs of a parent if it goes beyond mere exposure.179 Such a 
regulation will undoubtedly be challenged if it is viewed as an attempt by 
the State to indoctrinate the children with a belief system or a religion. If 
this is found to be the case, the regulation will be held in violation of the 
Establishment Clause of the First Amendment unless it withstands strict 
scrutiny review. The State may also be in danger of violating the 
constitutional constraints imposed by the First Amendment despite 
enacting regulations with the intent of neutrality and for secular purposes. 
“Even though a practice may not be coercive, active support of a particular 
belief raises the danger of eventual establishment of state approved 
religious views.”180

Finally, strict scrutiny review reinforces the understanding that “the 
power of the parent, even when linked to a free exercise claim, may be 
subject to limitations under Prince if it appears that parental decisions will 
jeopardize the health or safety of the child, or have a potential for 
significant social burdens.”181 When the concern regards the health and 
safety of the child, the State’s interest trumps the parent’s rights.

CONCLUSION

Parents have a right and a duty to provide their children the necessities 
that will enable them to make life decisions grounded in values the family 
and society perceives to be of utmost importance. The State has the 
obligation to ensure that the child has the adequate education that will 
afford him or her the opportunities and abilities to be an effective 
participant in our democratic community. The parent and the State 
essentially share the same goal: to develop an autonomous adult of moral 

179 See Mozert v. Hawkins County Bd. of Ed., 827 F.2d 1058, 1066 (1987), cert. denied, 484 U.S. 
1066 (1988) (indicating that the challenged materials did not compel the plaintiffs to declare a belief); 
SALOMONE, supra note 64, at 120-26 (discussing the various opinions and approaches of the judges on 
the court).

180 NOWAK & ROTUNDA, supra note 29, at 1460.

181 Yoder, 406 U.S. at 233-34.
character. As Theodore Roosevelt once proffered: “to educate a man in mind and not in morals is to educate a menace to society.”  

Rather than determining who knows best for the child, we as a society must recognize that battling over who “controls” certain aspects of the child’s development ultimately stems from our own self-interests. Putting it in another way, it is a “political” custody battle over the rights to a child. Have we forgotten about the rights of our children and have we lost focus of what is truly in the best interest of the child? We must be reminded that “[i]t is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.”  

Our nation takes great pride in its pluralistic society, vehemently protecting the right of its citizens to hold many different opinions and beliefs without fear of persecution. The nature of our society requires consideration of all views and the ability to compromise—elements necessary to sustain a democracy. Hence, intermediate scrutiny in parental rights claims and strict scrutiny on hybrid claims that include the claim of free exercise, are the appropriate levels of judicial scrutiny; it is a suitable compromise that would safeguard the rights and further the interests of the parent and State. Federal courts must adhere to a standard of review in these cases with consistency and predictability.

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184 See Patterson v. Colorado, 205 U.S. 454, 462 (1907) (noting the main purpose of the First Amendment is to prevent all prior restraints on free speech as have been practiced by earlier governments); NOWAK & ROTUNDA, supra note 29, at § 16.6 (discussing the justifications and the values of the freedom of speech under the First Amendment, in that it prevents ignorance, allows truth to arise from the “marketplace” of competing ideas, enhances individual contribution to the social welfare, curbs government abuse, and acts as a safety valve for society).