

2006

## Opting Out of Public School Curricula: Free Exercise and Establishment Clause Implications

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### Recommended Citation

Shane Ramsey, *Opting Out of Public School Curricula: Free Exercise and Establishment Clause Implications*, 33 Fla. St. U. L. Rev. (2006) .  
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# FLORIDA STATE UNIVERSITY LAW REVIEW



## OPTING OUT OF PUBLIC SCHOOL CURRICULA: FREE EXERCISE AND ESTABLISHMENT CLAUSE IMPLICATIONS

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VOLUME 33

SUMMER 2006

NUMBER 4

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Recommended citation: Shane Ramsey, *Opting Out of Public School Curricula: Free Exercise and Establishment Clause Implications*, 33 FLA. ST. U. L. REV. 1199 (2006).

# OPTING OUT OF PUBLIC SCHOOL CURRICULA: FREE EXERCISE AND ESTABLISHMENT CLAUSE IMPLICATIONS

SHANE RAMSEY\*

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## I. INTRODUCTION

From the Protestant-Catholic school wars of the mid-1800s to the prosecution of Amish parents in the 1960s and home schooling parents in the 1980s, societal rules enacted by the government have clashed with the conscientiously motivated activities of religious believers. Perhaps the greatest area of conflict between government regulation and religious belief is in the context of public school education.<sup>1</sup> States undoubtedly have a strong interest in providing a public school education to their citizens. As the Supreme Court has stated, “Providing public schools ranks at the very apex of the function of a State.”<sup>2</sup> The state’s interest in this regard, however, “is not

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\* J.D., Florida State University College of Law, 2006; B.A., University of Tampa, 2003. I am extremely grateful to Professor Steve Gey for suggesting this topic and providing valuable feedback on earlier drafts. Special thanks to Mark Scott, Todd Messinger, and Megan Menagh for all of their editing work. All errors are my own.

1. See, e.g., Crystal V. Hodgson, *Coercion in the Classroom: The Inherent Tension Between the Free Exercise and Establishment Clauses in the Context of Evolution*, 9 NEXUS 171, 171 (2004) (“Courts have effectively taken teacher-led prayer out of public schools, have prohibited Bible reading in the classroom, have prohibited the requirement of the posting of the Ten Commandments in public classrooms, have prohibited non-denominational prayers at graduation ceremonies, and have forbidden the display of religious holiday decorations in public buildings.” (footnotes omitted)); Donna Marie Werner, Comment, *Ware v. Valley Stream High School District: At What Expense Should Religious Freedoms Be Preserved?*, 64 ST. JOHN’S L. REV. 347, 348-49 (1990) (“The public school arena is fertile ground for religion clause debate.”).

2. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.”<sup>3</sup> Thus, in some instances the state’s interest in providing public education must yield to those individual interests and rights deemed by the Court to be fundamental.

This Comment addresses situations in which individual interests and rights outweigh a state’s interest in providing education. This Comment will first examine the question of whether the Constitution or state Religious and Freedom Restoration Acts (RFRAs) require states to grant opt-out provisions to the children of parents who find certain public school curricula religiously offensive. For instance, can parents who believe in creationism require the school to grant their child an opt-out of a biology class that teaches evolution? After addressing whether a state can be forced to provide an opt-out, this Comment will next consider if granting an opt-out, whether pursuant to the Constitution or by the state’s own free will, violates the Establishment Clause of the First Amendment. Thus, this Comment examines both the question of whether an opt-out is legally required and also whether an opt-out is constitutionally prohibited.

Part II of this Comment explores various claims that may be raised in arguing for an opt-out provision. Such claims include a Free Exercise Clause challenge, a “hybrid claim,” and a state RFRA action. Part III addresses whether a state is permitted to provide an opt-out or whether such a concession would be a violation of the Establishment Clause. Part IV offers concluding remarks.

## II. THE RIGHT TO OPT OUT

### A. *The Free Exercise Clause*

#### 1. *The Free Exercise Standard*

The Free Exercise Clause, made applicable to the states by incorporation into the Fourteenth Amendment,<sup>4</sup> provides that “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*.”<sup>5</sup> The Free Exercise Clause excludes all “governmental regulation of religious *beliefs* as such.”<sup>6</sup> The government cannot compel affirmation of religious belief,<sup>7</sup> punish adherents

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3. *Id.* at 214.

4. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

5. U.S. CONST. amend. I (emphasis added).

6. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (citing *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

7. *See Torcaso v. Watkins*, 367 U.S. 488 (1961).

of religions it believes to be false,<sup>8</sup> lend its power to one side in religious controversies,<sup>9</sup> or impose special disabilities based upon religious status or views.<sup>10</sup>

“[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”<sup>11</sup> As such, the Constitution does not require public schools to delete from the curriculum all materials that may be religiously offensive.<sup>12</sup> Thus, “while the Free Exercise clause protects, to a degree, an individual’s right to practice her religion within the dictates of her conscience, it does not convene on an individual the right to dictate a school’s curriculum to conform to her religion.”<sup>13</sup> While the Free Exercise Clause may not allow a student to change a school’s curriculum, the question still remains as to whether a student may opt out of a particular class. Such a request would impose at least a minimal burden on the school but would fall short of actually dictating to the school the curriculum to be taught.

In *Sherbert v. Verner*,<sup>14</sup> the Supreme Court addressed a free exercise claim by a member of the Seventh-day Adventist Church who was discharged by her employer because she refused to work on Saturday.<sup>15</sup> After being discharged, Sherbert sought to obtain unemployment benefits, but she was denied on the grounds that she had failed “without good cause . . . to accept available suitable work when offered.”<sup>16</sup> Sherbert brought suit claiming this action violated her free exercise right under the First Amendment.<sup>17</sup>

In evaluating her claim, the Court put forth a two-prong free exercise test. For plaintiffs to succeed on a free exercise challenge, they must show that (1) the government regulation placed a burden on the free exercise of religion, and (2) the government lacks a “compelling state interest” in regulating the burdening activity.<sup>18</sup> In applying the first prong, the Court found that the regulation burdened Sherbert’s

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8. *United States v. Ballard*, 322 U.S. 78, 86-88 (1944).

9. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-25 (1976); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 445-52 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119 (1952).

10. See *McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953).

11. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963)). As Justice Douglas stated, “The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them.” *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring).

12. *Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311, 1318 (8th Cir. 1980).

13. *Bauchman v. W. High Sch.*, 132 F.3d 542, 557 (10th Cir. 1997).

14. 374 U.S. 398.

15. *Id.* at 399.

16. *Id.* at 401 (citing S.C. CODE § 68-114(3) (1962)).

17. *Id.*

18. *Id.* at 403.

free exercise of religion.<sup>19</sup> While noting that no criminal sanction directly compelled her to work on Saturday, the Court stated that a burden can be established by indirect compulsion: “[I]f the purpose or effect of a law is to impede the observance of one or all religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.”<sup>20</sup> In describing the burden placed on Sherbert, the Court opined: “The [lower court’s] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”<sup>21</sup> The Court held that such an imposition was analogous to imposing a fine on Sherbert for worshipping on Saturday.<sup>22</sup>

With respect to the second prong, the state argued that there was a compelling state interest in disallowing unemployment benefits in this situation.<sup>23</sup> According to the state, granting employment benefits under this situation would lead to fraudulent claims being filed, which would lead to the depletion of the unemployment fund and “hinder the scheduling by employers of necessary Saturday work.”<sup>24</sup> The Court rejected this argument because it had not been raised in the lower court.<sup>25</sup> The Court went on, however, to discredit the state’s argument: “For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon [the employers and employment commission] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”<sup>26</sup> Therefore, according to the Court, the state had unconstitutionally infringed upon the First Amendment right to the free exercise of religion.<sup>27</sup>

19. *Id.*

20. *Id.* at 404 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

21. *Id.*

22. *Id.*

23. *Id.* at 406-07.

24. *Id.* at 407.

25. *Id.*

26. *Id.* The Court also noted that “before the instant decision, state supreme courts had, without exception, granted benefits to persons who were physically available for work but unable to find suitable employment solely because of a religious prohibition against Saturday work.” *Id.* at 408 n.7.

27. *Id.* at 409. The Court also claimed that such a holding did not violate the Establishment Clause:

In holding as we do, plainly we are not fostering the “establishment” of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.

*Id.* In a concurring opinion, however, Justice Stewart took issue with this claim, stating that such a holding violated the Establishment Clause as the Court had construed it in

In *Mozert v. Hawkins County Board of Education*,<sup>28</sup> the Sixth Circuit applied the *Sherbert* standard in the context of public school curricula. There, parents of school children brought suit against the school board for its use of the Holt, Rinehart, and Winston basic reading series (the “Holt Series”), which discussed various types of religions.<sup>29</sup> The parents claimed that forcing students “to read school books which teach or inculcate values in violation of their religious beliefs and convictions is a clear violation of their rights to the free exercise of religion.”<sup>30</sup>

In addressing the first prong of the *Sherbert* test, the court held that the school district’s use of the Holt Series did not burden the free exercise of religion. According to the court, the school district’s action did not require one to affirm or deny a religious belief or require or prohibit one from engaging in the practice of religion.<sup>31</sup> The court stressed that no free exercise violation had occurred, because the Holt Series had merely exposed the plaintiffs to differing views of religion: “[D]istinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion.”<sup>32</sup> In holding that no burden had been placed on the free exercise of religion, the court was not required to determine whether the state had shown a compelling interest.<sup>33</sup>

The question arises, however, as to whether a court would employ the standard enumerated in *Sherbert* or the more onerous free exercise standard articulated by the Supreme Court in *Employment Division v. Smith*.<sup>34</sup> In *Smith*, the respondents were fired from their jobs because they had used peyote, a hallucinogen, for religious purposes at a ceremony of their Native American Church.<sup>35</sup> Thereafter, the respondents applied to the Employment Division for unemployment benefits, but were denied under a finding that they had been discharged for employment-related “misconduct.”<sup>36</sup> The respondents brought suit claiming this denial of benefits violated their free exercise rights.<sup>37</sup>

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previous cases. *Id.* at 413. (Stewart, J., concurring). This issue will be addressed in Part III, *infra*.

28. 827 F.2d 1058 (6th Cir. 1987).

29. *Id.* at 1060, 1062.

30. *Id.* at 1061.

31. *Id.* at 1069.

32. *Id.* at 1068 (quoting *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1543 (9th Cir. 1985)).

33. *Id.* at 1070.

34. 494 U.S. 872 (1990).

35. *Id.* at 874.

36. *Id.*

37. *Id.*

Under *Smith*, a state would be “‘prohibiting the free exercise [of religion]’ if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.”<sup>38</sup> Rather than apply strict scrutiny, the Court “held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>39</sup> Thus, after *Smith*, courts must apply rational basis review to neutral laws of general applicability. The Court did, however, recognize limited exceptions under which strict scrutiny would still be applicable. For instance, the Court distinguished the *Sherbert* balancing test by noting that it “was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.”<sup>40</sup> Additionally, the Court recognized that strict scrutiny would still apply in the context of a hybrid claim.<sup>41</sup> This hybrid exception will be discussed in detail in Part II.B.

## 2. Applying the Free Exercise Standard to Public School Curricula

The success of a free exercise challenge in the context of public school curricula depends largely on the standard the court employs. Application of the *Sherbert/Mozert* standard would provide some hope for plaintiffs, whereas application of the *Smith* standard would invariably foreclose any chance of a successful free exercise claim. Some commentators have suggested that the Court would not apply *Smith* in the public school context: “The *Smith* standard, however, is not likely to be applied to a claim arising in the public school context. Other more pertinent standards, similar to the principles set out in *Mozert*, are more likely to apply.”<sup>42</sup> This statement, however, seems somewhat dubious.

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38. *Id.* at 877 (quoting U.S. CONST. amend. I).

39. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

40. *Id.* at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

41. *Id.* at 881.

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents, acknowledged in *Pierce v. Society of Sisters*, . . . to direct the education of their children.

*Id.* (citation omitted).

42. Gabriel Aeri, Comment, *Persistent Monkey on the Back of the American Public Education System: A Study of the Continued Debate over the Teaching of Creationism and Evolution*, 41 CATH. LAW 39, 63 (2001).

In *Vandiver v. Hardin County Board of Education*,<sup>43</sup> the Sixth Circuit—the same circuit that decided *Mozert*—reviewed a post-*Smith* free exercise challenge to the public school curricula. The court held that *Smith*—a case addressing a criminal statute—applied equally to neutral civil statutes of general applicability.<sup>44</sup> The court held “that the Supreme Court would not ‘have been as concerned as it was to distinguish and explain numerous previous free exercise cases that address ‘civil’ statutes’ were the *Smith* holding limited to the criminal context alone.”<sup>45</sup> After holding that *Smith* applied in the public school curricula context, the court noted that the public school curricula law in question was a neutral law of general applicability; therefore, any “free exercise challenge [was] presumably precluded.”<sup>46</sup>

The *Vandiver* decision is important for two reasons. First, it essentially dismisses any argument that *Mozert*, rather than *Smith*, would be applied in the context of public school curricula. Had *Smith* not essentially overruled *Mozert*, the Sixth Circuit surely would have applied its own binding case law in *Vandiver*. The Sixth Circuit’s failure to even mention *Mozert* and its application of *Smith*, shows that *Smith* governs a free exercise claim in the context of public school curricula. Second, *Vandiver* illustrates that any free exercise challenge to a law regulating a public school curricula is “presumably precluded” as these are neutral laws of general applicability. It would be hard to imagine a law regulating a public school curricula that was not. Therefore, a free exercise challenge, standing alone, would be unsuccessful.

## B. Hybrid Claims

### 1. The Free Exercise Clause and Parental Right Hybrid Standard

Based on the foregoing, it seems almost certain that any free exercise challenge to a law regulating public school curricula would be bound to fail. Nevertheless, plaintiffs in the public school context have a stronger claim at their disposal. In *Smith*, the Supreme Court noted an exception to the onerous standard articulated in that case.<sup>47</sup>

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43. 925 F.2d 927 (6th Cir. 1991).

44. *Id.* at 932. Other circuits have held the same. See *Salvation Army v. Dep’t of Cmty. Affairs*, 919 F.2d 183 (3d Cir. 1990) (holding that a family center for disadvantaged persons was not exempt from a state statute regulating boarding houses); *St. Bartholomew’s Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (holding that a religious organization was not exempt from compliance with a facially neutral landmark preservation law).

45. *Vandiver*, 925 F.2d at 932 (quoting *Salvation Army*, 919 F.2d at 195).

46. *Id.* After holding that the free exercise challenge was precluded, the court went on to address the hybrid exception noted in *Smith*. See *id.* at 933.

47. See *supra* note 41.

This exception—known as a “hybrid claim”—would provide plaintiffs in the public school context with a greater likelihood of success.

The hybrid claim was first articulated in *Wisconsin v. Yoder*.<sup>48</sup> In *Yoder*, the Supreme Court addressed a claim brought by Amish parents challenging Wisconsin’s compulsory school attendance law.<sup>49</sup> The parents were members of Old Order Amish communities, which did not permit children to be sent to high school.<sup>50</sup> As a result of this religious belief, the parents withheld their children from high school and were subsequently tried and convicted for violating the aforementioned law.<sup>51</sup> In challenging the law, the parents claimed that, by sending their children to high school, they would expose themselves to reprimand from the church and also compromise their salvation and that of their children.<sup>52</sup> The state stipulated that these religious beliefs were sincere.<sup>53</sup>

In addressing the constitutional challenge, the Court stated that, for the law to be upheld, it must be shown that the state did not deny the free exercise of religion by this requirement or that there is a state interest sufficient to override the free exercise challenge.<sup>54</sup> The Court held that the Wisconsin law violated the Free Exercise Clause because it “affirmatively compel[led the parents], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.”<sup>55</sup>

Having determined that the Wisconsin law burdened the free exercise of religion, the Court went on to examine the state’s contention of a compelling government interest. The state made two arguments in this regard. First, the state argued that education is intrical to prepare people to participate in the political system that is necessary in an independent and free society.<sup>56</sup> Second, the state argued that education is necessary to ensure that individuals are self-sufficient

48. 406 U.S. 205 (1972).

49. *Id.* at 207.

50. *Id.* at 207, 209.

51. *Id.* at 208.

52. *Id.* at 209.

53. *Id.*

54. *Id.* at 214.

55. *Id.* at 218. The Court further stated that the law threatened the continued existence of the Amish community. *Id.* The Court also observed:

Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age [sixteen] for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

*Id.*

56. *Id.* at 221.

and self-reliant.<sup>57</sup> The Court dismissed these interests, claiming that, with respect to the Amish, an additional one or two years of formal education would do little to serve the purported state interests.<sup>58</sup>

The Court then went on to discuss the hybrid nature of the claim. The Court stated that the case “involve[d] the fundamental interest of parents . . . to guide the religious future and education of their children.”<sup>59</sup> As such, the Court held that strict scrutiny was appropriate in evaluating the Wisconsin law: “[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.”<sup>60</sup>

As the *Smith* and *Yoder* Courts explained, a hybrid claim is a free exercise claim coupled with another constitutional protection. In the context of challenging public school curricula, that other constitutional protection would be the parental right articulated by the Supreme Court in *Meyer v. Nebraska*<sup>61</sup> and *Pierce v. Society of Sisters*.<sup>62</sup> As the free exercise standard was discussed in Part II.A.1, the remainder of this Part will address the parental right articulated in *Meyer* and *Pierce*.

In *Meyer*, a teacher was tried and convicted under a Nebraska law that criminalized teaching a foreign language.<sup>63</sup> In reversing the conviction and overturning the law, the Court stated, “[I]t is the natural duty of the parent to give his children education suitable to their station in life . . . .”<sup>64</sup> Two years later the Court decided *Pierce*. There, the Court considered the constitutionality of an Oregon law that required parents to send their children to public schools.<sup>65</sup> Relying on

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57. *Id.*

58. *Id.* at 222.

[T]he evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents’ experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

*Id.*

59. *Id.* at 232.

60. *Id.* at 233 (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)).

61. 262 U.S. 390 (1923).

62. 268 U.S. 510.

63. *Meyer*, 262 U.S. at 396-97.

64. *Id.* at 400.

65. *Pierce*, 268 U.S. at 530-31.

*Meyer*, the Court held that the law “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>66</sup> As the Court noted, “The child is not the 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.”<sup>67</sup>

## 2. Applying the Hybrid Standard to Public School Curricula

Plaintiffs putting forth a hybrid claim in the public school curricula context have, by and large, been unsuccessful. Courts have severely limited *Yoder* to the unique facts of that case.<sup>68</sup> The *Yoder* Court explicitly limited its holding to “a free exercise claim of the nature revealed by [the] record”<sup>69</sup> and “one that probably few other religious groups or sects could make.”<sup>70</sup>

In addition, the Second Circuit has refused to even consider a hybrid claim, arguing that the language in *Smith* was dicta and therefore nonbinding.<sup>71</sup> Similarly, the Sixth Circuit has refused to follow *Smith*'s hybrid exception until the Supreme Court clarifies its statement.<sup>72</sup> Despite the Second and Sixth Circuits' refusal to follow *Smith*'s hybrid exception, the First,<sup>73</sup> Ninth,<sup>74</sup> Tenth,<sup>75</sup> and D.C.<sup>76</sup> Circuits, by contrast, have followed the Supreme Court's hybrid analysis as enumerated in *Smith*.

In *Brown v. Hot, Sexy and Safer Productions, Inc.*,<sup>77</sup> the plaintiffs alleged that they were compelled to attend an indecent sex education course conducted at their high school by Hot, Sexy and Safer Productions.<sup>78</sup> Plaintiffs alleged many constitutional violations, and among

66. *Id.* at 534-35.

67. *Id.* at 535.

68. *See, e.g.*, *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987) (“*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule . . . .”); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 135 (N.D.N.Y. 1988) (“[T]he holding in *Yoder* must be limited to its unique facts.”).

69. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

70. *Id.* at 236.

71. *See Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003).

72. *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180-81 (6th Cir. 1993) (holding that the hybrid rights exception will apply if a free exercise claim is joined with another independently viable substantive due process claim).

73. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 538-39 (1st Cir. 1995) (holding that the hybrid rights exception was prevented without an independently viable claim).

74. *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999) (applying *Smith* outside the criminal context).

75. *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699-700 (10th Cir. 1998) (applying a “colorable claim of infringement” theory to implement the hybrid rights exception).

76. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that the addition of an Establishment Clause violation establishes a hybrid rights exception).

77. 68 F.3d 525.

78. *Id.* at 529.

those was a *Smith* hybrid claim based on a free exercise challenge and a violation of the parental right established in *Meyer* and *Pierce*.<sup>79</sup> The First Circuit, however, never analyzed the hybrid right. Rather, the court held that the parents had not shown a violation of the *Meyer* and *Pierce* parental right, and therefore no hybrid claim was properly alleged. According to the court, the *Meyer* and *Pierce* right does not “encompass[] a fundamental constitutional right to dictate the curricula at the public school to which [parents] have chosen to send their children.”<sup>80</sup> The court elaborated on this holding: “We think it is fundamentally different for the state to say to a parent, ‘You can’t teach your child German or send him to a parochial school,’ than for the parent to say to the state, ‘You can’t teach my child subjects that are morally offensive to me.’”<sup>81</sup> In so holding, the court summarily dismissed the hybrid claim stating: “Their free exercise challenge is . . . not conjoined with an independently protected constitutional protection.”<sup>82</sup>

Likewise, other courts have summarily dismissed the hybrid claim, arguing that a *Meyer* and *Pierce* violation was not shown.<sup>83</sup> These courts have essentially held that *Meyer* and *Pierce* do not provide parents with the right to have their children opt out of offensive public school curricula. As the *Brown* court stated:

If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school’s choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.<sup>84</sup>

If you believe the cases cited above, a hybrid claim in the context of public school curricula would, like a free exercise claim, undoubtedly fail. Yet, these cases seem to be selling the *Meyer* and *Pierce*

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79. *Id.* at 539.

80. *Id.* at 533.

81. *Id.* at 533-34.

82. *Id.* at 539.

83. See *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (“Whatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one’s child.”); see also *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999) (“We hold that a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right.”).

84. *Brown*, 68 F.3d at 534.

holdings short. In essence, these courts are saying that *Meyer* means only that parents can choose to teach their child a foreign language and that *Pierce* means simply that parents can send their child to a private, rather than public, school.<sup>85</sup>

This limited interpretation of the holdings in *Meyer* and *Pierce* completely ignores the Supreme Court's prior treatment of those cases. Rather than treating *Meyer* and *Pierce* as limited to the specific facts of those cases, the Supreme Court has stated that those cases articulated "broad statements of the substantive reach of liberty under the Due Process Clause."<sup>86</sup> Moreover, a limited view of the reach of those holdings completely ignores the Court's decision in *Yoder*. As the *Yoder* court stated, "The duty to prepare the child for 'additional obligations,' referred to by the [*Meyer*] Court, *must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.*"<sup>87</sup> Additionally, *Yoder* did not deal with sending children to a private school or the teaching of a foreign language, yet the Supreme Court found it within the bounds of constitutional law to apply those holdings to the entirely different facts of that case. Thus, the limited view of the *Meyer* and *Pierce* holdings articulated by the circuit courts is completely unfounded and without support in Supreme Court jurisprudence.<sup>88</sup>

Assuming that a court could be convinced that *Meyer* and *Pierce* do provide a broad parental right sufficient to successfully plead a hybrid claim, a strict scrutiny test would be applicable, and the question would turn to whether, under a *Sherbert* analysis, an opt-out would be required.<sup>89</sup> The *Sherbert* analysis requires that (1) the government regulation placed a burden on the free exercise of religion,

85. See *id.* at 533 ("The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language.").

86. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

87. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (emphasis added).

88. To be clear, this Comment does not maintain that *Meyer* and *Pierce*, alone, provide parents with the constitutional right to opt out. Rather, this Comment maintains simply that *Meyer* and *Pierce* provide a broad parental right sufficient to adequately plead a hybrid claim. This does not mean that a plaintiff would be entitled to an opt-out, but merely means that a court would have to conduct a hybrid claim analysis relying on the standard articulated in *Sherbert* and applied to public school curriculum in *Mozert*. Whether the plaintiff would be entitled to an opt-out would depend on the outcome of this analysis.

89. While the *Smith* Court did not specifically state that a hybrid claim would require strict scrutiny, a common sense reading of the opinion dictates such a result. In discussing the hybrid exception, the Court cited specific examples of the hybrid exception and all of the cases cited by the Court involved a strict scrutiny analysis. See *Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990). Moreover, numerous circuit courts have held that the hybrid exception enumerated in *Smith* mandates strict scrutiny. See *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 163 n.20 (3d Cir. 2002).

and (2) the government lacks a “compelling state interest” in regulating burdening activity.<sup>90</sup>

The starting point for this analysis is the Sixth Circuit’s decision in *Mozert*. There, the court held that requiring students to read from a textbook containing religiously offensive ideas did not burden the free exercise of religion but had merely exposed the plaintiffs to differing views of religion.<sup>91</sup> In so doing, the court stated, “[D]istinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion.”<sup>92</sup>

The plaintiffs in *Mozert* were essentially asking for an opt-out of a class that taught religiously offensive ideas.<sup>93</sup> According to the *Mozert* court, what is absent in an opt-out situation is “the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff’s religion.”<sup>94</sup>

This does not mean, however, that any and all opt-out challenges would be invariably denied. To the contrary, a plausible argument can be made that the majority in *Mozert* was incorrect in holding that there was no burden on the plaintiffs’ free exercise of religion.<sup>95</sup> In fact, Judge Boggs wrote a separate concurring opinion disagreeing with the majority’s holding that the plaintiffs had not shown a burden on their free exercise of religion. He opined that the majority “view both slights plaintiffs’ honest beliefs that studying the full Holt series would be conduct contrary to their religion, and overlooks other Supreme Court Free Exercise cases which view ‘conduct’ that may offend religious exercise at least as broadly as do plaintiffs.”<sup>96</sup>

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90. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

91. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1068 (6th Cir. 1987).

92. *Id.* (quoting *Grove City v. Mead Sch. Dist.* No. 354, 753 F.2d 1528, 1543 (9th Cir. 1985)).

93. The plaintiffs were seeking to opt out of the reading period, at which the Holt Series was being read, and be excused to the library. *See id.* at 1063.

94. *Id.* at 1069.

95. In addition to simply arguing that the majority in *Mozert* was incorrect, at least one commentator has suggested that a class that strictly teaches evolution is distinguishable from the facts of *Mozert* and falls within a “judicially created gray area.” Hodgson, *supra* note 1, at 180.

If the *Mozert* court tells us mere exposure to contrary religious ideas does not burden free exercise, and the Court in *Barnette* and *Yoder* proscribes mandating an outward expression of contrary religious beliefs, or a compulsion of behavior contrary to one’s religion, then there must be some gray area in between the two. Given this framework, teaching the theory of evolution (with no competing theories) as the only scientifically plausible theory of the origins of life falls short of *Barnette* and *Yoder* but compels much more than *Mozert*, thus falling into that judicially created gray area.

*Id.*

96. *Mozert*, 827 F.2d at 1075 (Boggs, J., concurring).

Judge Boggs noted, “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”<sup>97</sup> Accordingly, Judge Boggs stated that the plaintiffs had “drawn their line” as to what was religiously acceptable and “would [have held] that if they are forced over that line, they are ‘engaging in conduct’ forbidden by their religion.”<sup>98</sup>

Judge Boggs based this conclusion on the Supreme Court’s decision in *Thomas v. Review Board*.<sup>99</sup> *Thomas* involved a situation where the plaintiff quit his job producing turrets for military tanks based upon religious reasons.<sup>100</sup> *Thomas* thereafter applied for unemployment benefits but was denied them on the grounds that he had no good cause to terminate his employment.<sup>101</sup> In addressing *Thomas*’ claim, the Court noted that “a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program.”<sup>102</sup> The Court conceded that the Indiana law did not *compel* a violation of conscience, yet “‘this is only the beginning, not the end, of [the] inquiry.’”<sup>103</sup> The Court held that when the state conditions receipt of an important benefit on conduct prohibited by a religious faith, “thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.”<sup>104</sup> In remarking on the *Thomas* holding, Judge Boggs in *Mozert* correctly noted:

For *Thomas*, there was no commandment against hooking up chains. He asserted that this would be “aiding in the manufacture of items used in the advancement of war,” because it was in a tank turret line, but he had also said that he would work in a steel factory that might ultimately sell to the military. . . . This distinction appears as convoluted as [the *Mozert*] plaintiffs’ distinctions seem to some. Nevertheless, *Thomas* drew his line, and the Supreme Court respected it and dealt with it.<sup>105</sup>

Judge Boggs, however, ultimately concluded that the plaintiffs were not entitled to an opt-out, arguing that the principle enumerated in *Sherbert* was “sufficiently thin” and “should not be extended blindly.”<sup>106</sup> For Judge Boggs, the nature of the school system and the

97. *Id.* at 1076 (alteration in original) (citing *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981)).

98. *Id.*

99. 450 U.S. 707.

100. *Id.* at 712.

101. *Id.*

102. *Id.* at 716.

103. *Id.* at 717 (quoting *Sherbert v. Verner*, 374 U.S. 393, 404 (1963)).

104. *Id.* at 717-18.

105. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1076 (6th Cir. 1987) (citing *Thomas*, 450 U.S. at 712 n.4).

106. *Id.* at 1079.

burden an opt-out would place upon a school dictated that *Sherbert* not be extended to cover that situation:

Running a public school system of today's magnitude is quite a different proposition. A constitutional challenge to the content of instruction (as opposed to participation in ritual such as magic chants, or prayers) is a challenge to the notion of a politically-controlled school system. Imposing on school boards the delicate task of satisfying the "compelling interest" test to justify failure to accommodate pupils is a significant step. It is a substantial imposition on the schools to *require* them to justify each instance of not dealing with students' individual, religiously compelled, objections (as opposed to *permitting* a local, rough and ready, adjustment), and I do not see that the Supreme Court has authorized us to make such a requirement.<sup>107</sup>

Judge Boggs' argument seems sound, and would foreclose most opt-out requests—certainly all requests as burdensome as the one in *Mozert*. However, Judge Boggs seems to suggest that the *Sherbert* analysis should never been applied in the context of public school curricula. While it is a compelling argument under the facts of *Mozert*, its appeal would not be as strong under a different set of facts. For instance, suppose a parent requested an opt-out of merely a four-week period of a biology class during which the theory of evolution was taught. This is a much narrower opt-out request, and its compliance would be much less burdensome on the school. As such, it would seem entirely reasonable to extend the *Sherbert* compelling interest test to this situation.

If *Sherbert* were to be applied to such a scenario, a plaintiff would almost certainly prevail. Judge Boggs conceded that a burden had been shown in *Mozert* and, in fact, stated, "the burden in our case is greater than in . . . *Sherbert*."<sup>108</sup> Accordingly, with the first prong of *Sherbert* present, the burden would then move to the state to come forth with a compelling interest as to why the burdensome action should be permitted to stand. The compelling interest test is "quite strict" such that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."<sup>109</sup> In the context of an opt-out request, it would be necessary to show actual problems with the accommodation provided; otherwise, "it is difficult to see how this standard could be met if a constitutional burden were established."<sup>110</sup> Moreover, it seems unlikely that a state would be able to

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107. *Id.* at 1079-80 (footnotes omitted).

108. *Id.* at 1079 ("Here, the burden is many years of education, being required to study books that, in plaintiffs' view, systematically undervalue, contradict and ignore their religion.")

109. *Id.* at 1077 (citing *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)) (alteration in original).

110. *Id.* at 1078.

show a problem with the accommodation under a narrow opt-out request.<sup>111</sup> Excusing a student from four weeks of biology hardly seems to rise to the level of a grave abuse that would “endanger[] paramount interests.”<sup>112</sup>

Nevertheless, a hybrid claim seeking an opt-out of a public school curriculum would be unlikely to prevail. No court has been inclined to grant an opt-out; moreover, no court has been persuaded that *Meyer* and *Pierce* provide a broad parental right sufficient to conduct a hybrid analysis. Even if a court were persuaded to conduct a hybrid analysis, the *Mozert* decision would foreclose opt-outs in almost all but the narrowest of circumstances. Thus, for a hybrid claim to succeed, a plaintiff would first have to convince a court that *Meyer* and *Pierce* provide a broad parental right and then show the court that the opt-out he or she is requesting is very narrow in scope, such that a *Sherbert* analysis should be conducted.

### C. RFRA Claims

#### 1. The RFRA Standard

In addition to the constitutional claims enumerated above, plaintiffs seeking an opt-out from religiously offensive public school curricula also have a statutory claim under state Religious and Freedom Restoration Acts (RFRAs). Although the federal RFRA is unconstitutional as applied to the states after *City of Boerne v. Flores*,<sup>113</sup> a number of states have enacted a similar RFRA statute.<sup>114</sup> Likewise, courts

111. It should be noted, however, that such a request could be seen as burdensome in two respects. First, the obligation on the part of the school to consider the opt-out request may, in and of itself, be a burden. If one student is permitted to opt out of a portion of the curriculum, then other students may be permitted to do so for other reasons. This would force the school board to undertake a case-by-case analysis to determine if the opt-out request is valid and should be granted. Second, it is now common for many school boards to require that students pass a standardized achievement test prior to graduation. If a student were permitted to opt out of a biology part of the curriculum, it would then be logical to allow the student to opt out of the biology portion of the standardized test. This could create problems much larger than the original four-week opt-out of the biology class. The outcome of a narrow opt-out case would largely depend on how the school board phrased the nature of the burden. If the school board simply maintained that the four-week opt-out was, in and of itself, burdensome, the school board would be unlikely to win. However, if the school board were to fully articulate the more far-reaching ramifications of permitting the opt-out, namely the two issues noted above, it would be a much more difficult case for a plaintiff to win.

112. See *Mozert*, 827 F.2d at 1077.

113. *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997) (“Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”).

114. Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2213 n.31 (2005) (“The language of state RFRAs is similar to the original federal RFRA in that they typically require that the government follow a compelling state interest/least restrictive means standard.” (citing ALA. CONST. of 1901, amend. 622 (1999))).

in a number of states have interpreted their state constitutions to require a strict scrutiny test for religious freedom.<sup>115</sup> However, the majority of states has not adopted a RFRA similar to that of the federal RFRA, nor have courts in these states interpreted their state constitutions as requiring strict scrutiny.<sup>116</sup> In these states, parents would be forced to rely on the hybrid claim.

The typical state RFRA applying strict scrutiny provides:

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.<sup>117</sup>

Such statutes effectively overturn the *Smith* decision and reinstate the *Sherbert* standard. This is extremely beneficial for two reasons. First, it forces the government to meet a higher standard—one more likely to provide plaintiffs with an opt-out. Second, while the state RFRA would likely result in the same outcome as a successful hybrid claim, a state RFRA claim provides less hurdles for a successful plaintiff to clear. For instance, plaintiffs in this context would not be forced to first establish that *Meyer* and *Pierce* provide the type of broad parental right entitling the action to strict scrutiny. As noted above, the circuit courts have been reluctant to find that *Meyer* and *Pierce* provide such a broad right. Moreover, in the hybrid context it could be difficult to convince a court that the strict scrutiny test in *Sherbert* should be applied in the context of public school curricula. By contrast, the RFRA strict scrutiny standard undoubtedly applies across the board. Thus, the RFRA action is less difficult for a plaintiff to successfully plead and still provides a strict scrutiny level of analysis.

To establish a claim under RFRA, the interference with the plaintiff's religious practice must be more than an inconvenience and rise to

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115. *Id.* at 2213-14 (citing *State v. Miller*, 549 N.W.2d 235, 240-41 (Wis. 1996); *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994); *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 865 (Minn. 1992)).

116. *Id.* at 2214. These states are Alaska, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.* at 2214 n.33.

117. FLA. STAT. § 761.03(1)(a)-(b) (2005). All state RFRAs are essentially identical in content. This Comment will proceed by using Florida's RFRA as an example.

the level of a substantial burden.<sup>118</sup> To show a substantial burden under RFRA, the plaintiff must show that the government regulation is one that either compels the plaintiff to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires.<sup>119</sup>

## 2. *Applying the RFRA Standard to Public School Curricula*

While very few cases have addressed a RFRA claim seeking an opt-out of public school curricula, a federal district court did confront this issue under the federal RFRA before it was held unconstitutional by the Supreme Court in *Boerne*.<sup>120</sup> In *Battles v. Anne Arundel County Board of Education*,<sup>121</sup> the court addressed a Maryland law regulating home schooling of children.<sup>122</sup> The law required “instruction in English, mathematics, science, social studies, art, music, health, and physical education.”<sup>123</sup> To ensure that instruction was provided in these areas, the law required parents to “maintain a portfolio of instructional materials and examples of the child’s work . . . permit a representative to observe the teaching provided and review the portfolio at a mutually agreeable time and place not more than three times a year.”<sup>124</sup> Battles refused to comply with the law, claiming that it violated the free exercise of religion protected by the federal RFRA.<sup>125</sup> Battles was attempting to opt out of this curriculum, claiming “that the public school system indoctrinates children in atheism, non-Christian religions, secular humanism, evolutionism and other teachings which are contrary to her religious beliefs.”<sup>126</sup>

In addressing the RFRA claim, the court held that the allegations “that the required curriculum promotes atheism, paganism, and evolutionism” were not sufficient to establish a substantial burden on the free exercise of religion.<sup>127</sup> According to the court, the plaintiffs did “not have to alter their religious beliefs or forego acts necessary to their be-

118. *First Baptist Church of Perrine v. Miami-Dade County*, 768 So. 2d 1114, 1117 n.3 (Fla. 3d DCA 2000).

119. *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004).

120. Cases applying the federal RFRA are relevant because the federal RFRA is nearly identical to the state RFRA that impose strict scrutiny. The federal RFRA provides that “government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(a)-(b) (1994).

121. 904 F. Supp. 471 (D. Md. 1995).

122. *Id.* at 472.

123. *Id.* at 473.

124. *Id.*

125. *Id.* at 476.

126. *Id.* at 472.

127. *Id.* at 477.

liefs to comply with Maryland's monitoring requirements."<sup>128</sup> As such, the court held that there was no free exercise violation.<sup>129</sup>

The *Battles* decision, however, is not dispositive for a variety of reasons. First, the opt-out request in *Battles* was extremely broad and overly burdensome on the state. A court may view a case presenting a narrower opt-out request more favorably. Second, and more importantly, the *Battles* decision ignores Supreme Court precedent regarding burdens on the free exercise of religion. As the *Thomas* Court indicated, a government regulation that compels an affirmation or denial of a religious belief is not always necessary to find a burden on the free exercise of religion. Rather, such an inquiry is "only the beginning, not the end," of the analysis.<sup>130</sup> In fact, the state cannot require a person to choose between an otherwise public program and a religious belief.<sup>131</sup> Were a state to condition an important benefit upon conduct prohibited by a religious belief, this compulsion, while indirect, would "nonetheless [be] substantial."<sup>132</sup>

Public education is certainly a "public program" providing an "important benefit." As such, the state may not condition this right upon conduct prohibited by a religious belief.<sup>133</sup> As Judge Boggs correctly noted in *Mozert*, the plaintiff in *Thomas* did not adhere to a religion that specifically commanded him to refrain from producing weapons used for war, yet he fully believed that his religion prohibited this type of conduct.<sup>134</sup> Likewise, plaintiffs seeking to opt out of a class teaching evolution does not do so based on a specific commandment prohibiting them from learning the theory of evolution. Yet, such a situation burdens the free exercise of their religion because the theory of evolution denies the literal truth of the Bible, something fundamentalist believers adhere to. According to Judge Boggs, once plaintiffs have "drawn their line" as to what is religiously acceptable and "are forced over that line, they are 'engaging in conduct' forbidden by their religion."<sup>135</sup> Assuming a court was persuaded by this argument, a plaintiff could potentially win a state RFRA claim seeking to opt out of a public school curriculum.

If a court were to grant an opt-out, the question would be whether that action violated the Establishment Clause of the First Amendment. The remainder of this Comment addresses that issue.

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128. *Id.*

129. *Id.*

130. *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981) (quoting *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963)).

131. *Id.* at 716.

132. *Id.* at 717-18.

133. *See id.* at 716-18.

134. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1076 (6th Cir. 1987) (Boggs, J., concurring).

135. *Id.*

## III. THE ESTABLISHMENT CLAUSE

A. *The Establishment Clause Standard*

The Establishment Clause of the First Amendment, made applicable to the States by incorporation into the Fourteenth Amendment,<sup>136</sup> provides that “Congress shall make no law respecting an establishment of religion . . . .”<sup>137</sup> The Supreme Court has articulated a variety of Establishment Clause tests and has resisted confining such analyses to “any single test or criterion.”<sup>138</sup> To the extent the Court has attempted to advance an analytical framework for assessing Establishment Clause cases, its efforts have proven ineffective.<sup>139</sup> In fact, several Justices have repeatedly directed harsh criticism towards the Court’s Establishment Clause standard. Justice Thomas stated that “the Court’s Establishment Clause jurisprudence is in hopeless disarray,”<sup>140</sup> while Justice Kennedy has proclaimed it in need of “[s]ubstantial revision.”<sup>141</sup> Nonetheless, there are at least four main frameworks of analysis: (1) the *Lemon* test,<sup>142</sup> (2) the endorsement test,<sup>143</sup> (3) the coercion test,<sup>144</sup> and (4) the neutrality test.<sup>145</sup>

The starting point for any Establishment Clause analysis is undoubtedly the Supreme Court’s decision in *Lemon v. Kurtzman*.<sup>146</sup> The *Lemon* test states that government action does not violate the Establishment Clause so long as it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement between government and religion.<sup>147</sup> However, both Justices and academics

136. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

137. U.S. CONST. amend. I (emphasis added).

138. *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984).

139. *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997); see also Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 301 (1993) (describing the endorsement test as an ineffective guide to the Court in Establishment Clause cases); Nancy E. Drane, Comment, *The Supreme Court’s Missed Opportunity: The Constitutionality of Student-Led Graduation Prayer in Light of the Crumbling Wall Between Church and State*, 31 LOY. U. CHI. L.J. 497, 511 (2000) (“Subsequent application of the various Establishment Clause tests proved to be as ineffective and uneven as the use of the *Lemon* test.”); Bryan D. LeMoine, Note, *Changing Interpretations of the Establishment Clause: Financial Support of Religious Schools*, 64 MO. L. REV. 709, 733 (1999) (describing the *Lemon* test as ineffective).

140. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

141. *County of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part).

142. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

143. See *Lynch*, 465 U.S. at 687-94 (O’Connor, J., concurring).

144. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

145. See *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005).

146. 403 U.S. 602.

147. *Id.* at 612-13.

have repeatedly attacked the *Lemon* test.<sup>148</sup> It was this criticism of *Lemon* that led Justice O'Connor to write a concurring opinion in *Lynch v. Donnelly*,<sup>149</sup> arguing that the *Lemon* test should be refined to focus more on whether the government is "endorsing" religion.<sup>150</sup>

Justice O'Connor's endorsement analysis states that the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying that "religion or a particular religious belief is favored or preferred."<sup>151</sup> The purpose prong asks whether the government intended to "endorse or disapprove of religion."<sup>152</sup> Conversely, the effect prong asks whether a "reasonable observer," familiar with the history and context of the community, would view the government conduct as communicating a message of endorsement or disapproval.<sup>153</sup> Some courts and commentators have accepted Justice O'Connor's endorsement test "as the controlling analytical framework for evaluating Establishment Clause claims."<sup>154</sup> The Supreme Court, however, has not been unanimous in its adoption of the endorsement test.<sup>155</sup> In fact, "even the Justices who have adopted the endorsement test do not agree on how it should be applied."<sup>156</sup>

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148. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that the Court should not advocate or adopt the *Lemon* test as the primary guide for resolving difficult Establishment Clause issues); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 33 (1989) (Scalia, J., dissenting) (stating that use of *Lemon* test to deny tax exemption was not founded on the Constitution, precedent, or history); *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting) (criticizing inconsistent application of the *Lemon* test); *Aguilar v. Felton*, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting) (stating that the *Lemon* test is too formalistic); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (stating that *Lemon* test is "blurred" and "indistinct"); *Lynch*, 465 U.S. at 679 (stating that the *Lemon* test is not overriding criteria); *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (stating that the *Lemon* test is nothing but a "helpful signpost"); *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983) (ignoring the *Lemon* test in favor of historical argument); see also Stuart W. Bowen, Jr., Comment, *Is Lemon a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129, 134 (1990) ("[T]he Court should clarify its [Establishment Clause] analysis by abandoning *Lemon* and adopting a test that more accurately reflects the framers' original understanding of the word 'establishment.'").

149. 465 U.S. 668.

150. *Id.* at 687-94 (O'Connor, J., concurring).

151. *Allegheny*, 492 U.S. at 592-93 (citations omitted); see also *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring).

152. *Edwards*, 482 U.S. at 585 (quoting *Lynch*, 465 U.S. at 690).

153. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-81 (1995) (O'Connor, J., concurring).

154. *Bauchman v. W. High Sch.*, 132 F.3d 542, 552 (10th Cir. 1997); see also James M. Lewis & Michael L. Vild, Note, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671 (1990).

155. *Bauchman*, 132 F.3d at 552.

156. *Id.* For instance, the Court has indicated that the purpose component alone is sufficient to invalidate government action. *Edwards*, 482 U.S. at 585. Yet, the Court has rarely decided cases based solely on the purpose component. See *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985). Additionally, the Court's willingness to analyze the government's subjective intent in determining the purpose of the government's action has been criticized by other Justices on the Court. See *Edwards*, 482 U.S. at 636-37 (Scalia, J., dissenting) (stat-

In addition to the *Lemon* and endorsement tests articulated above, the Court, in reviewing government action under the Establishment Clause, has also asked whether the government conduct at issue has a coercive effect.<sup>157</sup> In *Lee v. Weisman*, the Court addressed whether allowing clerical members to offer prayer as part of a high school graduation ceremony was consistent with the religion clauses of the First Amendment.<sup>158</sup> The Court focused on the coercive nature of the prayer, stating “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”<sup>159</sup> Moreover, “prayer exercises in public schools carry a particular risk of indirect coercion.”<sup>160</sup> The Court held the coercive nature of the prayer did not withstand Establishment Clause scrutiny.<sup>161</sup> In so holding, the Court stated, “[T]he school district’s supervision and control of a high school graduation ceremony places . . . pressure . . . on attending students to stand as a group . . . . This pressure, though subtle and indirect, can be as real as any overt compulsion.”<sup>162</sup> Thus, another factor to use in analyzing government action under the Establishment Clause is the coercive nature of the behavior.

Lending more confusion to the already cumbersome body of Establishment Clause jurisprudence is the existence of yet another standard. In addition to the standards enumerated above, the Court has employed a neutrality test in determining whether government action violates the Establishment Clause.<sup>163</sup> The Court has stated that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”<sup>164</sup> Moreover, “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”<sup>165</sup> The Court has characterized this neutrality principle as part of *Lemon*’s purpose requirement.<sup>166</sup>

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ing that determining the government’s subjective intent is “almost always an impossible task” and looking “for *the sole purpose* of even a single legislator is probably to look for something that does not exist”).

157. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

158. *Id.* at 580.

159. *Id.* at 592.

160. *Id.*

161. *Id.* at 599.

162. *Id.* at 593.

163. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005).

164. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

165. *McCreary County*, 125 S. Ct. at 2733.

166. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (“*Lemon*’s ‘purpose’ requirement aims at preventing the

The question is whether granting an opt-out, as either the result of a legal challenge or as a result of the state's own free decision, would be unconstitutional under any of the Establishment Clause standards. The next Part addresses that issue.

*B. Applying the Establishment Clause Standard to Public School Curricula Opt-Outs*

The few courts that have addressed the constitutionality of providing an opt-out or other religious accommodation have generally concluded that such practice does not violate the Establishment Clause. For instance, after granting the accommodation in *Sherbert*, the Court summarily dismissed the Establishment Clause problem:

In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.<sup>167</sup>

Justice Stewart, however, took issue with the majority's holding. While noting that he did not agree with the Court's Establishment Clause jurisprudence, he stated that there are many situations where free exercise claims "will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause."<sup>168</sup> In Justice Stewart's opinion, *Sherbert* was "clearly such a case."<sup>169</sup> Justice Stewart opined: "[T]he Establishment Clause as construed by this Court not only *permits* but affirmatively *requires* South Carolina equally to deny the appellant's claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed."<sup>170</sup>

*Sherbert*, however, was decided before *Lemon*, so there is some question as to whether the majority's analysis would be the same after *Lemon*. Nevertheless, the Court had the opportunity to address that portion of the *Sherbert* holding post-*Lemon* and seemed to pass on the issue. In *Thomas*, the Court granted a religious accommodation and summarily dismissed the Establishment Clause issue by relying on the above quoted passage from *Sherbert*. In so doing, the

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[government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.".)

167. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

168. *Id.* at 414 (Stewart, J., concurring).

169. *Id.*

170. *Id.* at 415.

Court stated, “Unless we are prepared to overrule *Sherbert*, . . . Thomas cannot be denied the benefits due him on the basis of the finding[] . . . that he terminated his employment because of his religious convictions.”<sup>171</sup> The Court apparently was not prepared to overrule *Sherbert*, thereby paying scant attention to the Establishment Clause problem. Justice Rehnquist dissented, arguing that to accommodate Thomas would be to violate the Court’s Establishment Clause cases, and in particular, *Lemon*.<sup>172</sup> In noting the conflict between *Sherbert* and *Lemon*, Justice Rehnquist opined, “To the extent *Sherbert* was correctly decided, it might be argued that cases such as . . . *Lemon* . . . were wrongly decided.”<sup>173</sup>

Justices Stewart and Rehnquist make valid points. Under a strict interpretation of the Establishment Clause standards, providing a religious accommodation, such as a public school curriculum opt-out, would likely be unconstitutional. For instance, under a *Lemon* analysis, the opt-out would likely fail the secular purpose prong, as it is hard to imagine any secular purpose for providing an opt-out. In fact, granting the opt-out inhibits the school’s secular purpose of teaching evolution and has the primary effect of advancing religion. Such action sends the signal that being of a particular religious belief is a favorable thing as it can excuse one from class.

Likewise, under the endorsement analysis the opt-out would likely fail the purpose and effect prong because, as noted above, it sends the message that “religion or a particular religious belief is favored or preferred.”<sup>174</sup> This is true because adherents of religious beliefs that are not opposed to the theory of evolution would not be granted an opt-out. For this same reason, such an opt-out would violate the neutrality test because the “First Amendment mandates governmental neutrality between religion and religion.”<sup>175</sup> Such an opt-out favors those adherents who believe in a literal interpretation of the Bible to the exclusion of those who do not. This action is clearly not neutral towards religion. Additionally, it could also be argued that such opt-outs violate the coercion analysis for similar reasons.

171. *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981).

172. *Id.* at 726 (Rehnquist, J., dissenting). Justice Rehnquist stated:

It is not surprising that the Court today makes no attempt to apply [the *Lemon*] principles to the facts of this case. If Indiana were to legislate what the Court today requires—an unemployment compensation law which permitted benefits to be granted to those persons who quit their jobs for religious reasons—the statute would “plainly” violate the Establishment Clause as interpreted in such cases as *Lemon* . . . .

*Id.*

173. *Id.* at 724 n.2.

174. See *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985)); see also *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O’Connor, J., concurring).

175. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

While there is no direct compulsion, the message that a particular religious belief will receive favorable treatment seems to exhibit the same type of subtle coercion the Court was concerned with in *Lee*.<sup>176</sup>

Nonetheless, the Supreme Court has continuously held that religious accommodations do not violate the Establishment Clause.<sup>177</sup> The Court “has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause.”<sup>178</sup> A strict interpretation of Establishment Clause jurisprudence would lead to invalidation of religious accommodations, yet the Court seems to apply a less stringent Establishment Clause standard in this area. In the recent case of *Locke v. Davey*,<sup>179</sup> the Court noted the tension between the two clauses but “reaffirmed that ‘there is room for play in the joints between’ the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.”<sup>180</sup> Although, the Court has conceded, “[a]t some point, accommodation may devolve into ‘an unlawful fostering of religion.’”<sup>181</sup> However, based on the accommodation programs the Court has previously upheld, it is difficult to see how the Court could find a narrow public school curriculum opt-out as violative of the Establishment Clause.<sup>182</sup>

### C. Conflict Between Free Exercise Rights and the Establishment Clause

To the extent that an opt-out is regarded as required under a free exercise, hybrid, or RFRA analysis and further, to the extent that an opt-out is regarded as prohibited under the Establishment Clause, the question becomes: Which right trumps? Which right is more im-

176. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

177. See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 5 (2000) (“The Supreme Court has repeatedly held that religious accommodations are constitutionally permissible.”). But cf. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 320 (1991) (arguing religious exemptions are problematic under the Establishment Clause).

178. *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144-45 (1987).

179. 540 U.S. 712 (2004).

180. *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2117 (2005) (quoting *Davey*, 540 U.S. at 718); see also *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970).

181. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334-35 (1987) (quoting *Hobbie*, 480 U.S. at 145).

182. See, e.g., *Cutter*, 125 S. Ct. at 2117 (upholding Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 (2000)); *Hobbie*, 480 U.S. at 144-45 (granting an unemployment compensation religious accommodation); *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981) (same); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (granting exemption from compulsory school attendance law to Amish children); *Walz*, 397 U.S. at 674 (upholding a statute providing tax exemption to religious organizations); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (granting an unemployment compensation religious accommodation).

portant? Numerous scholars and judges have recognized and discussed the conflict between the religion clauses of the First Amendment.<sup>183</sup> “The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”<sup>184</sup> While the Court has struggled to find a neutral course between the two clauses, the Court has nevertheless made it clear that the rights enumerated in the Free Exercise Clause do not supersede the limitations imposed by the Establishment Clause: “The principle that government may accommodate the free exercise of religion *does not supersede* the fundamental limitations imposed by the Establishment Clause.”<sup>185</sup>

While the Court has acknowledged that the Free Exercise Clause does not supersede the Establishment Clause, the Court has also stated “that ‘there is room for play in the joints between’ the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.”<sup>186</sup> Moreover, the Court has continuously permitted religious accommodations despite the fact that, under a strict interpretation of Establishment Clause jurisprudence, such accommodations would seem to be unconstitutional.

To the extent that a court determines it violates the Establishment Clause to provide an opt-out, one may not be provided no matter how a court decides the free exercise claim. Nevertheless, the Court has repeatedly upheld religious accommodations<sup>187</sup> and has, in fact, employed a less strenuous Establishment Clause test when scrutinizing religious accommodations.<sup>188</sup> Therefore, while strict adherence to the Court’s Establishment Clause jurisprudence would prevent a public school curriculum opt-out, the Court has avoided addressing the conflict between the Establishment Clause and the Free Exercise Clause head-on by employing a less stringent Establishment Clause standard to religious accommodations. Ultimately, this would allow parents to prevail on a public school curriculum opt-out challenge despite the fact that there are serious Establishment

183. See *Locke v. Davey*, 540 U.S. 712, 718 (2004) (“[T]he Establishment Clause and the Free Exercise Clause . . . are frequently in tension.”); *Norwood v. Harrison*, 413 U.S. 455, 469 (1973); *Tilton v. Richardson*, 403 U.S. 672, 677 (1971); *Walz*, 397 U.S. at 668-69; see also Emilie Kraft Bindon, Comment, *Entangled Choices: Selecting Chaplains for the United States Armed Forces*, 56 ALA. L. REV. 247, 259 (2004).

184. *Walz*, 397 U.S. at 668-69.

185. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (emphasis added).

186. *Cutter*, 125 S. Ct. at 2117 (quoting *Davey*, 540 U.S. at 718); see also *Walz*, 397 U.S. at 669.

187. *Hobbie*, 480 U.S. at 144-45 (stating that the Court “has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause”).

188. See cases cited *supra* note 182.

Clause problems inherent in granting such an accommodation and despite the fact that the Free Exercise Clause does not supersede the Establishment Clause.

#### IV. CONCLUSION

Opting out of public school curricula on grounds that the curriculum is religiously offensive raises a variety of issues. For instance, may parents force school boards to allow their children to opt out of certain classes based on a claim of free exercise, whether that claim is in the form of a Free Exercise Clause challenge, a hybrid claim challenge, or a state RFRA challenge? To the extent that a school board is forced to provide an opt-out or provides an opt-out based on its own initiative, does such action violate the Establishment Clause? To the extent that an opt-out is required based upon free exercise principles and to the extent the Establishment Clause prohibits providing an opt-out, which right prevails?

After *Smith*, any Free Exercise Clause challenge, standing alone, would be unsuccessful. However, the hybrid exception to *Smith* would provide some likelihood of success. Nevertheless, courts have been extremely reluctant to apply *Smith's* hybrid exception and have been even more reluctant to provide religious accommodations in the realm of public schools. State RFRA would provide parents with the most likelihood for success; however, only a handful of states have adopted a RFRA that provides for strict scrutiny. Additionally, as with hybrid claims, courts have been reluctant to interfere in the functions of public education. As such, courts have gone out of their way to hold that no burden on the free exercise of religion exists in order to avoid imposing burdens on the schools that would result from curriculum opt-outs. If an opt-out claim were to succeed, it would likely be a very narrow opt-out. A narrow opt-out would impose only a minimal burden on the school and would alleviate many of the concerns expressed by the courts considering curriculum opt-outs.

In addition, granting an opt-out raises Establishment Clause concerns. Moreover, the Court has acknowledged that the Free Exercise Clause does not supersede the Establishment Clause. Therefore, to the extent that a court were to determine that an opt-out violated the Establishment Clause, one may not be provided no matter how the court determined the free exercise claim. Nevertheless, the Court has repeatedly upheld religious accommodations despite the fact that such accommodations seem to be unconstitutional under a strict interpretation of Establishment Clause jurisprudence.

While courts have been reluctant to grant curriculum opt-outs, it seems plausible that a court would grant a narrow opt-out. Due to

the Court's willingness to apply a less stringent Establishment Clause standard to religious accommodations, an opt-out would unlikely be found violative of the Establishment Clause. Thus, a narrow opt-out would be both likely to prevail based on notions of free exercise, whether it is via a hybrid claim or via a state RFRA action, and unlikely to be prohibited based on the Establishment Clause.