

THE CONSTITUTIONALITY OF TEACHER CERTIFICATION REQUIREMENTS FOR HOME- SCHOOLING PARENTS: WHY THE ORIGINAL *RACHEL* *L.* DECISION WAS VALID

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INTRODUCTION

In March 2008, the California Court of Appeal decided *In re Rachel L.*, in which California's compulsory education statute was interpreted to effectively prohibit parents from home schooling their children unless they possessed state teaching certifications.¹ Although this case concerned a troubled family with a history suggesting that compulsory public schooling might be preferable in their case, the impact of the court's decision was far greater. Over 200,000 children were then being home schooled in California, many by parents with no teaching certification.² The *Rachel L.* decision made this method of home schooling illegal.³ Amidst great public backlash, the Court of Appeal reheard the case in August 2008. The court reinterpreted the statute, holding that it implicitly allowed uncertified parents to teach their children at home.⁴

The Court of Appeal reversed its earlier view based largely on legislative history, statutory interpretation, and apparent acquiescence by the California Legislature to the widespread practice of home schooling by uncertified parents.⁵ However, states could constitutionally require these parents to possess

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1. 73 Cal. Rptr. 3d 77 (Ct. App. 2008), *vacated sub nom.* Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571 (Ct. App. 2008).

2. Assem. Con. Res. 115, 2007-08 Leg., Reg. Sess. (Cal. 2008).

3. See 73 Cal. Rptr. 3d at 84-85.

4. See *Jonathan L.*, 81 Cal. Rptr. 3d at 577.

5. See *id.* at 576-89.

state teaching certifications as a measure of oversight over home-schooling families. This Note argues that, had the Court of Appeal retained its original interpretation, a requirement that parents must be certified by the state to teach their children at home would, in most circumstances, withstand a constitutional challenge. The Note first presents the two decisions of the California Court of Appeal and the reasoning behind each. The Note then examines the origins and development of parental rights over education stemming from *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, arguing that these precedents grant parents less than an absolute, fundamental right to direct all aspects of their children's education, both in traditional and home-school contexts. Further, the Note argues that challenges to certification requirements for home-schooling parents would withstand rational basis review, as the requirements are rationally related to legitimate state interests in education. The Note then examines protection of religion-based home schooling under *Wisconsin v. Yoder* and *Yoder's* later characterization as a "hybrid situation" involving both parental and religious rights in *Employment Division, Department of Human Resources v. Smith*. The Note finally argues that, although generally the *Yoder*-type hybrid claim has had limited success in the educational context, a challenge to a home-school certification requirement may prevail if parents can show evidence of the factors key to the *Yoder* decision.

I. BACKGROUND

A. *The Facts of In re Rachel L.*

In re Rachel L. involved a Los Angeles family that home schooled eight children.⁶ Since 1987, the family had been overseen by the Los Angeles County Department of Children and Family Services (DCFS) due to claims of physical abuse of the children by their father, sexual abuse of some of the female children by a family friend, Leonard C., and unsafe conditions in the home.⁷ On January 26, 2006, fourteen-year-old Rachel L.

6. 73 Cal. Rptr. 3d at 80.

7. See generally *In re Rachel L.*, Nos. B192601, B195484, 2007 WL 4112168, at *1-3 (Cal. Ct. App. Nov. 20, 2007) (describing in detail the various dependency petitions filed on behalf of

contacted the Los Angeles Police Department asking to be picked up, having run away from home several months earlier.⁸ Rachel reported physical and emotional abuse by her father, childhood sexual abuse by Leonard C., and was concerned that her younger sister, seven-year-old Mary Grace L., would become Leonard's victim as well.⁹ Rachel also expressed her desire to attend public school, which her father forbade.¹⁰ DCFS filed dependency petitions on behalf of Rachel, Mary Grace, and their nine-year-old brother, Jonathan L.¹¹

DCFS amended the petition to allege that refusing to send Rachel to public school could cause serious emotional damage.¹² All eight children in the family were taught at home by their mother, who had an eleventh-grade education.¹³ The mother arranged their educational program with Sunland Christian School, a private school through which parents teach their children at home using an independent study program.¹⁴ The children read from workbooks encompassing different subjects, and completed worksheets photocopied from the books so that the younger children could use the books passed down from the older children.¹⁵ The materials were copyrighted in 1978–79, but Sunland denied having provided these outdated books to the family.¹⁶ At the dependency court hearing, the children's father testified that lessons were given from nine or ten in the morning until between three and five in the afternoon, with short breaks.¹⁷ However, Rachel testified that she was taught sometimes for only one half-hour or two

several of the family's eight children between 1987 and 2006, and resolving issues not relevant to this Note).

8. *Id.* at *3.

9. *Id.*

10. *Id.*

11. *Id.* at *4.

12. *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571, 579 (Ct. App. 2008).

13. *Id.*

14. *Id.* For a detailed description of Sunland's program, see Sunland Christian School Handbook, http://www.home-schooling.org/SCS_Handbook/scs_handbook.html (last visited Nov. 17, 2009).

15. *Jonathan L.*, 81 Cal. Rptr. 3d at 579 & n.7.

16. *Id.* at 579–80 nn.7 & 9.

17. *In re Rachel L.*, Nos. B192601, B195484, 2007 WL 4112168, at *10 (Cal. Ct. App. Nov. 20, 2007).

hours.¹⁸ Her studies included citizenship, math, English, and science, but neither geography nor history.¹⁹ Rachel felt that math was her worst subject, stating that she could not add, subtract, multiply, or divide.²⁰

The dependency court expressed concern about the home schooling, particularly her parents' reliance on outdated materials, but finally concluded there was no serious risk of emotional damage to Rachel from this education.²¹ Nevertheless, Rachel, Jonathan, and Mary Grace were declared dependent due to Rachel's abuse allegations.²² Rachel was sent to live with an older sister, but subsequently ran away.²³ Jonathan and Mary Grace were permitted to return to their parents' home.²⁴

Counsel for Jonathan and Mary Grace then urged the dependency court to order that they attend a private or public school, given the family's history of abuse and the parents' past lack of cooperation with DCFS.²⁵ This was necessary, argued counsel, because the children would have regular contact with teachers who are required by law to report signs of child abuse.²⁶ The court denied the request, stating that it would "deprive the parents of their constitutional right to educate their own children," but did request that a school district representative "come out and investigate the appropriateness of the homeschooling."²⁷ One month later, the representative reported being denied entry into the family home, but had received documentation from Sunland Christian School about its program and was satisfied.²⁸ The court, believing the home schooling was legal, again declined to order that Jonathan and Mary Grace attend public school for safety reasons.²⁹ Counsel then petitioned the California Court of Appeal for an extraor-

18. *Id.* at *12.

19. *Id.*

20. *Id.*

21. *Jonathan L.*, 81 Cal. Rptr. 3d at 580 & n.10.

22. *Id.* at 580.

23. *Id.* at 580 n.11.

24. *Id.* at 580.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 580-81.

29. *Id.* at 581.

dinary writ, asking that the dependency court be directed to order the children to be enrolled in and actually attend a public or private school.³⁰

B. The First Decision: California Parents May Not Operate Home Schools Without a Teaching Certification

On March 7, 2008, the Court of Appeal granted the petition for extraordinary writ, holding that the dependency court erred by finding it legal under California law for the children's mother to teach them at home.³¹ The court based this holding on an examination of California's compulsory education statute, as well as California precedent upholding it as constitutional.³²

The court first noted that the California Legislature's enactment of the compulsory education statute³³ was pursuant to power granted by the California Constitution.³⁴ In addition, the court referenced *Pierce v. Society of Sisters*³⁵ and *Meyer v. Nebraska*,³⁶ two United States Supreme Court cases affirming the power of a state to enact compulsory education laws.³⁷ California's law requires full-time public school education for children between ages six and eighteen unless one of several exemptions applies.³⁸ Children may be exempted from attending public school if they are "instructed in a private full-time day school by persons capable of teaching"³⁹ or if they are

30. *In re Rachel L.*, 73 Cal. Rptr. 3d 77, 79 (Ct. App. 2008), *vacated sub nom.* Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571 (Ct. App. 2008).

31. *Id.*

32. *Id.*

33. CAL. EDUC. CODE §§ 48200–48342 (West 2006 & Supp. 2009).

34. CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.").

35. 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the state reasonably to regulate all schools . . . [and] require that all children of proper age attend some school . . .").

36. 262 U.S. 390, 402 (1923) ("The power of the state to compel attendance at some school . . . is not questioned.").

37. *In re Rachel L.*, 73 Cal. Rptr. 3d at 80.

38. CAL. EDUC. CODE § 48200.

39. *Id.* § 48222.

taught by a private tutor who “shall hold a valid state credential for the grade taught.”⁴⁰

The court relied extensively on *People v. Turner*, in which the code provisions were held constitutional.⁴¹ In *Turner*, parents challenged the requirement of a teaching certification for home-schooling parents, but the court said that *Pierce* did not compel a finding of unconstitutionality.⁴² Unlike the invalidated law in *Pierce*, which required parents to send their children to public school without exception, the California statutes provided alternative educational options subject to some state regulation.⁴³ The court felt this was permissible because *Pierce* acknowledged “the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils.”⁴⁴ The court reasoned that requiring certification for home tutors was a rational way for the Legislature to ensure quality instruction, as it would be difficult and expensive to supervise the teaching of widely scattered individual parents.⁴⁵ The court also rejected the parents’ claim that their home instruction fell under the private school exemption, as “a mere reading of [the statute] clearly indicates that the legislature intended to distinguish between private schools . . . and home instruction by a private tutor or other person.”⁴⁶ The court reasoned that if the private school exemption was meant to encompass a parent or tutor instructing at home, there would be no need for a separate private tutor exemption.⁴⁷

The court then noted that since *Turner*, the Legislature had not amended the exemptions to the compulsory education law, and found “no reason to strike down the Legislature’s evaluation of what constitutes an adequate education

40. *Id.* § 48224.

41. *In re Rachel L.*, 73 Cal. Rptr. 3d at 81 (citing *People v. Turner*, 263 P.2d 685 (Cal. App. Dep’t Super. Ct. 1953), *disagreed with by* Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571 (Ct. App. 2008)).

42. *Turner*, 263 P.2d at 686–87.

43. *Id.* at 687.

44. *Id.* (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925)).

45. *Id.* at 688.

46. *Id.*

47. *Id.*

scheme.”⁴⁸ Since Jonathan and Mary Grace were taught at home by a parent without a teaching certification, the court, following *Turner*, held that this home schooling did not qualify for either the private school or private tutor exemptions.⁴⁹ The parents further asserted that the children were “enrolled” in the Sunland Christian School, which occasionally monitored the mother’s teaching, but the court found this insufficient to meet the private school exemption, because “the fact remains that the children are taught at home by a noncredentialed person.”⁵⁰ The court, relying on the plain language of the statute, said that it exempts only “children who are being instructed in a private full-time day school.”⁵¹

The court finally rejected the parents’ claim that they were entitled to exemption from the compulsory education law based on their First Amendment right to free exercise of religion under *Wisconsin v. Yoder*.⁵² The court found no evidence that the parents’ religious practices would be burdened in the same way as those of the Old Order Amish were in *Yoder*, where detailed evidence showed that compelling Amish children to attend public high school lay in opposition to the Amish people’s “deep religious conviction, shared by an organized group, and intimately related to daily living.”⁵³ The court distinguished the extensive findings in *Yoder* from the parents’ merely conclusory, non-specific statements of religious belief, saying “such sparse representations are too easily asserted by any parent who wishes to home school his or her child.”⁵⁴

The Court of Appeal granted the extraordinary writ, and remanded to the dependency court to make specific findings regarding the parents’ compliance with the compulsory education law.⁵⁵ The court ordered: “[A]bsent any legal ground for

48. *In re Rachel L.*, 73 Cal. Rptr. 3d 77, 83 (Ct. App. 2008), *vacated sub nom.* Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571 (Ct. App. 2008).

49. *Id.* at 84.

50. *Id.* at 85.

51. *Id.* (quoting CAL. EDUC. CODE § 48222 (West 2006) (emphasis added)).

52. *Id.* at 86.

53. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972)).

54. *Id.* at 86.

55. *Id.* The dependency court based its ruling solely on its belief that parents have a constitutional right to home school their children, and thus its record contained no specific factual findings on whether the parents were in compliance with the compulsory education law. *Id.*

not doing so, the [dependency] court must order the parents to (1) enroll their children in a public full-time day school, or a legally qualified private full-time day school and (2) see to it that the children receive their education in such school."⁵⁶ Thus, in effect, the court held that parents without a teaching certification may not home school their children in California.

C. *The Public Response and Call for Reversal*

The *Rachel L.* decision met with immediate objection from California parents, home-school advocacy organizations, and Governor Arnold Schwarzenegger. Governor Schwarzenegger stood firmly in the parents' camp, saying, "'Every California child deserves a quality education, and parents should have the right to decide what's best for their children . . .'"⁵⁷ He referred to the decision as an "'outrageous ruling [that] must be overturned by the courts,'" promising that "'if the courts don't protect parents' rights then, as elected officials, we will.'"⁵⁸

Home-school advocacy organizations took the position that section 48222 of California's compulsory education law does allow home schooling as a form of private school, despite the contrary ruling of the Court of Appeal.⁵⁹ Thus, organizations such as the California Homeschool Network (CHN)⁶⁰ promote a "hands-off" legislative policy toward home schooling, stating:

We stand opposed to any legislation which would alter or amend these current laws to add any greater state authority to regulate, control or evaluate private schools and tutorial situations; define "home school," "home education," or related terms; add to or change

56. *Id.*

57. Jill Tucker & Bob Egelko, *Governor Vows to Protect Home Schooling*, S.F. CHRON., Mar. 8, 2008, at A1.

58. *Id.*

59. See, e.g., Legislation Affecting California Homeschoolers, <http://californiahomeschool.net/legis/legis.htm> (last visited Nov. 17, 2009); J. Michael Smith, Home School Legal Defense Association President, Response to Ruling of California Court of Appeal (Mar. 6, 2008), <http://www.hslda.org/elert/archive/2008/03/20080306162800.asp>.

60. The California Homeschool Network is an organization of volunteer home-schooling families that monitors legislation with the goal of "preserving the freedom to home school independent of government intervention or regulation." See CHN-Who We Are, <http://www.californiahomeschool.net/about/who.htm> (last visited Nov. 17, 2009).

the definitions of “tutor” or “private school” as they now exist in the law; [or] create any additional exemptions to compulsory attendance than those now stipulated in the education code.⁶¹

One home-schooling parent and CHN volunteer stressed that “[w]e just want to leave it alone because it’s good the way it is. . . . The law as it stands is working well in California.”⁶² The Home School Legal Defense Association (HSLDA)⁶³ also announced its disagreement with the interpretation of the statute and its intention to file an amicus brief for the appeal, arguing that “parents may legally teach their own children under the private-school exemption. . . . [I]f the court disagrees with our statutory argument, we will argue that the [statute as interpreted] violate[s] the constitutional rights of parents to direct the education and upbringing of their children.”⁶⁴

On March 10, 2008, members of the California State Assembly also expressed their disagreement with the Court of Appeal’s interpretation of the law through a Concurrent Resolution authored by Assembly Member Joel Anderson.⁶⁵ The resolution noted California’s home-schooling tradition, stating that “[s]ome [thirty] years of experience with the modern home schooling movement in California demonstrates that home-school graduates take up responsible positions as parents, as students in and graduates of colleges and universities, in the workplace, and as citizens in society at large[.]”⁶⁶ The resolution estimated that 200,000 California students were currently involved in home schooling.⁶⁷ The resolution then stated that the *Rachel L.* decision was a “misguided interpretation den[ying] California parents their primary responsibility

61. Legislation Affecting California Homeschoolers, *supra* note 59.

62. Tucker & Egelko, *supra* note 57, at A1.

63. The Home School Legal Defense Association is “a nonprofit advocacy organization established to defend and advance the constitutional right of parents to direct the education of their children and to protect family freedoms.” HSLDA provides legal consultation and representation to its members in conflicts with state or local school officials, and also both tracks legislation harmful to home schooling and assists in the drafting of protective legislation at the state and federal level. See About HSLDA, <http://www.hslda.org/about/default.asp> (last visited Nov. 17, 2009).

64. Smith, *supra* note 59.

65. Assem. Con. Res. 115, 2007–08 Leg., Reg. Sess. (Cal. 2008).

66. *Id.*

67. *Id.*

and right to determine the best place and manner of their own children's education[.]”⁶⁸ The resolution finally called for a reversal from the California Supreme Court.⁶⁹

The Court of Appeal agreed to rehear the case on March 25, 2008.⁷⁰

D. The Rehearing Decision: California Parents May Operate Home Schools Without Teacher Certification Under a “Private School Exemption” but Do Not Have an Absolute Constitutional Right To Teach Their Children at Home

On August 8, 2008, the Court of Appeal held that “California statutes permit home schooling as a species of private school education” but that in the context of a dependency proceeding, the permission “may constitutionally be overridden in order to protect the safety of a child”⁷¹ The court based their change in statutory interpretation on more recent additions to California’s Education Code that seemed to demonstrate the Legislature’s awareness and approval of home schools operating as private schools.⁷²

The court again referenced *Turner* and a subsequent case, *In re Shinn*,⁷³ both of which held that the Legislature did not intend to permit home schooling by uncertified parents under the private school exemption.⁷⁴ The Legislature had not amended the compulsory education law to supersede these opinions, giving rise to at least a slight inference of “acquiescence or passive approval” of the court’s statutory interpretation.⁷⁵ However, the court then acknowledged that, despite the legislative silence in the wake of *Turner* and *Shinn*, the Leg-

68. *Id.*

69. *Id.*

70. *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571, 577 (Ct. App. 2008). Sixteen amicus curiae briefs were considered by the court, including briefs from the Governor and Attorney General of California, the Los Angeles Unified School District, the California Department of Education, and several home-school advocacy groups. *Id.* at 577 n.3.

71. *Id.* at 576.

72. *Id.* at 577.

73. 16 Cal. Rptr. 165 (Dist. Ct. App. 1961), *disagreed with by Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571 (Ct. App. 2008).

74. *Jonathan L.*, 81 Cal. Rptr. 3d at 577–78.

75. *Id.* at 588 (quoting *Wilcox v. Birtwhistle*, 987 P.2d 727, 733 (Cal. 1999)).

islature "has acted as though home schooling is, in fact, permitted in California."⁷⁶

The court found the most explicit acknowledgement of home schools operating as private schools in an Education Code provision mandating that all private schools require their employment applicants to submit fingerprints for a criminal background check.⁷⁷ The statute exempts "a parent or legal guardian working exclusively with his or her children" from the fingerprint requirement.⁷⁸ Legislative history indicated that the purpose of this language was to exempt "parents and guardians employed in home study programs . . . if they worked exclusively with their own children."⁷⁹ Therefore, the court reasoned that "the Legislature both *understood* that some parents home school their children by designating their home schools as private schools, and *sought to benefit* those parents by exempting them from the fingerprint requirement."⁸⁰ The court concluded that interpreting the private school exemption to exclude home schools would render this provision, as well as other provisions enacted subsequently to *Turner* and *Shinn*,⁸¹ meaningless, and therefore held that "home schools may constitute private schools."⁸²

A further reason for the court's changed interpretation was its desire to adopt a reading of the statute that would "render it free from doubt as to its constitutionality."⁸³ The court recognized that if the compulsory education law were interpreted to prohibit home schools run as private schools by uncertified parents, the statute could potentially be unconstitutional as applied under *Wisconsin v. Yoder*.⁸⁴ If the statute were applied to parents similarly situated to the Old Order Amish, then "the law would be unconstitutional as to them if home schools were not private schools, but the constitutional difficulty

76. *Id.*

77. *Id.* (citing CAL. EDUC. CODE § 44237(a) (West 2006)).

78. CAL. EDUC. CODE § 44237(b)(4).

79. *Jonathan L.*, 81 Cal. Rptr. 3d at 589 (internal quotation omitted).

80. *Id.*

81. See generally *id.* at 588–89 (discussing other statutory and regulatory provisions that can be read to acknowledge the existence of home schools operating as private schools).

82. *Id.* at 590.

83. *Id.* at 591.

84. *Id.* at 591–92.

would disappear under the interpretation that home schools may be private schools.”⁸⁵

Although the court changed its previous ruling in *Rachel L.* on statutory grounds, it nevertheless reaffirmed its belief that the dependency court erred in believing that parents possess an absolute constitutional right to home school their children.⁸⁶ Instead, the court stated that “parents possess a constitutional liberty interest in directing the education of their children, but the right must yield to state interests in certain circumstances.”⁸⁷ The court noted that the standard of scrutiny to be applied to restrictions of parental autonomy was not clearly established, but that two recent California cases had applied strict scrutiny to such restrictions.⁸⁸

The Court of Appeal then applied strict scrutiny to the restriction on home schooling that would occur if a dependency court required Jonathan and Mary Grace L. to attend public school to ensure exposure to mandated reporters of child abuse.⁸⁹ It considered the welfare of a child to be a “compelling state interest that a state has not only a right, but a duty, to protect,”⁹⁰ and also noted that under *Yoder*, “the power of a parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child.”⁹¹ The court emphasized that the parents’ claim was in the context of a dependency proceeding, “in which the children *have already been found dependent due to abuse and neglect of a sibling*. We are therefore not concerned with the interference with the rights of a *fit parent*”⁹² The court found that in such a situation, restricting home schooling was narrowly tailored to achieve the goal of child safety and was a less restrictive means of protecting the children as opposed to terminating custody.⁹³ Therefore, the court held that a dependency court’s order re-

85. *Id.* at 592.

86. *Id.*

87. *Id.*

88. *Id.* at 593 (citing *Herbst v. Swan*, 125 Cal. Rptr. 2d 836, 840 (Ct. App. 2002); *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 145 (Ct. App. 2001)).

89. *Id.*

90. *Id.* (quoting *In re Marilyn H.*, 851 P.2d 826, 833 (Cal. 1993)).

91. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972)).

92. *Id.* at 593–94.

93. *Id.* at 594.

quiring children to attend a public or private school outside the home due to history of abuse in the family satisfied strict scrutiny.⁹⁴

E. The Court's Concern with the Lack of State Oversight of Home Schooling

The court closed by mentioning that there is no explicit home-schooling statute in California, but only the implicit legislative recognition of the practice upon which the court based its change in statutory interpretation.⁹⁵ Consequently, there are no provisions for enforcement or oversight of a home school written into the statutory scheme.⁹⁶ The court noted that "the propriety of any parent's home schooling will arise only in dependency (or family law) proceedings, or in a prosecution for failing to comply with the compulsory education law."⁹⁷ The court opined that "[g]iven the state's compelling interest in educating all of its children [under the California Constitution,] . . . additional clarity in this area of the law would be helpful."⁹⁸

II. ANALYSIS

The Court of Appeal changed its conception of the California compulsory education law based largely on statutory interpretation, despite the fact that its prior precedent upheld restrictions on home schooling by uncertified parents as constitutional. The court was heavily influenced by the fact that the California Legislature and Department of Education were aware that over 100,000 children were being home schooled in the state, but had not challenged the practice.⁹⁹ The court felt that "clinging to such precedent would undermine a practice that has been, if not actively encouraged, at least acknowl-

94. *Id.*

95. *Id.* at 595.

96. *Id.* at 596.

97. *Id.*

98. *Id.* (citing CAL. CONST. art. IX, § 1). Although the Court of Appeal saw the lack of regulation and oversight as potentially problematic, California parents and home-school advocacy groups strongly prefer that no new legislation be enacted. *See supra* text accompanying notes 59-62.

99. *Jonathan L.*, 81 Cal. Rptr. 3d at 591.

edged and accepted by officials and the public for many years.”¹⁰⁰

Leaving aside whether or not home schooling by uncertified parents is desirable as a matter of educational policy, the court’s original interpretation of the law in *Rachel L.*, which forbade this practice, can withstand constitutional challenge in most circumstances, absent a particularized religion-based claim. Although parents have a liberty interest in deciding the manner of their children’s education, it does not rise to the level of a fundamental right free from state regulation. Therefore, state restrictions on parents need only meet rational basis review, a standard highly deferential to the state. Teacher certification requirements can easily be considered rationally related to legitimate state interests in education. Where home schooling is conducted for religious reasons, restrictions might be subjected to higher scrutiny under *Wisconsin v. Yoder*, if parents can successfully frame their challenge as a “hybrid situation” as coined in *Employment Division, Department of Human Resources v. Smith*. Hybrid claims combining parental rights to direct education with free exercise of religion have only had limited success, but certain families may prevail in challenging a certification requirement if enough considerations key to the *Yoder* decision are present.

*A. The Scope of Parents’ Constitutional Liberty Concerning
Education of Their Children Is Not Without Limits*

Requiring parents to obtain a state teaching certification before home schooling their children clearly burdens their freedom to determine how their children should be educated. Although the United States Supreme Court has recognized a constitutional liberty interest of parents to direct their children’s education, continued state oversight of education through various means, including monitoring the quality of teachers, is anticipated by its foundational precedents, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. The language recognizing parental rights in these cases played a significant role in the Supreme Court’s expansion of substantive due process to include an unenumerated fundamental right of privacy.¹⁰¹ De-

100. *Id.*

101. See *infra* text accompanying notes 134–44.

spite this doctrinal development, the Court has never conclusively answered the question of whether the *Meyer/Pierce* parental rights are fundamental, requiring a compelling government interest for infringement.¹⁰² However, the Court has tended to apply *Meyer* and *Pierce* narrowly in cases specifically involving parental rights, emphasizing the propriety of reasonable state oversight.¹⁰³ In the educational context, including home schooling, the lower courts have followed suit, often defining the *Meyer/Pierce* rights with great specificity and rejecting attempts to fit parental rights claims into the privacy rubric.¹⁰⁴ Therefore, parents' rights to direct their children's education remain far from absolute or fundamental, but something less, leaving enough leeway for a state regulation such as a certification requirement for home-schooling parents.

1. *Meyer v. Nebraska* and *Pierce v. Society of Sisters*

In 1923, the Supreme Court recognized parents' rights to direct their children's education as part of "liberty" guaranteed by the Fourteenth Amendment in *Meyer v. Nebraska*.¹⁰⁵ The Court reversed the conviction of a parochial schoolteacher who taught German to children in violation of Nebraska law.¹⁰⁶ The Court first adopted an expansive definition of liberty, stating:

[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁰⁷

102. See *infra* text accompanying notes 127–29.

103. See *infra* text accompanying notes 130–33, 145–57.

104. See *infra* text accompanying notes 158–200.

105. 262 U.S. 390, 399–400 (1923).

106. *Id.* at 396–97, 403.

107. *Id.* at 399. The rights to contract and engage in common occupations are no longer considered part of "liberty" under the Fourteenth Amendment, being part of the now-discredited *Lochner* era, during which economic rights were protected under substantive due process. See generally *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (invalidating a state law pre-

The Court noted that traditionally, education and learning had been regarded as supremely important in America, and that "it is the natural duty of the parent to give his children education suitable to their station in life" ¹⁰⁸ It further held that "the right of parents to engage [Meyer] so to instruct their children [is] within the liberty of the [Fourteenth] [A]mendment." ¹⁰⁹

Two years later in *Pierce v. Society of Sisters*, the Court again recognized a parental liberty interest in directing their children's education. ¹¹⁰ The Court invalidated an Oregon law requiring parents to send their children to public schools, not private or parochial schools. ¹¹¹ The Court reasoned that the private institutions' educational programs were "not inherently harmful, but long regarded as useful and meritorious," ¹¹² similar to their finding in *Meyer* that teaching children German "is not injurious to the health, morals, or understanding of the ordinary child." ¹¹³ The Court concluded:

[A state has no] general power . . . to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. ¹¹⁴

Despite the Court's acknowledgment of parents' rights concerning their children's education, the authority of the state was not completely excised from the equation, indicating that *Meyer* and *Pierce* did not grant unlimited authority to parents that would safeguard any educational choice, including un-

venting the making of contracts with out-of-state insurance companies unless the insurance company had a place of business and authorized agent in the state); *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (invalidating a maximum-hours law for bakers as an impermissible interference with the freedom of contract). In 1937, the Supreme Court shifted its approach to begin upholding economic regulations. *See generally Parrish*, 300 U.S. 379 (upholding a state minimum-wage law despite the employer's claim of interference with his liberty to contract with employees for a lower wage).

108. *Meyer*, 262 U.S. at 400.

109. *Id.*

110. 268 U.S. 510, 534–35 (1925).

111. *Id.* at 530.

112. *Id.* at 534.

113. *Meyer*, 262 U.S. at 403.

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

regulated home schooling. In *Meyer*, the Court noted that “the power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned.”¹¹⁵ In other dicta, the Court expressed the view that “[p]ractically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto.”¹¹⁶ Although not part of the Court’s holding, this language seems to indicate that the Court understood it was granting parents the right to have their children taught a foreign language, but not necessarily proscribing the state from requiring that any teacher selected meet certain criteria.

In *Pierce*, the Court again emphasized that “[n]o question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils”¹¹⁷ Because the issue was whether the state can prohibit parents from choosing between two *options* for out-of-home schooling, both subject to some state regulation, it is unclear if the Court considered that the liberty interest of parents to direct their children’s education would extend to a third option: schooling at home free of any certification requirement for the parent. Thus, *Pierce* and *Meyer*, at least on a close textual reading, likely do not provide an absolute, fundamental right to parents to *educate* their children completely free of any state oversight. Their language arguably indicates that requiring all teachers, including parents, to be certified by the state was anticipated as a permissible state regulation.

2. *Subsequent Supreme Court decisions did not clearly define whether the Meyer/Pierce right is “fundamental”*

An examination of the Supreme Court’s subsequent use of the doctrine established in *Meyer* and *Pierce* creates more questions than it answers regarding whether parents’ rights to direct their children’s education were intended to be “fundamental” as we understand that term today. Must state restrictions on parents’ educational choices meet strict scrutiny,¹¹⁸ or

115. 262 U.S. at 402.

116. *Id.* at 400.

117. 268 U.S. at 534.

118. Strict scrutiny requires that a law be “necessary to achieve a compelling government purpose,” placing the burden of proof on the government to show that it is the “least restric-

is a rational basis for the law sufficient?¹¹⁹ Although *Meyer* and *Pierce* did become “the cornerstone” of the Supreme Court’s personal liberties decisions of the 1960s and 1970s,¹²⁰ the Court proceeded with caution rather than granting parents broad authority when applying *Meyer* and *Pierce* in their original educational context. Both the scope of parental rights granted and the proper standard of review remain unclear.¹²¹

In addition to parental liberties, the decisions in both *Meyer* and *Pierce* placed considerable emphasis on property rights, including the schools’ freedom to run a business, teachers’ rights to teach, and freedom of contract between schools and parents.¹²² This was typical of the Supreme Court’s use of due process principles during the *Lochner* era to strike down state laws regulating wages and working conditions.¹²³ Although subsequent Supreme Court cases rejected the use of due process in this context,¹²⁴ *Meyer* and *Pierce* “seem to have escaped

tive or least discriminatory alternative.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 541–42 (3d ed. 2006).

119. Rational basis review is highly deferential to the government, requiring only that a law is “rationally related to a legitimate government purpose.” The challenger has the burden of proving that “the law does not serve any conceivable legitimate purpose or that it is not a reasonable way to attain the end.” *Id.* at 540.

120. William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 179 (2000) [hereinafter Ross, *Contemporary Significance*].

121. *Id.* at 184–85.

122. See generally WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927*, at 186–88 (1994) (analyzing the Court’s discussion of economic liberties in *Meyer* and *Pierce* and positing that the presence of broader language regarding individual freedom indicates that the cases are not *solely* about economic liberties).

123. David Fisher, Note, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 405 (1997). The *Lochner* era was named for a representative case, *Lochner v. New York*, 198 U.S. 45 (1905), in which a state maximum-hours law was invalidated, and cases from this time broadly interpret employees’ rights to contract for any wage or working condition free from state regulation. *Id.* at 405 & n.37 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 567–68 (2d ed. 1988)). For further discussion of the *Lochner* era, see *infra* text accompanying notes 205–15.

124. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–93 (1937) (“[P]ower under the Constitution to restrict freedom of contract . . . may be exercised in the public interest with respect to contracts between employer and employee”); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner* . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely[] has long since been discarded.”).

the general disapproval of due process cases of this era."¹²⁵ One scholar suggests that perhaps *Meyer* and *Pierce* survived because they were not as entrenched in laissez-faire economic policies as other *Lochner* era cases, as they also involved the rights of individual parents outside of the workplace.¹²⁶

Despite the survival of the parental liberty interests established in *Meyer* and *Pierce*, the status of the rights as fundamental (requiring strict scrutiny) or as something less (requiring only rational basis review) is unclear.¹²⁷ Justice McReynolds, author of both opinions, never explicitly established the proper standard of review, although he stated in *Meyer* that "the individual has certain fundamental rights which must be respected."¹²⁸ However, this is likely because when these cases were decided, the establishment of "fundamental rights" as opposed to lesser liberty interests in order to determine the standard of review was less central to the Supreme Court's analytical process.¹²⁹ After *Meyer* and *Pierce*, the Court tended to limit parental rights, even while consistently acknowledging traditional parental authority.¹³⁰ A clear example is *Prince v. Massachusetts*, in which the Court upheld the conviction of a woman for permitting her underage niece (of whom she was legal guardian) to sell religious pamphlets on the street in violation of a child labor statute.¹³¹ Despite declaring that "the custody, care and nurture of the child reside first in the parents,"¹³² the Court qualified this with reference to the state's "wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . includ[ing], to some extent, matters of conscience and religious conviction."¹³³

In the 1960s and 1970s, *Meyer* and *Pierce* emerged in a new context: the Court's creation of the modern fundamental right

125. Fisher, *supra* note 123, at 405.

126. *Id.*

127. Tara Dahl, *Surveys in America's Classroom: How Much Do Parents Really Know?*, 37 J.L. & EDUC. 143, 151-52 (2008).

128. 262 U.S. 390, 401 (1923).

129. Fisher, *supra* note 123, at 404 (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 383-84 (4th ed. 1991)).

130. *Id.* at 406.

131. 321 U.S. 158, 161-62, 170 (1944).

132. *Id.* at 166.

133. *Id.* at 167.

to privacy under the Due Process Clause.¹³⁴ This subsequent use of parental rights doctrine in cases protecting contraception,¹³⁵ abortion,¹³⁶ and homosexual conduct,¹³⁷ was almost certainly unforeseen by Justice McReynolds, author of *Meyer* and *Pierce*. McReynolds was notoriously conservative and intolerant of other races, religions, and lifestyles.¹³⁸ Indeed, as one scholar notes, the conservative Lutheran and Catholic challengers to the school laws in *Meyer* and *Pierce* “might not have hailed the Court so heartily for saving their schools if they could have known that these decisions would provide the foundation for the Court’s enunciation of a right to privacy that culminated in *Roe v. Wade*.”¹³⁹

In *Griswold v. Connecticut*, which protected a married couple’s right to use contraception, the Court first discussed the theory that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”¹⁴⁰ The right to use contraceptives within the marital relationship, although not enumerated in the Constitution, was thus within the “zone of privacy” created by the fundamental guarantees of the First, Third, Fourth, Fifth, and Ninth Amendments.¹⁴¹ The Court uses the “right to educate one’s children as one chooses” from *Pierce* and “the right to study the German language” from *Meyer* as examples of unnamed rights emanating from the protections of the First Amendment to support the new “penumbra” doctrine.¹⁴² In *Roe v. Wade*, in laying the foundation for recognizing a constitutional right to choose abortion in some circum-

134. Fisher, *supra* note 123, at 407.

135. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing the right of married couples to receive and use contraceptives).

136. See generally *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a woman’s right to choose whether or not to bear children).

137. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (establishing the right to engage in consensual homosexual conduct).

138. See Barbara Bennett Woodhouse, “Who Owns the Child?”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1080–84 (1992) (discussing Justice McReynolds’s personal and religious background and prejudices to explain the unlikelihood that he would be sympathetic to the German-Lutheran and Polish-Catholic parties challenging the school laws in *Meyer* and *Pierce*).

139. Ross, *Contemporary Significance*, *supra* note 120, at 179–80.

140. 381 U.S. at 484.

141. *Id.* at 484–85.

142. See Fisher, *supra* note 123, at 407–08 (citing *Griswold*, 381 U.S. at 482).

stances, the Court lists *Meyer* in a string of cases illustrating the Court's recognition that "a guarantee of certain areas or zones of privacy[] does exist under the Constitution."¹⁴³ More recently, in *Lawrence v. Texas*, the Court began its recognition of a fundamental privacy right for homosexual couples to engage in consensual sex by noting the "broad statements of the substantive reach of liberty under the Due Process Clause" in *Meyer* and *Pierce*.¹⁴⁴

Despite the Court's use of *Meyer* and *Pierce* in the privacy cases, the Court has hesitated to define parental rights over children's education as fundamental and free from any state oversight when applying *Meyer* and *Pierce* to parental due process claims.¹⁴⁵ In *Wisconsin v. Yoder*, the Court characterized *Pierce* narrowly as protecting "the rights of parents to direct the religious upbringing of their children," and thus requiring more than "'a reasonable relation to some purpose within the competency of the State'" for any restriction affecting both parental interests and the free exercise of religion.¹⁴⁶ It can be inferred from this language that a general parental rights claim *absent* any religious grounding is subject only to rational basis review, not any heightened or "strict" scrutiny.¹⁴⁷ Justice White, in concurrence, approved of a continuing state role in education, saying that *Pierce* "lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what a child needs."¹⁴⁸ Later, in *Runyon v. McCrary*, the Court again defined parental rights to direct education narrowly, characterizing *Pierce* as providing parents "a constitutional right to send their children to private schools," and *Meyer* as providing "the right to select private schools that offer specialized instruc-

143. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

144. David M. Wagner, *Hints, Not Holdings: Use of Precedent in Lawrence v. Texas*, 18 BYU J. PUB. L. 681, 683 (2004) (quoting *Lawrence v. Texas*, 539 U.S. 558, 564 (2003)). Wagner's article criticizes the *Lawrence* Court's reliance on *Meyer* and *Pierce*, arguing that citing them as authority for the right protected in *Lawrence* is stretching the doctrine too far. See generally *id.* at 683-86.

145. See Fisher, *supra* note 123, at 408.

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

147. Lana Larson Dean, Comment, *Mandatory Twin Separation in Schools: How Parents Can Best Rely on Another Set of "Twins" - Meyer and Pierce - To Keep Their Children Together*, 29 STEINSON L. REV. 451, 469 (1999). See also Fisher, *supra* note 123, at 409.

148. *Yoder*, 406 U.S. at 239 (White, J., concurring).

tion.”¹⁴⁹ The Court emphasized that parents “have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”¹⁵⁰

More recently, the Supreme Court invoked *Meyer* and *Pierce* to decide the constitutionality of a grandparent visitation statute in *Troxel v. Granville*.¹⁵¹ Justice O’Connor’s plurality opinion cited both *Meyer* and *Pierce* to support the declaration that “the interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by this Court.”¹⁵² Although the plurality used the word “fundamental,” both the scope of the right and the level of scrutiny required remain unclear from the various opinions in the case. Justice Souter stated in concurrence that “[o]ur cases . . . have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child”¹⁵³ In Justice Thomas’s concurrence, he contended that strict scrutiny should apply and noted that the Court’s majority and other opinions do not “articulate[] the appropriate standard of review.”¹⁵⁴ Justice Scalia’s dissent questioned the extension of *Meyer*, *Pierce*, and *Yoder* to the context of visitation, stating: “The sheer diversity of today’s opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that [produces] such diverse outcomes in [a simple case] is not a legal principle that has induced substantial reliance.”¹⁵⁵ Finally, Justice Kennedy’s dissent, while acknowledging that “parents have a fundamental liberty interest in caring for and guiding their children,” emphasized that “these interests have never been seen to be without limits” and also that “a parent’s interests in a child must be balanced against the State’s long-recognized interests as *parens patriae*”¹⁵⁶ Thus, even though the *Meyer/Pierce* rights are sometimes called “fundamental,” the Supreme Court has not explicitly mandated that infringements on pa-

149. Dean, *supra* note 147, at 470 (quoting *Runyon v. McCrary*, 427 U.S. 160, 178 (1976)).

150. *Runyon*, 427 U.S. at 178.

151. 530 U.S. 57 (2000).

152. *See id.* at 65 (O’Connor, J., plurality opinion).

153. *Id.* at 78 (Souter, J., concurring).

154. *Id.* at 80 (Thomas, J., concurring).

155. *Id.* at 92 (Scalia, J., dissenting).

156. *Id.* at 88 (Kennedy, J., dissenting).

rental rights to direct the education of children trigger strict scrutiny review in the lower courts.¹⁵⁷

3. *Most lower courts apply Meyer and Pierce narrowly to other educational restrictions*

In analyzing claims of parental rights, lower courts have referenced the Supreme Court's failure to definitively establish the proper level of scrutiny to be applied.¹⁵⁸ Scholars note that, in general, lower courts are not considering parents' rights to direct education as fundamental, requiring strict scrutiny of infringing legislation,¹⁵⁹ and that parents' claims of a constitutional violation of these rights consistently fail in the educational arena.¹⁶⁰

One common area of litigation over the reach of the *Meyer/Pierce* rights has been in the context of challenges to the curriculum offerings of public schools. In one such case, *Brown v. Hot, Sexy & Safer Productions, Inc.*, parents challenged their children's required attendance at a sexually graphic AIDS education assembly held at their public high school.¹⁶¹ The First Circuit rejected the parents' claim of infringement on their childrearing rights without explicitly deciding on a level of scrutiny, saying that *even if* the right were fundamental, "the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude."¹⁶² The court limited the reach of *Meyer* and *Pierce* as protecting the parents' right to "choos[e] a specific educational program" for their children, saying "[w]e do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their chil-

157. Ross, *Contemporary Significance*, *supra* note 120, at 185.

158. See, e.g., *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996) ("The Supreme Court . . . has never expressly indicated whether this 'parental right,' when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review."); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) ("[T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny.").

159. Ross, *Contemporary Significance*, *supra* note 120, at 186.

160. Eric W. Schulze, *The Constitutional Right of Parents to Direct the Education of Their Children*, 138 EDUC. L. REP. 583, 596 (1999).

161. 68 F.3d at 529.

162. *Id.* at 533.

dren.”¹⁶³ The court reasoned that recognizing such a right would be a great burden on public schools:

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.¹⁶⁴

Brown’s characterization of *Meyer* and *Pierce* as protecting only choice of school, rather than the broader right to determine what children will be exposed to once the choice has been made, has been referenced or followed by many other courts in deciding similar curricular challenges.¹⁶⁵

In curricular as well as other types of school challenges, the trend in the lower courts is often to define the parental right alleged by plaintiffs with specificity,¹⁶⁶ and hold that, regard-

163. *Id.*

164. *Id.* at 534.

165. *See, e.g.,* Fields v. Palmdale Sch. Dist., 447 F.3d 1187, 1190–91 (9th Cir. 2006) (per curiam) (following *Brown* to reject parents’ challenge to a school’s administration of a voluntary survey containing some questions regarding sex); Leebaert v. Harrington, 332 F.3d 134, 140–43 (2d Cir. 2003) (agreeing with *Brown*’s characterization of *Meyer* and *Pierce* to reject parents’ challenge to a mandatory health class); Parker v. Hurley, 474 F. Supp. 2d 261, 263–64 (D. Mass. 2007), *aff’d*, 514 F.3d 87 (1st Cir. 2008) (following *Brown* to reject parents’ challenge to a public school’s teaching about different sexual orientations and family forms); Larson v. Burmaster, 720 N.W.2d 134, 149–50 (Wis. Ct. App. 2006) (following *Brown* to reject parents’ challenge to a requirement that their child complete summer homework assignments in order to participate in an advanced math class).

166. *See, e.g.,* Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461–62 (2d Cir. 1996) (framing plaintiff’s claimed right as the “right to exempt their children from educational requirements to which they object on secular grounds” and then applying rational basis review to uphold a school’s mandatory community service requirement); *Brown*, 68 F.3d at 533–34 (framing plaintiff’s claimed right as the “right to dictate the curriculum at the public school to which they have chosen to send their children” and holding that *Meyer/Pierce* rights “do not encompass a broad-based right to restrict the flow of information in the public schools”); Hubbard *ex rel.* Hubbard v. Buffalo Indep. Sch. Dist., 20 F. Supp. 2d 1012, 1016 (W.D. Tex. 1998) (quoting Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 933 (6th Cir. 1991)) (upholding a mandatory testing requirement and framing plaintiff’s claimed right as “a special constitutionally recognized interest to abstain from test-taking”); Cornwell v. State Bd. of Educ., 314 F. Supp. 340, 342–44 (D. Md. 1969), *aff’d*, 428 F.2d 471 (4th Cir. 1970) (considering and dismissing a mo-

less of the level of scrutiny to be applied or whether the *Meyer/Pierce* right to direct education is called “fundamental,” it simply does not encompass the plaintiffs’ claim. For example, in *Swanson ex rel. Swanson v. Guthrie Independent School District*, home-schooling parents wanted their daughter to begin attending public school only part-time in order to take certain specialized courses they felt unable to effectively teach.¹⁶⁷ The school board adopted a part-time attendance policy requiring any student enrolled in the district to be a full-time student.¹⁶⁸ The board president noted in a public statement that part-time students were not counted for state aid purposes, citing the board’s concerns that granting the parents’ request “could set a precedent allowing other home-schooled children as well as private-school students to use the public school’s facilities on an as-wanted basis, without a corresponding increase in state financial aid.”¹⁶⁹ The Tenth Circuit acknowledged that “parents have a constitutional right to direct [their children’s] education, up to a point,” but that this right did not extend to “control[ling] each and every aspect of their children’s education and oust[ing] the state’s authority over that subject.”¹⁷⁰ The court defined the parents’ claim as alleging an infringement of a very specific “right of parents to send their children to public school on a part-time basis, and to pick and choose which courses their children will take from the public school.”¹⁷¹ The court concluded that the plaintiffs had not shown any infringement of a “recognized and specific constitutional right[.]” and thus no infringement on parental rights to direct children’s education.¹⁷²

Another approach for parents, also generally unsuccessful, has been to invoke parental rights when claiming a violation of the constitutional right to privacy established by the Su-

tion to enjoin a school district’s implementation of sex education and framing plaintiff’s claimed right as the “exclusive . . . right to teach their children about sexual matters in their own homes”).

167. 135 F.3d 694, 696 (10th Cir. 1998).

168. *Id.* at 696–97. The policy had limited exceptions not applicable to the *Swanson* plaintiffs. *See id.*

169. *Id.* at 697.

170. *Id.* at 699.

171. *Id.* at 699–700. The plaintiffs’ *Meyer/Pierce* claim was part of an attempted “hybrid claim” under *Employment Division v. Smith*. *See infra* text accompanying notes 272–80.

172. *Id.* at 700.

preme Court in the 1960s and 1970s.¹⁷³ In *Fields v. Palmdale School District*, parents of elementary school students objected to the administration of a survey concerning “psychological barriers to learning,” which contained some questions on sexual topics.¹⁷⁴ The parents alleged that the survey violated their right to “independence when making certain kinds of important decisions,” which is one of at least two protected privacy interests recognized by the Supreme Court.¹⁷⁵ The Ninth Circuit rejected this argument, distinguishing the parents’ situation from past Supreme Court privacy cases in which laws directly interfering with intimate personal decisions were invalidated, such as a law restricting abortion in *Roe v. Wade* and a law restricting private sexual behavior in *Lawrence v. Texas*.¹⁷⁶ The court differentiated between “making intimate decisions” and “controlling the state’s determination of information regarding intimate matters,” noting that the Constitution does not prohibit “the dissemination of information to children.”¹⁷⁷ Therefore, the court held that the parents’ claimed right to introduce their children to sexual matters as they pleased in line with their personal beliefs was not protected by a constitutional privacy right.¹⁷⁸

In another survey case, *C.N. v. Ridgewood Board of Education* (this time involving high school students),¹⁷⁹ the parents again sought to frame their claimed constitutional violation as an interference with their privacy interest in making important decisions for their children.¹⁸⁰ The Third Circuit distinguished the parents’ situation from that in *Gruenke v. Seip*, in which the court recognized a privacy violation when a swim coach forced a student to take a pregnancy test and disclosed the results to others, but not to her parents.¹⁸¹ Because of the ensuing publicity, the parents claimed they were not able to manage the pregnancy discreetly within the family unit.¹⁸²

173. See *supra* text accompanying notes 134–44.

174. 427 F.3d 1197, 1200 (9th Cir. 2005), *reaff’d per curiam*, 447 F.3d 1187 (9th Cir. 2006).

175. *Id.* at 1207 (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

176. See *id.* at 1208 (collecting cases).

177. *Id.*

178. *Id.*

179. 430 F.3d 159, 161 (3d Cir. 2005).

180. *Id.* at 178–79.

181. *Id.* at 183 (citing *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000)).

182. *Id.* at 184 (citing *Gruenke*, 225 F.3d at 306).

The court drew from *Gruenke* "a distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that, although perhaps unwise and offensive, are not of constitutional dimension."¹⁸³ The court concluded that "the decision whether to permit a . . . student to participate in a survey of this type is not a matter of comparable gravity" to the decision of how to handle a teen's pregnancy, and thus any interference with parental decision-making did not violate the Constitution.¹⁸⁴

4. Meyer/Pierce challenges to home-schooling regulations

Home-schooling parents have generally fared no better in bringing *Meyer/Pierce* claims or privacy claims to invalidate state regulation of their home education programs. Courts have upheld the constitutionality of state laws requiring: annual testing of home-schooled children;¹⁸⁵ submission of a proposed curriculum, syllabus, and information about the teacher's credentials for approval;¹⁸⁶ review of a student work portfolio by a school board representative;¹⁸⁷ and periodic home visitation by school board representatives.¹⁸⁸ In upholding such laws, courts often reference *Pierce's* language retaining a state's power to reasonably regulate all schools to support limitations on the scope of parents' rights to educate at home.¹⁸⁹

This reading of parents' rights over their children's education as less than fundamental and subject to state regulations, including a certification requirement to home school, is consistent with the approach taken by lower federal and state courts resolving challenges to certification requirements for home-school parents. In *Hanson v. Cushman*, the United States District Court for the Western District of Michigan held that parents challenging Michigan's certification requirement had not

183. *Id.*

184. *Id.* at 185.

185. *See, e.g.,* *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988).

186. *See, e.g.,* *Blackwelder v. Safnauer*, 689 F. Supp. 106 (N.D.N.Y. 1988).

187. *See, e.g.,* *Battles v. Anne Arundel County Bd. of Educ.*, 904 F. Supp. 471 (D. Md. 1995).

188. *See, e.g., id.*; *Blackwelder*, 689 F. Supp. 106.

189. *See, e.g.,* *Battles*, 904 F. Supp. at 476 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925)); *Murphy*, 852 F.2d at 1043 (citing *Pierce*, 268 U.S. at 534).

established a fundamental right to home school their children.¹⁹⁰ The court noted the parents' reliance on the broad definition of liberty in *Meyer*,¹⁹¹ but cautioned that this language must be read in context with other language stating that "education of the young is only possible in schools conducted by especially qualified persons"¹⁹² This language was also referenced by the Court of Criminal Appeals of Alabama in *Jernigan v. State*, in which the court found "this statement to be equally true for children who must receive their education in the home and an ample justification for [Alabama]'s reasonably narrow requirement of board certification."¹⁹³ The Supreme Court of North Dakota also relied on this language in *State v. Patzer* to support its assertions that "[t]he state has the power to impose reasonable regulations as to the quality of the education and instruction furnished" and that "[North Dakota's] teacher certification requirement for instructors in . . . home schools is a reasonably narrow one and is amply justified."¹⁹⁴

The *Hanson* court also urged that the language in *Pierce* regarding "the liberty of parents and guardians to direct the upbringing and education of children under their control"¹⁹⁵ must be read in context with earlier language affirming "the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, *their teachers* and pupils."¹⁹⁶ The *Jernigan* court similarly referenced this language to support its conclusion that a certification requirement was within the state of Alabama's power as promoter of basic education for its citizens.¹⁹⁷ In addition, the Supreme Court of Michigan noted in *People v. Bennett* that "[i]n no sense . . . has *Pierce* been interpreted to mean that parents have a fundamental right to direct all of their children's educational decisions . . . under all circumstances"¹⁹⁸ The court referenced Jus-

190. 490 F. Supp. 109, 114 (W.D. Mich. 1980).

191. *Id.* at 112 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923)).

192. *Id.* (quoting *Meyer*, 262 U.S. at 400) (emphasis in original).

193. 412 So. 2d 1242, 1247 (Ala. Crim. App. 1982) (citing *Meyer*, 262 U.S. at 400).

194. 382 N.W.2d 631, 639 (N.D. 1986) (citing *Meyer*, 262 U.S. at 400).

195. *Hanson*, 490 F. Supp. at 113 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925)).

196. *Id.* (quoting *Pierce*, 268 U.S. at 534) (emphasis in original).

197. 412 So. 2d at 1246.

198. 501 N.W.2d 106, 112-13 (Mich. 1993).

tice White's concurring opinion in *Wisconsin v. Yoder*, which stated:

Pierce v. Society of Sisters . . . lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in *Pierce*, [the schools] were in compliance with all the educational standards that the State had set¹⁹⁹

Based on this language, the *Bennett* court said that the parents challenging Michigan's certification requirement mistakenly relied on *Pierce* in claiming a broad fundamental right to direct their children's education.²⁰⁰

B. Certification Requirements Are Rationally Related to Legitimate State Interests in Education

Because parents' rights regarding their children's education are not absolute and fundamental, a certification requirement need only meet rational basis review, requiring a reasonable relation to a legitimate government interest. Although the laws in *Meyer* and *Pierce* did not survive rational basis review, this result should be understood with reference to the Supreme Court's protection of economic substantive due process rights involved in those cases.²⁰¹ As the modern approach to rational basis review is highly deferential to state and local government decisions, allowing for under- or overinclusiveness, a certification requirement can easily meet this level of constitutional scrutiny.²⁰²

199. *Id.* at 113 n.18 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring)).

200. *Id.* at 113.

201. See *infra* text accompanying notes 203–22.

202. See *infra* text accompanying notes 223–49.

1. *The Court's rational basis review in Meyer and Pierce is colored by the defunct doctrine of economic substantive due process*

In *Meyer*, the Court used the familiar language of rational basis, stating that "liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."²⁰³ The Court in *Pierce* similarly applied rational basis review, stating that "the liberty of parents and guardians to direct the upbringing and education of children under their control . . . may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."²⁰⁴ Although in both cases, the laws restricting parental choice over education were invalidated, the Court's level of deference to government regulation was much lower during the early twentieth century, especially when economic liberties were also at stake. As one commentator has noted:

At the time [*Meyer* and *Pierce*] were decided, they were consistent with the generally prevailing judicial skepticism regarding any government interference with the rights of citizens. [They] are both couched in the same substantive due process language which characterized the now discredited cases, such as *Lochner v. New York* . . . declaring state attempts to regulate the economy invalid.²⁰⁵

The Court's decisions in *Allgeyer v. Louisiana* and *Lochner v. New York* ushered in the *Lochner* era, during which various economic rights, such as freedom of contract and freedom to practice a trade were protected through substantive due process under the Fourteenth and Fifth Amendments. In *Allgeyer*, a Louisiana company entered into a contract with an out-of-state insurance company, in violation of a state law prohibiting out-of-state insurers from conducting business in Louisiana without a place of business and authorized agent located

203. 262 U.S. 390, 399–400 (1923).

204. 268 U.S. 510, 534–35 (1925).

205. STEPHEN R. GOLDSTEIN ET AL., LAW AND PUBLIC EDUCATION: CASES AND MATERIALS 64 (3d ed. 1995).

in Louisiana.²⁰⁶ The Court struck down the law as an impermissible interference with liberty of contract under the Due Process Clause of the Fourteenth Amendment,²⁰⁷ emphasizing:

The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.²⁰⁸

The Court rejected Louisiana's argument that the law was a reasonable exercise of its police power to protect its citizens from fraudulent insurance companies.²⁰⁹ In *Lochner*, using similar reasoning, the Court struck down a New York law setting maximum working hours for bakers, stating that "the general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment"²¹⁰ The Court rejected New York's claim that the law was reasonably related to protecting worker health within its police power.²¹¹

This era of general intolerance for any government regulation of economic activity ended in 1937 with *West Coast Hotel Co. v. Parrish*, in which the Court upheld a state minimum-wage law despite the employer's claim that the law interfered with his liberty to contract with employees for a lower wage.²¹² The Court's approach shifted to a more lenient standard of review of economic regulations: "The Constitution does not

206. 165 U.S. 578, 579-80 (1897).

207. *Id.* at 589.

208. *Id.*

209. *Id.* at 591-92.

210. 198 U.S. 45, 53 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

211. *Id.* at 58.

212. 300 U.S. at 392 ("There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards.").

speak of freedom of contract. . . . Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."²¹³ Thus began a period of high deference to government regulations of the economy, largely in response to the Great Depression, the perceived failures of an unregulated laissez-faire economy, and President Franklin Roosevelt's threat to expand the number of seats on the Supreme Court in order to appoint new justices friendly to his New Deal economic legislation.²¹⁴ Since 1937, no state or federal economic regulation has been invalidated under the Due Process Clauses of the Fifth and Fourteenth Amendments.²¹⁵

However, *Meyer* and *Pierce*, decided in the early 1920s, fall squarely into the *Lochner* era. Along with parental rights concerning children's education, economic liberties were also at issue in both cases, which explains the Court's higher scrutiny and invalidation of the restrictions at issue, even though its analysis uses rational basis language. As one scholar notes, "the Court (though it lacked a name for its process) was applying something with more bite than today's rational basis review."²¹⁶ In *Meyer*, the Court, in addition to considering parents' rights to have their children taught foreign languages, also emphasized the teacher's economic liberties: "[Meyer] taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] [A]mendment."²¹⁷ The Court rejected Nebraska's argument that the prohibition on teaching in foreign languages was within its power to "promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals."²¹⁸

213. *Id.* at 391.

214. CHEMERINSKY, *supra* note 118, at 621-22.

215. *Id.* at 625.

216. Jennifer H. Gelman, Comment, *Brave New School: A Constitutional Argument Against State-Mandated Mental Health Assessments in Public Schools*, 26 N. ILL. U. L. REV. 213, 223 (2005).

217. 262 U.S. 390, 400 (1923).

218. *Id.* at 401.

In *Pierce*, the Court was not only concerned with parents' rights to send their children to private or parochial schools, but also with the economic viability of the Society of Sisters and the Hill Military Academy, the two institutions challenging the law requiring children to attend public schools. The Society of Sisters claimed that the law "has already caused the withdrawal from [our] schools of children who would otherwise continue, and [our] income has steadily declined."²¹⁹ Similarly, Hill Military Academy asserted that "[b]y reason of the statute and threat of enforcement [our] business is being destroyed and [our] property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn."²²⁰ Along with recognizing the liberty interest of parents, the Court emphasized that "[t]he inevitable practical result of enforcing the [law] would be destruction of [the two schools]."²²¹ The Court invalidated the law, considering it an "arbitrary, unreasonable, and unlawful interference with [the schools'] patrons and [threatening] the consequent destruction of their business and property."²²² Therefore, although the educational restrictions in *Meyer* and *Pierce* did not survive rational basis review, the Court's decision rested in large part on a now-defunct doctrine of economic liberties, not solely on any absolute right of parents to be free from state regulation of their choices regarding their children's education.

2. *Under modern rational basis review, there is ample room for a certification requirement*

The Court's modern approach to rational basis review is much more deferential to government regulation. To survive constitutional challenge, a certification requirement needs only a reasonable relation to a legitimate government purpose. The purpose need only be any *conceivable* purpose for the law, regardless of whether it was the *actual* purpose motivating the

219. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532 (1925).

220. *Id.* at 533.

221. *Id.* at 534.

222. *Id.* at 536.

state legislature,²²³ and any parent challenging the requirement has the burden to negate any conceivable purpose for the law.²²⁴

If California or any other state chose to explicitly require parents to be certified to teach their children at home, there is a rich history of state involvement in education from which to draw a legitimate basis for such a requirement. A state's authority over education finds its roots in the doctrine of *parens patriae*, or "parent of the country," under which a state has "the responsibility and legal authority to provide for the welfare of its children who, in turn, serve the state as enlightened citizenry."²²⁵ In addition, although the United States Constitution is silent regarding education, every state constitution includes language encouraging or requiring the state legislature to establish a free-public-education system.²²⁶ The California Constitution in particular reads: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."²²⁷

California case law has also recognized the relationship of a quality education to the overall general welfare. In *Serrano v. Priest*, education was said to be "a major determinant of an individual's chances for economic and social success in our competitive society" as well as "a unique influence on a child's development as a citizen and his participation in political and community life."²²⁸ Beyond these economic and political benefits, education is also thought to be a means to promote social unity:

223. See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress's action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.") (internal quotation omitted).

224. See *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993).

225. Robert C. Cloud, *Balancing Parental Rights and State Interests in Home Schooling*, 235 EDUC. L. REP. 697, 700 (2008).

226. Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 6 (2002).

227. CAL. CONST. art. IX, § 1.

228. *Serrano v. Priest*, 487 P.2d 1241, 1255-56 (Cal. 1971).

[A]mong our varied population, [education] promot[es] cohesion based upon democratic values. The public schools bring together members of different racial and cultural groups and, hopefully, help them to live together in harmony and mutual respect.

....

... [G]roup activities encourage active participation in community affairs, promote the development of leadership qualities, and instill a spirit of collective endeavor. These results are directly linked to the constitutional role of education in preserving democracy

....²²⁹

Given states' strong interest and state constitutional directives to provide for public education, political scientist Rob Reich posits that some types of home schooling may fall short of a state's obligation.²³⁰ Reich cautions that some individualized home-school curriculums may not prepare children to be conscientious citizens²³¹ and that parental authority over education reaches its outer boundary when "its exercise compromises the development of their children into adults capable of independent functioning or when it disables or retards the development of minimalist autonomy in children."²³² In particular, he finds troubling the attitude of some home-schooling parents who may treat education as a "consumption item," choosing to expose their children only to certain ideas and values that comport with their own, as if choosing items from a restaurant menu.²³³ Reich argues that this approach is not conducive to the child's growth toward responsible citizenship:

In a diverse, democratic society, part of able citizenship is to come to respect the fact that other people will have beliefs and convictions, religious and otherwise, that conflict with one's own. Yet from the standpoint

229. *Hartzell v. Connell*, 679 P.2d 35, 41, 43 (Cal. 1984) (internal quotations omitted).

230. See ROB REICH, *BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION* 145-72 (2002) [hereinafter REICH, *BRIDGING LIBERALISM*].

231. Rob Reich, *The Civic Perils of Homeschooling*, *EDUC. LEADERSHIP*, April 2002, at 56, 58 [hereinafter Reich, *Civic Perils*].

232. REICH, *BRIDGING LIBERALISM*, *supra* note 230, at 160.

233. Reich, *Civic Perils*, *supra* note 231, at 58.

of citizenship, these other people are equals. And students must learn not only that such people exist, but how to engage and deliberate with them in the public arena. Thus, students should encounter materials, ideas, and people that they or their parents have not chosen or selected in advance.²³⁴

Rather than forbid home schooling altogether, Reich argues that “the state must . . . regulate it, and strictly enforce such regulations, so as to ensure that the interests of the state and the child are met.”²³⁵ This is necessary because “[c]hildren are owed as a matter of justice the capacity to choose to lead lives—to adopt values and beliefs, pursue an occupation, endorse new traditions—that are different from those of their parents,” and thus the state has a duty to ensure that all education instills the minimal autonomy necessary to make these choices.²³⁶ Reich’s argument is supported by Justice White’s concurrence in *Wisconsin v. Yoder*. Although Justice White agreed with the majority that home schooling should be allowed for the Old Order Amish children under the unusual circumstances of that case,²³⁷ he acknowledged that states have an interest in promoting the minimal autonomy of these children:

It is possible that most Amish children will wish to continue living the rural life of their parents, in which case their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary. There is evidence in the record that many children desert the Amish faith when they come of age. A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the

234. *Id.*

235. REICH, BRIDGING LIBERALISM, *supra* note 230, at 163.

236. *Id.*

237. See *Wisconsin v. Yoder*, 406 U.S. 205, 240 (1972) (White, J., concurring) (“In the circumstances of this case, although the question is close, I am unable to say that the State has demonstrated that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire new academic skills later. The statutory minimum school attendance age set by the State is, after all, only 16.”).

life style that they may later choose, or at least to provide them with an option other than the life they have led in the past.²³⁸

A state could claim that a certification requirement is a reasonable way to achieve its legitimate interest in promoting an educated, self-sufficient population prepared to meaningfully participate in the democratic process. North Dakota successfully asserted this interest to defend its certification requirement in *State v. Patzer*, in which the Supreme Court of North Dakota noted the "interest in requiring minimum standards . . . to insure adequate education of the children of the state to enable them to become viable citizens in the community."²³⁹ The court also referenced the United States Supreme Court's statement in *Wisconsin v. Yoder* that a state's most compelling interests in education are to "prepare citizens to participate effectively and intelligently in our open political system" and ensure that "individuals [are] self-reliant and self-sufficient participants in society."²⁴⁰ A state might also claim that a certification requirement serves the narrower interest of exercising supervision to ensure that education is provided by competent instructors. Michigan successfully asserted this interest in *Hanson v. Cushman*, where the court considered supervision of instructor competency a legitimate state interest, and held that a certification requirement was a reasonable way to achieve it compared to other options:

[T]he state would surely face [difficulty] in examining and supervising, at considerable expense, a host of facilities and individuals, widely scattered, who might undertake to instruct their children at home without certification; as compared with the less difficult and expensive mechanism of requiring certification as a standard for competency. This clearly satisfies the state's burden of acting rationally and reasonably.²⁴¹

238. *Id.* at 239–40.

239. 382 N.W.2d 631, 636 (N.D. 1986) (quoting *State v. Rivinius*, 328 N.W.2d 220, 228 (N.D. 1982)).

240. *Id.* (quoting *Yoder*, 406 U.S. at 221 (1972)). See also *Hanson v. Cushman*, 490 F. Supp. 109, 115 (W.D. Mich. 1980) (quoting *Yoder*, 406 U.S. at 221); *People v. DeJonge*, 501 N.W.2d 127, 138 (Mich. 1993) (quoting *Yoder*, 406 U.S. at 221).

241. 490 F. Supp. at 115. See also *People v. Bennett*, 501 N.W.2d 106, 116 & n.31 (Mich. 1993) (citing *Hanson*, 490 F. Supp. at 115).

Notably, both of the possible state interests discussed here were also relied upon by the California Superior Court in *People v. Turner*.²⁴² Thus, had the *Rachel L.* court held to their original interpretation of the compulsory-education law, thus preserving *Turner* as relevant precedent, a certification requirement for home-schooling parents in California would have ample support to withstand constitutional challenge.

It may well be that a certification requirement is not the most efficient or effective way for a state to oversee the quality of home-school education. States have chosen various other methods to achieve this purpose, including administering standardized achievement tests²⁴³ and requiring parents to keep portfolios of educational materials and student work for periodic review by a school board representative.²⁴⁴ Other states, like Texas, do not require any type of assessment of instructional quality or require parents to be certified.²⁴⁵ However, the value and efficacy of certification requirements as compared to other types of regulation, or no regulation at all, is beyond the scope of this Note. From a purely constitutional standpoint, the requirement could withstand modern rational basis review, even if a parent argued that it was not the best or most logical way for a state to achieve its purpose. Under rational basis review, a very loose fit is allowed between the means and the end. The law may be either underinclusive (not covering all similarly situated people),²⁴⁶ or overinclusive (covering more people than absolutely necessary to achieve the government interest),²⁴⁷ or both.

Certainly, a certification requirement would affect both competent and incompetent parent-teachers. Some parents could argue, for instance, that because they are well-educated

242. See 263 P.2d 685, 686–87 (Cal. App. Dep’t Super. Ct. 1953), *disagreed with by* Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571 (Ct. App. 2008).

243. See, e.g., ARK. CODE ANN. § 6-15-504 (2007) (outlining requirements and procedures for the administration of achievement tests to home-schooled students).

244. See, e.g., MD. CODE REGS. 13A.10.01.01(D)–(E) (1981).

245. Denise Oliveri, Home School Regulations in Texas: An Overview of the Homeschooling Laws (Jan. 2, 2008), http://homeschool-regulations.suite101.com/article.cfm/homeschool_regulations_in_texas.

246. See *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (“It is no requirement . . . that all evils of the same genus be eradicated or none at all.”).

247. See *New York City Transit v. Beazer*, 440 U.S. 568, 593 (1979) (“[I]t is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole.”).

and perfectly capable of teaching their children at an acceptable level, a certification requirement is overinclusive as applied to them and fails to serve the state's interest in monitoring the quality of instruction. Parents might also claim that because they are teaching the state's required curriculum and complying with other state home-schooling regulations, requiring them to be certified does little else to further the state's interest in ensuring an educated population. Such a claim was raised in *Hanson v. Cushman*, in which the parents "fully intend[ed] to comply with all . . . reasonable and/or legal requirements in the education given to their children [at home]" and even sought to purchase the same textbooks used by their public school district in order to conform their home education to district standards.²⁴⁸ However, these overinclusiveness arguments would fail, as they did in *Hanson*, as a certification requirement is not invalid under rational basis review simply because it might not serve the state's interests as logically or effectively when applied to parents who are competent and responsible home teachers as it might when applied to parents who are ill-equipped to teach or who fail to teach the required subjects. "[I]t is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole."²⁴⁹ Therefore, a certification requirement can easily meet rational basis review, even if it may not be the most logical or direct way to further a state's interests in educational quality as applied to each and every home-schooling parent.

C. Religious Challenges to Home-schooling Restrictions Will Only Rarely Succeed Under a "Hybrid Rights" Framework

Many parents choose to home school their children for religious reasons, hoping to protect them from secular ideas and values taught in the public schools.²⁵⁰ Although the Supreme Court applied higher scrutiny to a compulsory-school-attendance law challenged as a burden on free exercise of religion

248. 490 F. Supp. 109, 111 (W.D. Mich. 1980).

249. *Beazer*, 440 U.S. at 593 (citing *Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976)).

250. Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 123 (2008).

in *Wisconsin v. Yoder*,²⁵¹ this protection was not absolute and all-encompassing, and the case has not opened the floodgates for families to raise religion as a bar to any state oversight of their home-school education. After *Employment Division, Department of Human Resources v. Smith*, which greatly curtailed the possibility of religious exemptions from generally applicable laws, *Yoder* remained valid precedent as a “hybrid situation,” combining claims of parental rights over education with a free exercise claim.²⁵² *Smith*’s hybrid claim distinction has met with much criticism and resistance in the lower courts, and parental rights/free exercise hybrid claims have only had limited success in the educational arena.²⁵³ While parents might still be able to successfully challenge a certification requirement, courts typically use *Yoder* as a basis for comparison, and parents will therefore likely have to show the presence of several specific factual circumstances that were important to the *Yoder* parents’ success.²⁵⁴

1. *Wisconsin v. Yoder*

The Supreme Court indicated in *Yoder*²⁵⁵ that, where home schooling is nearly indispensable to the free exercise of sincerely held religious beliefs, a state may have less power to interfere. In *Yoder*, several members of the Old Order Amish religion were convicted of violating Wisconsin’s compulsory-school-attendance law for refusing to continue enrolling their fourteen- and fifteen-year-old children in public school until they reached age sixteen.²⁵⁶ The Supreme Court found the law unconstitutional as applied to these parents under the Free Exercise Clause of the First Amendment.²⁵⁷ Extensive testimony about the Amish religion indicated that the “fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence” was central to their faith.²⁵⁸ As such, the Amish preferred to

251. See *infra* text accompanying notes 255–70.

252. See *infra* text accompanying notes 271–80.

253. See *infra* text accompanying notes 281–99.

254. See *infra* text accompanying notes 300–20.

255. 406 U.S. 205 (1972).

256. *Id.* at 207.

257. *Id.*

258. *Id.* at 210.

give their children a practical, skills-based education at home after the eighth grade to prepare them for their adult roles in the Amish community.²⁵⁹ They objected to high school education for emphasizing values in direct conflict with Amish values:

The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.²⁶⁰

In its analysis, the Court, referencing *Pierce v. Society of Sisters*, reaffirmed the power of a state to "impose reasonable regulations for the control and duration of basic education."²⁶¹ However, the Court further stated:

[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests [under] the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they . . . "prepare them for additional obligations."²⁶²

The Court emphasized that to receive protection under the Free Exercise Clause, a parent must show not just a personal objection to public education, but one rooted in religious belief.²⁶³

A way of life, however virtuous and admirable, [is no] barrier to reasonable state regulation of education if it is based on purely secular considerations [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of

259. *Id.* at 212.

260. *Id.* at 211.

261. *Id.* at 213 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925)).

262. *Id.* at 214 (quoting *Pierce*, 268 U.S. at 535).

263. *Id.* at 215.

conduct in which society as a whole has important interests.²⁶⁴

Thus, if the Amish rejected public education because of mere subjective disagreement with the values taught there, this would be a philosophical and personal belief not protected by the Free Exercise Clause.²⁶⁵ The Court concluded that “the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”²⁶⁶ The Court imposed a higher level of scrutiny, stating: “[W]hen the interests of parenthood are combined with a free exercise claim [like that of the Amish], more than merely a reasonable relation to some purpose within the competency of the State is required”²⁶⁷ In support of its compulsory-education requirement, the state of Wisconsin argued “that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system” and that “education prepares individuals to be self-reliant and self-sufficient participants in society.”²⁶⁸ However, the Court concluded that these state interests were not enough to overcome an infringement on the Amish’s religious practices considering that their community had functioned independently and successfully for over 200 years.²⁶⁹

[T]here is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom²⁷⁰

264. *Id.* at 215–16.

265. *Id.* at 216.

266. *Id.*

267. *Id.* at 233 (internal quotation omitted).

268. *Id.* at 221.

269. *Id.* at 226–27.

270. *Id.* at 227.

2. *Employment Division v. Smith* preserves *Yoder* as a “hybrid claim”

Eighteen years later, the Supreme Court decided *Employment Division, Department of Human Resources v. Smith*,²⁷¹ which has been termed “a rapid reconfiguration of the First Amendment’s Free Exercise Clause jurisprudence.”²⁷² *Smith* presented the issue of whether the Free Exercise Clause permitted Oregon to criminalize Native Americans’ use of peyote, a controlled substance, for religious purposes.²⁷³ The Court, in an opinion by Justice Scalia, held that where a generally applicable law does not target, but only incidentally burdens, religion, “the First Amendment has not been offended,”²⁷⁴ and “an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”²⁷⁵ The Court upheld the constitutionality of Oregon’s peyote prohibition.²⁷⁶ The Court rejected the use of strict scrutiny, stating: “To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’—permitting him, by virtue of his beliefs, ‘to become a law unto himself,’—contradicts both constitutional tradition and common sense.”²⁷⁷

This result would seem to repudiate the holding in *Yoder*, in which the Amish were exempted from a generally applicable secondary school attendance law because of their religious beliefs. Also, the *Yoder* Court had applied heightened scrutiny, requiring the school law to have more than a “reasonable relation to some purpose within the competency of the State” in order to be valid under the First Amendment.²⁷⁸ However, Justice Scalia preserved *Yoder* by characterizing it as a “hybrid situation,” involving “not the Free Exercise Clause alone, but

271. 494 U.S. 872 (1990).

272. 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, 2210–11 (2005).

273. 494 U.S. at 874.

274. *Id.* at 878.

275. *Id.* at 878–79.

276. *Id.* at 890.

277. *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

278. 406 U.S. 205, 233 (1972).

the Free Exercise Clause in conjunction with other constitutional protections," specifically, the right of parents to direct the education of their children from *Pierce*.²⁷⁹ The Court thus created a hybrid-rights exception to generally applicable laws that incidentally burden religion, though it provided little guidance as to the scope of hybrid claims or how they should be analyzed.²⁸⁰

Smith's hybrid rights doctrine has been criticized as both illogical and a mischaracterization of precedent. One scholar disagrees with the *Smith* Court's characterization of *Yoder* as a decision based on both free exercise and parental rights to direct education, writing that "*Yoder* expressly stated that parents do *not* have the right to violate the compulsory education laws for nonreligious reasons."²⁸¹ Thus, the *Yoder* Court focused on the free exercise claim, not parental rights, because, "according to *Yoder*[.] parents have no right independent of the Free Exercise Clause to withhold their children from school" ²⁸² It may be that the idea of hybrid claims provided a means for the Court to distinguish *Yoder* and preserve it as good law.²⁸³ Justice Souter comments on the logical flaws in the doctrine in his concurring opinion in *Church of the Lukumi Babalu Aye v. City of Hialeah*:

[T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one

279. *Smith*, 494 U.S. at 881-82.

280. Lechlitter, *supra* note 272, at 2212. Congress responded to *Smith* with the Religious Freedom Restoration Act in order to compel states to grant religious exemptions as they had done prior to *Smith*. *Id.* at 2212-13. However, the Act was struck down as applied to the states for exceeding Congress's power under the Fourteenth Amendment to pass remedial legislation. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). In a majority of states, neither the courts nor legislatures have imposed heightened scrutiny on neutral laws, and parents must therefore bring a hybrid claim under *Smith*. Lechlitter, *supra* note 272, at 2214 & n.33 (listing states that do not follow a compelling interest test).

281. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990).

282. *Id.*

283. *Id.*

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.²⁸⁴

The hybrid rights doctrine is also criticized for failing to provide a clear and predictable method for lower courts to follow in resolving hybrid claims.²⁸⁵ Scholars have found this surprising because Justice Scalia, the doctrine's creator, is a well-known advocate of reliable and predictive judicial rules.²⁸⁶ The federal circuits have used varied approaches when presented with hybrid claims.²⁸⁷ Some have criticized and rejected the hybrid rights exception, declining to apply any heightened scrutiny when a free exercise challenge is brought in conjunction with another constitutional claim.²⁸⁸ Some have rejected the hybrid claim when the other constitutional claim accompanying the free exercise claim is not independently viable.²⁸⁹ Finally, some require the accompanying

284. 508 U.S. 520, 567 (1992) (Souter, J., concurring). Lower courts have drawn on Justice Souter's criticisms in discussing the hybrid rights doctrine. See, e.g., *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 704-05 (9th Cir. 1999), *rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (discussing Justice Souter's criticisms in depth but ultimately disagreeing that the doctrine is untenable, instead adopting a middle-ground "colorable claim" standard); *Kissinger v. Bd. of Trs. of the Ohio State Univ., Coll. Of Veterinary Med.*, 5 F.3d 177, 180 n.1 (6th Cir. 1993) (citing *Lukumi*, 508 U.S. at 567 (Souter, J., concurring)).

285. Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 605 (2003).

286. *Id.* at 574. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (comprehensively explaining Justice Scalia's judicial philosophy).

287. See generally Lechliter, *supra* note 272, at 2222-34 (identifying and discussing three different approaches the federal circuits have taken in adjudicating hybrid claims).

288. See, e.g., *Kissinger*, 5 F.3d at 180 ("[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. . . . [U]ntil the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause."); *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (adopting the reasoning of *Kissinger* to state: "We too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated.").

289. See, e.g., *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) ("For [plaintiffs'] argument to prevail, one would have to conclude that although the regulation does not violate the Free Exercise Clause, . . . and although they have no viable First Amendment [Free Speech Clause] claim . . . , the combination of two untenable claims equals a tenable one. But in law as in mathematics zero plus zero equals zero."); *Brown v. Hot, Sexy & Safer Prods., Inc.*,

claim to at least be “colorable,” which appears to mean something less than “independently viable,” or perhaps at least “likely to succeed.”²⁹⁰

3. *The limited success of parental rights/free exercise hybrids in education cases*

For the most part, the hybrid rights doctrine has provided little additional ammunition for parents challenging neutral, generally applicable laws burdening both their religious exercise and their right to direct their children’s education. Even though they may combine a parental rights claim under *Pierce* with a claim that the regulation in question burdens their free exercise of religion, the *Pierce* claim is likely to be found lacking under either an “independently viable” or a “colorable claim” test due to the courts’ general approach of giving parental rights claims only rational basis review and limiting the reach of those rights.²⁹¹ Two representative cases are *Brown v. Hot, Sexy & Safer Productions* and *Swanson ex rel. Swanson v. Guthrie Independent School District*.²⁹² In both cases, parents attempted to bring hybrid claims of free exercise and parental rights to direct education in order to invoke application of strict scrutiny,²⁹³ requiring a compelling government interest to overcome infringement of the right. The *Brown* court used an

68 F.3d 525, 539 (1st Cir. 1995) (“[T]he plaintiff’s allegations of interference with family relations and parental prerogatives do not state a privacy or substantive due process claim. Their free exercise challenge is thus not conjoined with an independently protected constitutional protection.”).

290. See, e.g., *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 707 (9th Cir. 1999), *rev’d on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (“[A] free exercise plaintiff must make out a ‘colorable claim’ that a companion right is violated—that is, a ‘fair probability’ or a ‘likelihood,’ but not a certitude, of success on the merits”); *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699–700 (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.”). The colorable claim approach has been criticized as indistinguishable from the independently viable approach. E.g., Lechliter, *supra* note 272, at 2233 (“[T]here is no standard for what amounts to a ‘genuine’ or colorable claim. A claim is either viable or it is not, but what is the correct standard for something in between? . . . [I]t is easy to see the two seemingly distinct standards joining together to form one blurry, malleable standard.”).

291. Kyle Still, Comment, *Smith’s Hybrid Rights Doctrine and the Pierce Right: An Unintelligent Design*, 85 N.C. L. REV. 385, 417–18 (2006).

292. For the facts of *Brown* and *Swanson*, see *supra* text accompanying notes 161–72.

293. See *Brown*, 68 F.3d at 539; *Swanson*, 135 F.3d at 699.

"independently viable" standard. As the court had already determined that the parental rights claim under *Meyer* and *Pierce* "did not state a privacy or substantive due process claim," the free exercise claim was not joined with an independently protected constitutional right and did not fall within *Smith's* hybrid exception.²⁹⁴ The *Swanson* court used a "colorable claim" standard. Having concluded that the right to direct education did not encompass the plaintiff's very specific claimed right to send their home-schooled child to public school only for certain courses, the court found that the parents had shown "no colorable claim of infringement on the constitutional right to direct a child's education" and therefore, "this [was] not a hybrid rights case."²⁹⁵

Courts also tend to use *Yoder* as their guide for comparison in analyzing hybrid claims. This trend is understandable considering *Yoder's* role in *Smith* as the original example of a parental rights/free exercise "hybrid claim"²⁹⁶ and given the lack of more specific guidance on analyzing hybrid claims.²⁹⁷ Courts very often distinguish parents' religious objections to educational requirements from the unique set of circumstances presented in *Yoder*. In some instances, courts note that the regulation or policy at issue falls short of threatening the parents' entire way of life and the survival of their community.²⁹⁸ Parents' claims have also failed when they seek exemptions from *any* state involvement or oversight of their children's education,²⁹⁹ rather than the mere two-year exemption sought by the *Yoders*.

4. *Successful challenge of a certification requirement may depend on factors important in Yoder*

Yoder, like *Meyer* and *Pierce*, should also not be read as giving absolute leeway for parents to home school their children with no state oversight, even if religious reasons play a role in the decision. Because the *Yoder* Court relied heavily on several

294. *Brown*, 68 F.3d at 539.

295. 135 F.3d at 699-700.

296. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 882 (1990).

297. See *Lechlitter*, *supra* note 272, at 2212.

298. See, e.g., *Brown*, 68 F.3d at 539; *State v. DeLaBruere*, 577 A.2d 254, 265 (Vt. 1990).

299. See, e.g., *Battles v. Anne Arundel County Bd. of Educ.*, 904 F. Supp. 471, 473 (D. Md. 1995); *DeLaBruere*, 577 A.2d at 265-66.

unusual facts present in the Yoders' situation, *Yoder* falls far short of declaring that any regulation of home schooling, including a certification requirement, will fail a Free Exercise challenge. Therefore, it seems that few parents can show that their situation is so like the Yoders' that a certification requirement impermissibly burdens their religious practices. This has held true in states whose certification requirements have been challenged for religious reasons.

For example, in both *Jernigan v. State* and *State v. Patzer*, the parents' objection to a certification requirement was grounded in their desire to exempt their children completely from any elementary education regulated by the state.³⁰⁰ Both courts upheld the requirements, distinguishing the facts from those in *Yoder*, in which the Amish parents only sought to exempt their children from two years of public education in favor of informal vocational training at home.³⁰¹ The *Patzer* court noted the apparent importance of this factor to several of the Justices on the *Yoder* Court, referencing Justice White's concurring opinion:

This would be a very different case for me if [the Yoders'] claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State. Since the Amish children are permitted to acquire the basic tools of literacy to survive in modern society by attending grades one through eight and since the deviation from the State's compulsory education law is relatively slight, I conclude that [the Yoders'] claim must prevail³⁰²

Another important consideration in *Yoder* was the extensive showing that the Amish community had a "long history of be-

300. *Jernigan v. State*, 412 So. 2d 1242, 1245 (Ala. Crim. App. 1982); *State v. Patzer*, 382 N.W.2d 631, 637 (N.D. 1986).

301. *Jernigan*, 412 So. 2d at 1245; *Patzer*, 382 N.W.2d at 637.

302. *Patzer*, 382 N.W.2d at 637 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 238 (1972) (White, J., concurring)). See also *Jernigan*, 412 So. 2d at 1245 (quoting *Yoder*, 406 U.S. at 238 (White, J., concurring)). Noting that Justices Brennan and Stewart joined Justice White in this concurrence, the *Patzer* court posited that "[t]he relatively small increment of additional schooling required by the state in *Yoder* cannot be over-emphasized, because had that factor not been present, it is questionable whether the *Yoder* opinion would have garnered a majority of the Court." *Patzer*, 382 N.W.2d at 637.

ing a successful, self-sufficient segment of society"³⁰³ and that the alternate vocational education provided was "highly successful in preparing the child for life" in the Amish community.³⁰⁴ The *Patzer* court, in contrast, found that the parents had not "demonstrated a long history of successful preparation of children outside of schools for life,"³⁰⁵ and the *Jernigan* court similarly found no "showing that the home education [these parents] practice is an adequate substitute or replacement. . . . Unlike the Amish parents in *Yoder*, the [parents] have not demonstrated that their home teachings are successful in preparing their children for life" ³⁰⁶

A final factor stressed in *Yoder* was that the Amish's three-century history of life as a separate community removed from all worldly influence was mandated by, and inextricable from, their religion. This led the Supreme Court to conclude that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of [religion]."³⁰⁷ The *Jernigan* parents had only claimed that secular education could *potentially* endanger their children's salvation, and the court found no evidence that "their entire way of life is inextricable from their religious beliefs or that public schooling would substantially interfere with their religious practices."³⁰⁸

Because *Jernigan* and *Patzer* both predated the Supreme Court's decision in *Smith*, the hybrid claim route was unavailable to these parents. Despite the general lack of success of hybrid claims in the educational context,³⁰⁹ the doctrine might provide a stronger foundation for certain families seeking to have a certification requirement declared an unconstitutional burden on free exercise of religion as applied to their particular belief systems, as long as the court is willing to recognize their hybrid claims. An illustrative case is *People v. DeJonge*, in which the Supreme Court of Michigan found that a certification requirement violated the Free Exercise Clause "as applied

303. *Patzer*, 382 N.W.2d at 637.

304. *Jernigan*, 412 So. 2d at 1245.

305. *Patzer*, 382 N.W.2d at 637.

306. *Jernigan*, 412 So. 2d at 1245.

307. 406 U.S. at 218-19.

308. 412 So. 2d at 1245-46.

309. See *supra* text accompanying notes 291-95.

to families whose religious convictions prohibit the use of certified instructors."³¹⁰ *DeJonge* is one of the few instances where plaintiffs have succeeded in bringing a hybrid claim combining parental rights and free exercise.³¹¹

The *DeJonge* court, while acknowledging the criticisms spurred by the *Smith* decision,³¹² concluded with almost no discussion that, because the certification requirement infringed on free exercise as well as parental rights to direct education, *Smith* mandated the application of strict scrutiny.³¹³ This represents an unusual approach, given several other courts' hesitancy to recognize valid hybrid claims or apply strict scrutiny to them.³¹⁴ The court felt that, as applied to this family, the certification requirement was not essential to achieve the state's interest in ensuring adequate education, agreeing with the parents that standardized testing could be a less restrictive alternative.³¹⁵

Despite the availability of a hybrid claim to parents, the Supreme Court's statement that "the sincerity of their religious beliefs [and] the interrelationship of belief with their mode of life" shown by the Amish in *Yoder* was "one that probably few other religious groups or sects could make"³¹⁶ must be kept in mind. Much of the DeJonges' success still appeared to rest on a showing of some of the factors important to the success of the Yoders' claim. In *DeJonge*, the parents' faith dictated that parents bear sole responsibility to God for the education of their children and involving the state by obtaining certification was sinful, in direct conflict with the commands of scripture.³¹⁷ The court agreed that this placed the parents in a spiritual

310. 501 N.W.2d 127, 144 (Mich. 1993).

311. See generally Aden & Strang, *supra* note 285, at 594-98 (discussing the few cases in which hybrid claims were recognized and successful). Two such cases were free exercise challenges to public school regulations of student appearance and attire. See *Hicks ex rel. Hicks v. Halifax County Bd. of Educ.*, 93 F. Supp. 2d 649, 663 (E.D.N.C. 1999) (directing that strict scrutiny should be applied to a school uniform policy burdening the parents' religious beliefs); *Alabama & Coushatta Tribes of Tex. v. Trs. of the Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1332-33 (E.D. Tex. 1993) (applying strict scrutiny to a male hair length restriction burdening religious beliefs of Native American students).

312. *DeJonge*, 501 N.W.2d at 134 n.27.

313. *Id.* at 134-35.

314. See *supra* notes 287-90 and accompanying text.

315. *DeJonge*, 501 N.W.2d at 140, 141 n.52.

316. *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1972).

317. 501 N.W.2d at 136-37.

bind similar to that in *Yoder* because "the state's enforcement of the teacher certification requirement compels the DeJonges to sin, as they have been coerced by the state to educate their children in direct violation of their religious faith."³¹⁸ Also important to the court's conclusion was evidence that the home-school curriculum taught by the parents, and administered by the Church of Christian Liberty and Academy, had been "in use since 1968 [and had been] employed by many thousands of youngsters who [later] attended and successfully graduated from major colleges and universities throughout the United States."³¹⁹ The court analogized this evidence to the showing in *Yoder* of the success of Amish teaching methods, concluding that "the success of [the educational program] repudiates the state's argument that the certification requirement is essential to the goals of compulsory education."³²⁰

III. CONCLUSION

In the aftermath of the *Rachel L.* decisions, it seems that California home-schooling parents will remain free from state oversight of their teaching, as they will be permitted to continue teaching at home without a state certification. Whether or not California's hands-off approach represents ideal educational policy is beyond the scope of this Note. However, the California Court of Appeal's original interpretation of the compulsory-education law as requiring certification has ample constitutional support. Should the California Legislature ever choose to amend the compulsory-education law and explicitly require teacher certification for home-schooling parents, it would be a legitimate form of state oversight that does not run afoul of the Constitution. Federal constitutional precedent, while recognizing that parents possess a significant liberty interest over the education of their children, also contemplates a level of state oversight allowing for such a regulation. A certification requirement would meet the modern constitutional rational basis standard, being rationally related to California's legitimate state interest and responsibility over education. Even if objected to for religious reasons through a *Yoder*-type

318. *Id.* at 137.

319. *Id.* at 130 (internal quotation omitted).

320. *Id.* at 142.

hybrid claim, absent a rare showing of some of the key considerations in *Yoder*, the requirement would nonetheless survive constitutional challenge.