State Religious Freedom Statutes in Private and Public Education

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INTRODUCTION

The ongoing controversy over religious freedom legislation, federal and state, concerns how best to deal with clashes between societal rules enacted by the state and the conscientiously motivated activities of religious believers and groups. Probably the most regular flashpoint for such conflicts is in the area of education, public and private. Consider the Catholic-Protestant "school wars" of the mid-1800s, the nativist laws of the 1920s that prompted the Supreme Court's first landmark statements on the right of families to pursue private education,[1] and the host of modern conflicts: the threatened prosecution of Amish parents in the 1960s and homeschooling parents in the 1980s, the jailing of fundamentalist pastors in the 1970s for refusing to accept state regulation, the widely and deeply held view among some faiths that public schools impose a tax-financed creed of secularism and must be replaced with private education, perhaps financed with government vouchers. The regularity of conflict over education is not surprising. At stake is the training of children, who must necessarily be subject to adult authority and who constitute the promise of the future for their parents, their religious communities, and society.

Thus, education is one of the most common arenas for the clash between religious conduct and generally applicable laws that states are now addressing in the wake of *Employment Division v. Smith*,[2] the Religious Freedom Restoration Act ("RFRA"),[3] and *City of Boerne v. Flores*.[4] Many states are considering, and four have enacted, provisions that any state or local government action imposing a substantial burden on religious exercise must be justified as the least restrictive means of serving a compelling governmental interest. When the Federal RFRA enacted this standard, there was substantial debate about its meaning and application.[5] The debate con-

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[1] *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[2] 494 U.S. 872, 879 (1990) (holding that Free Exercise Clause generally does not protect religious conduct from facially neutral and generally applicable laws).

[3] 42 U.S.C. §§ 2000bb-2000bb-4 (1994).

[4] 521 U.S. 507 (1997) (striking down RFRA, as applied to state and local laws, as beyond Congress's powers).

[5] *See, e.g.*, Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994); Douglas Laycock & Oliver C. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT.

tinues with respect to state religious freedom acts ("SRFAs"). What will the burden, compelling-interest mean for a state's laws and regulations concerning public and private education?

I will make a few general points before discussing how SRFAs might apply in particular areas of educational disputes. SRFAs should be interpreted vigorously, in keeping both with their language and with their purpose of avoiding unnecessary impositions of suffering on people for pursuing their religious conscience. But there has also been a strong impulse toward moderation among courts reviewing claims for exemption of religious conduct from generally applicable laws. That moderation will probably continue to some extent under SRFAs. But it should not be allowed to go so far that it renders the statutes ineffectual, and I will suggest some ways to avoid that result. Overall, SRFAs could significantly bolster claims of religious freedom concerning education, but they will not radically reduce the state's existing role in administering public schools or regulating private and home schools.

I. GENERAL ISSUES CONCERNING SRFAS AND EDUCATION

A. Religious Freedom Interests Generally and in Education

State religious freedom statutes should be construed vigorously, as befits their language and purpose. The statutory test of compelling interest and least restrictive means is, on its face, the most demanding legal standard for judging governmental action. In some areas of constitutional law, such as racial discrimination and freedom of speech, it nearly always leads to invalidation of the action. In the context of protecting religious conduct against generally applicable laws, the standard is more easily satisfied; but it is still a shorthand for declaring that substantial restrictions on conscience should occur only to vindicate a basic framework of social duties necessary to maintain a system of "ordered liberty."[6] This is not the venue in which to rehash all the arguments for the protection of religious exercise against generally applicable laws. But it is worth remembering that the federal and state constitutions explicitly make religious conscience a matter of concern, for a host of reasons. Religious obligations tend to be especially deeply felt and constitutive of identity, and forcing the believer to violate them

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L. REV. 171 (1995).

[6] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

tends to produce special pain, anger, and resistance. Religious tenets and understandings also offer a unique counter to the power of the state. That is partly because they refer to a realm higher than that of the state, and partly because they tend to come with their own obligations that add order to liberty.

The religious freedom interests in educating children are particularly sharp and multifaceted. Parents and guardians have a long-recognized liberty "to direct the upbringing and education of children under their control,"[7] which of course takes on added significance under a SRFA when their educational decisions are driven by religious conscience. A sphere of parental control has long been recognized because a parent generally has better incentives to care for his or her children than the majority of society does, and because raising children is such a central aspect of personal identity for most people.[8] For religious communities in particular, education is perhaps the most crucial element of the life and expression of the community, since it is how the community passes on its beliefs to the next generation. By affecting the teaching of religious children, a state can potentially achieve in the next generation the equivalent effect of barring a religious belief or practice now. The free exercise interests also dovetail with free speech interests, since state restrictions on religious education interfere with the ability of parents to engage in "educative speech" to their children.[9]

Likewise, when public schools adopt rules that prevent or interfere with students' and families' religious decisions, they put the families to the painful choice of violating their religious conscience or foregoing participation in the important state benefit of free public education. It is not enough to respond that families are free

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[7] Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); *see also* Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (noting parental right to bring up children, and right to choose path of children's education).

[8] *See* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 951-65 (1996). The preceding arguments would support a recognition of strong rights for all parents, not just religious ones. A general parental rights statute may be a good thing, but SRFAs are not that statute. Even if parental constitutional rights should be recognized for all parents, that fact is not a good reason for denying such rights to those following their religious conscience. There are a number of permissible reasons for a SRFA to protect religious conscience, including the special concern for religion in the federal and state constitutions and also the fact that only religious families are constitutionally disqualified (by the Establishment Clause) from using the public schools to propound their underlying beliefs.

[9] *See id.* at 1013-19.

to exit to private religious schools, because the tax-supported system of funding public schools but not private ones means that the state is using its financial power to create incentives against such exit. That does not necessarily entail that the system of selective funding of public schools in itself imposes an illegal burden under the terms of a SRFA.[10] But it does mean that courts should be alert and sensitive to claims by students and families that the public schools are denying religious freedom.

Of course, states have interests concerning the training of children that, at a general level, are extremely important or compelling.[11] It is accepted that children must be protected by the state from physical or emotional abuse or neglect, since they cannot defend themselves from such treatment or competently consent to it. Preventing such harms is a sufficient reason for limiting religious exercise, although we should be careful not to let the state just define anything it chooses to as a harm.[12] But forbidding physical harms to others is at the core of any sensible conception of the scope of religious freedom.[13] The state's role in how children are taught raises much more difficult questions. Most people would agree that refusing to educate a child at all is abuse or neglect. But religious freedom disputes in the real world do not involve a failure to educate children altogether; they involve parents or groups that educate children in a way that a society's majority or its representatives believe is insufficient, misguided, or ultimately harmful to the children or to society.

The Supreme Court in *Wisconsin v. Yoder*[14] summarized two societal interests in education that are fundamental in the abstract: giving children the basic competence "to be self-reliant and self-sufficient participants in society" and preparing them "to participate effectively and intelligently in our open political system."[15] Applying these two interests, *Yoder* held that the state lacked a

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[10] *See infra* Part III.D.

[11] *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (describing education as "perhaps the most important function of state and local governments").

[12] *See, e.g.*, Prince v. Massachusetts; 321 U.S. 158, 167 (1944) (declaring state has broad authority to control parental decisions to protect children from physical or emotional harm). *Prince* itself was an example of such an attenuated definition of harm; it upheld the prosecution of a Jehovah's Witness under child labor laws for bringing her niece with her to distribute religious tracts in public. *See id.* at 170-71.

[13] The definitive example of a proscribable religious act is the ritual sacrifice of a nonconsenting victim. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1879).

[14] 406 U.S. 205 (1972).

[15] *Id.* at 221.

compelling reason to force Amish parents to send their children to formal schooling after age fourteen, because the Amish community produced self-reliant and law-abiding citizens through its own distinctive practices.[16]

The first of the above interests, basic competence, is relatively uncontroversial in our current culture. Religious parents who dissent from public schooling and state regulation nevertheless affirm that their children must be taught reading, writing, mathematics, other core subjects like history, and a basic "capacity to evaluate alternatives and make considered choices" so that they can get along in the world and provide for themselves.[17] The second interest, inculcation in democratic citizenship, has been more problematic. Critics of fundamentalist schools, for example, have charged that the schools teach children intolerance by condemning other beliefs, and that because of reliance on biblical authority the schools fail to prepare children to think critically about public issues.[18]

Both of the above criteria, especially "inculcation in citizenship," can only satisfy the compelling interest test of a SRFA if they are interpreted in a way that is relatively thin or modest in ideological terms. The problem is that terms like "tolerance" and "critical thinking" do not have uncontested meanings, and under some versions of them religious education fares perfectly well, even education of a hardened traditionalist sort. The only way that conservative religious education clearly flunks the tolerance test is if tolerance is defined very broadly as refraining from any sharp condemnation of behavior; conservatives generally affirm that basic civil rights of others are free from direct religious coercion and discrimination. It is not clear, nor is there a wide consensus, that to be a good citizen one must be tolerant in the former, broader sense. Rather, as Stephen Gilles puts it, "The freedom that liberalism promises . . . includes the freedom to reject, criticize, and condemn some of the choices others make."[19] Of course, every outlook, religious or secular, progressive or conservative, condemns

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[16] *See id.* at 234-36.

[17] *See* Gilles, *supra* note 8, at 974.

[18] *See, e.g.*, JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 35 (1998) (stating that fundamentalist schools "are intent on creating a generation of adults with a mindset that can only be harmful to democratic freedoms"); AMY GUTMANN, DEMOCRATIC EDUCATION 31 (1987) (criticizing traditionalist parents for having "implicitly fostered (if not explicitly taught them) disrespect for people who are different").

[19] Gilles, *supra* note 8, at 981.

some behavior in moral terms, and society would be in trouble if there were no such condemnations. But on most of the hot-button issues, no broad social consensus exists as to what moral stands are correct and when incorrect ones spill over from private belief into public danger.

The Court in *Yoder* rejected a different kind of state justification, the interest in ensuring that Amish teenagers had an "opportunity to make an intelligent choice between the Amish way of life and that of the outside world" (at least where the children themselves did not make such an assertion).[20] In so doing, the Court suggested several other principles important to analysis of education disputes. First, the invocation of "children's interests" does not decide such disputes: the question is whether primary decision-making authority in serving those interests through education will be allocated to the parents or the state.[21] Second, the Court refused to allow states extensive control over the educational process in order to foster children's ability to "think critically" or make autonomous decisions later in their lives.[22] The Court recognized that any theory or practice of education, whether based on deferring to authority or on fostering autonomous individual decisions, will "influence, if not determine, the religious future of the child."[23] Professor Gilles has expanded on the Court's implicit reasoning here, arguing that "to appeal to the capacity for critical deliberation is to make a controversial judgment about the extent to which we should rely on reason to govern our lives."[24] Humans "also make commitments and adhere to unprovable, deeply felt beliefs," and "there is no consensus about how to strike the balance between reason and faith"; if religious education arguably "stunts children's capacity for critical deliberation," critical education arguably "deprives [students] of the capacity for faithful allegiance to a tradition."[25] Again, the compelling interest test should require the state to adhere to a fairly ideologically thin conception of "critical thinking." For example, religious schools could be required to teach students how to reason from one premise to another, but they could not be required to rule out some premises

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[20] *Yoder*, 406 U.S. at 232.

[21] *See id.* at 229-34.

[22] *See id.* at 221-23 (rejecting argument that without additional education children would wallow in ignorance).

[23] *Id.* at 232.

[24] Gilles, *supra* note 8, at 976.

[25] *Id.* at 976-77.

like religious authority on the ground that they are inconsistent with the (unrealistic) image of a decision maker guided solely by his own reason.

To determine whether the basic, "thin" purposes of education were being served, *Yoder* adopted what business consultants might call a results-based versus a process-based approach. The state cannot necessarily have a compelling interest in demanding education of the precise form it chooses. The societal interest that is fundamental to ordered liberty is, as one court in a home schooling case put it, "'that all children shall be educated, not that they shall be educated in any particular way'" or "that the educational process be dictated in its minutest detail."[26] The Amish in *Yoder* satisfied the state's important interests because they had a history, through their communal practices, of "practical agricultural training and habits of industry and self-reliance" that would keep them from being a drain on society.[27] In allowing the group to meet the basic goals of education through alternative means, *Yoder* suggests a powerful principle for religious claimants to challenge particular education regulations. And remember that the Court adopted the approach in a case where the claimants sought freedom to keep their children out of formal schooling altogether for a period, not just (as is typically the case) to avoid certain discrete education regulations. Thus the results-based theory of *Yoder* suggests, for example, that a state might well have to accept standardized test scores as a method of ensuring educational quality, since it is less restrictive on religious freedom than other methods, such as requiring certification of teachers.[28]

B. The Impulse Toward Moderation

So far I have argued for giving SRFAs a vigorous interpretation. But religious freedom claims often have not fared so well in court, even under the compelling interest test, including in educational disputes. For several reasons, courts have an impulse toward moderation in applying the test, often verging on simple deference to

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[26] Care & Protection of Charles, 504 N.E.2d 592, 600 (Mass. 1987) (quoting Commonwealth v. Roberts, 34 N.E. 402, 403 (Mass. 1893)).

[27] *See Yoder*, 406 U.S. at 224.

[28] *See, e.g.*, People v. DeJonge, 501 N.W.2d 127, 142 & n.55 (Mich. 1993) (concluding that conducting standardized testing was less restrictive means of ensuring quality; students schooled by parents without certification still scored quite well on such measures).

the government. That tendency was apparent in the application of RFRA, although I do not agree with Professor Lupu that RFRA has been a "failure."[29] The key for proponents of religious freedom will be to keep the courts' moderate impulses from devolving toward knee-jerk deference in the interpretation of SRFAs.

One risk for many religious freedom statutes is that they are billed as mere "restorations" of the law as it existed just before *Employment Division v. Smith*. That strategy has had political advantages, but it has also given ammunition to those who want to make the statutes ineffectual, because in the years leading up to *Smith*, protection for religious conduct had eroded from the level enforced in *Yoder* and *Sherbert v. Verner*.[30] Sometimes the courts held that there was no constitutionally significant burden on religion, so that the compelling interest test was not triggered; other times they held that the compelling interest test was satisfied even on a rather weak showing. The limits imposed by these doctrines helped cut off many religious freedom claims, particularly in education.[31] I discuss these limiting doctrines in more detail below; the point is that if a SRFA incorporates them all it will have a very modest effect.

SRFA proponents can avoid some of the most serious of these effects. Some SRFAs are not styled as restoration acts in the first place.[32] Others (as I will mention) explicitly reject some of the limiting doctrines in their text. The Federal RFRA, although somewhat ambiguous on the point, stated as its purpose "to restore the compelling interest test as set forth in *Sherbert* and *Yoder*," the most protective decisions.[33] Proponents of a SFRA should make it clear that their statute incorporates the compelling interest test in the meaningful sense of *Sherbert* and *Yoder*, not in every watered-down sense that can be found in case law.

Fixing on *Yoder*, however, does not eliminate the risk that courts

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[29] *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 575-76 (1998) (summarizing constitutional inadequacies of RFRA).

[30] 374 U.S. 398 (1963).

[31] For this reason, the public school lobby played a major political role in forcing amendments to the RFRA bills to make them look to the more recent court decisions deferring to the government. *See* Berg, *supra* note 5, at 26-27 (discussing inclusion of findings in RFRA endorsing other "prior Federal court decisions" besides *Sherbert* and *Yoder*); Lupu, *supra* note 5, at 188 n.74 (discussing addition of "substantial" to burden threshold).

[32] *See, e.g.*, Alabama Religious Freedom Amendment, S. 604, 1998 Reg. Sess. (enacted by ballot referendum November 3, 1998); California Religious Freedom Protection Act, A.B. 1617, 1997-98 Reg. Sess. (vetoed following enactment).

[33] 42 U.S.C. § 2000bb(b)(1) (1994) (full names and citations omitted).

will nullify a SRFA by interpretation. Although *Yoder* includes the powerful language and arguments described in the previous section, it also includes passages that can moderate that power, or even limit the decision solely to its facts, at the hands of judges unsympathetic to religious freedom. For one thing, the Court emphasized that the burden on the Amish was especially "severe," posing "a very real threat of undermining the Amish Community and religious practice as they exist today," and "gravely endanger[ing] if not destroy[ing] the free exercise of [their] beliefs."[34] For another, the Court mentioned some unique factors that minimized the state's interest: the Amish were only seeking to keep their children from school after age fourteen, and they were preparing them not "for life in modern society as the majority live, but . . . for life in the separated agrarian community that is the keystone of the Amish faith."[35] And it added that judges should not broadly second-guess state educational regulations, but should move with "great circumspection" in weighing state interests against burdens on religion.[36] I will discuss below how lower courts have used such language to deny strong religious freedom claims, and how to reduce the risk of such denials. But there is no doubt that despite *Yoder*'s result and strong standard, parts of it point toward a more moderate, "fact-intensive" approach to religious exemptions.[37]

Moderation also has some constitutional and policy considerations in its favor. The compelling interest test is more likely to be satisfied by laws that are generally applicable than by those that discriminate against religious conduct or exempt a number of other forms of conduct. When a law discriminates, a court can question the government's claim that the law is necessary without having to engage in direct substantive evaluation of the importance of the law's purpose. And although the religious claimant is not seeking to overturn the law in whole, but only to be exempted from its application, courts have been concerned that granting one exemption will lead by force of logic to granting others and un-

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[34] Wisconsin v. Yoder, 406 U.S. 205, 218-19 (1972).

[35] *Id.* at 222.

[36] *See id.* at 235.

[37] *See* William Bentley Ball, *Accountability: A View from the Trial Courtroom*, 60 GEO. WASH. L. REV. 809, 812 (1992) (arguing that facts upon which government relies to justify regulation are necessary part of record in religious litigation in order to hold government accountable).

dermining the law more generally.

Finally, as the Court has noted, "[a]t some point" accommodation of religion from laws applicable to other activities by citizens, unlike the prevention of discrimination against religion, "may devolve into 'an unlawful fostering of religion'" that violates the Establishment Clause.[38] If all church workers were exempted from the laws against speeding, that would almost certainly be struck down as unwarranted favoritism for religion. It plainly is not an establishment for the government to accommodate religious conduct by removing significant state-imposed burdens; such an interpretation would put the Establishment Clause at war with the special concern for religious conscience shown in the Free Exercise Clause. But as the plurality in *Texas Monthly v. Bullock*[39] stated, the government must have a "reasonable" argument that there is such a burden to be removed, and for that reason it may be important that SRFAs protect only against "substantial" burdens on religion.[40]

None of the above considerations justify nullifying the text of a SRFA and giving the government wide discretion to restrict religious conduct. But they do suggest that courts are quite likely to approach the question of accommodations under a SRFA in a moderate rather than absolute fashion. SRFA proponents must be able to suggest an approach "that is religion-protective and yet 'moderate' rather than absolute":[41] they must suggest some middle principles that allow for balancing between the religious interest and the state interest, or else courts may be scared by the compelling interest standard and overreact by deferring to the state. What follows are some suggestions for moderate but religion-protective principles under both the burden and state-interest parts of the analysis.

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[38] *See* Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 334-35 (1987).

[39] 489 U.S. 1 (1989) (striking down sales tax exemption for religious publications on ground, in part, that it was not "removing a significant state-imposed deterrent to the free exercise of religion"); *id.* at 18 n.8 (distinguishing *Amos*, 483 U.S. at 327, on ground that exemption there for religious discrimination by religious organizations removed significant burden on religion).

[40] *See id.* at 24. Alabama's religious freedom constitutional amendment, *supra* note 32, has no such qualifier, subjecting all burdens on religion to the compelling interest test. This surely does not make the amendment facially unconstitutional, because many or most of its applications are still constitutional. *See* United States v. Salerno, 481 U.S. 739, 755 (1987). Surely also, the Alabama courts will find ways to interpret the amendment so as not to prevent minimal burdens on religion, like the few extra dollars imposed by a license fee for the church van.

[41] Berg, *supra* note 5, at 30.

1. Substantial Burdens on Religion

In some constitutional decisions before *Smith*, the courts raised the threshold definition of burdens and so avoided applying heightened scrutiny for religious freedom claims. In particular, the Supreme Court in two decisions suggested that a government burden was not constitutionally significant unless it (1) affected mandatory religious tenets of behavior for the believer and (2) went so far as to prohibit religious exercise as opposed to simply making it more difficult.[42] There was considerable controversy over whether RFRA incorporated such limits in the phrase "substantial burden," and the continued raising of the threshold contributed to the defeat of many RFRA claims.[43]

The first issue above is explicitly resolved in some SRFAs, which broadly protect behavior that is substantially "motivated" by religion, not just behavior that is actually mandated by a particular religious tenet.[44] Since much religious behavior cannot be reduced to mandatory rules, the adoption of the narrower definition of burdens would extinguish many serious claims. If SRFA proponents want to avoid that result, they should establish the substantial-motivation language in the text, or at least the legislative history, of their bills.

The second issue above, the extent of the imposition on religious conduct, has figured prominently in educational disputes. In *Yoder*, the Court described two kinds of burdens on religion reflected in the Amish objection that sending their teenagers to school would "expose their children to . . . worldly influence" and, thus, "interfer[e] . . . with [their] integration into" the community's simple, traditional, church-oriented life.[45] The first sense of burden was that school attendance was "at odds with fundamental tenets of [Amish] religious beliefs"; the Court called this contravention of the parents' religious tenets a "subjective" burden.[46] But

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[42] *See* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 392 (1990); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451-52 (1988).

[43] *See, e.g.*, Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) (discussing various interpretations of "substantial burden"); Berg, *supra* note 5, at 52-57 (examining legislative inclusion of "substantial" qualifier); Lupu, *supra* note 29, at 594 n.86 (stating that more than 70% of reported decisions that threw out RFRA claims did so for lack of substantial burden).

[44] *See, e.g.*, Florida Religious Freedom Restoration Act of 1998, FL. STAT. ANN. § 761.02 (West 1998).

[45] Wisconsin v. Yoder, 406 U.S. 205, 217-18 (1972).

[46] *See id.* at 218. The question in the previous paragraphs, text at notes 42-44, was whether free exercise claims are limited to such conflicts with mandatory religious tenets.

second, the Court also said that compelled school attendance posed a serious "objective danger" to the Amish faith. As already noted, the tempting of Amish teenagers in schools by worldly values and practices threatened to "undermin[e] the Amish community and religious practice."[47]

A common question in cases about education has been whether religious claimants must show such an "objective" threat to their religious life, or whether they can prove a sufficient burden simply by showing that the law in question forces them to contravene a tenet of their faith as they "subjectively" understand it. Burdens in the subjective sense are relatively easily established. The Supreme Court ruled in *Thomas v. Review Board*[48] that courts should seldom second-guess a religious believer's understanding of the tenets of her faith or her sincerity in asserting them. The Court said that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. . . . Courts are not arbiters of scriptural interpretation."[49]

But many courts have worried that simply acting on the believer's description of her tenets would trigger heightened scrutiny too easily. Indeed, as will be discussed, religious schools and parents have often claimed that any state regulation of education contravenes their faith.[50] As a result, a number of decisions look beyond the believer's subjective tenets and ask whether in the court's "objective" understanding, her faith has been substantially restricted. Courts have dismissed challenges to some education laws on the ground that the laws neither prevented families from pursuing a religious education nor severely restricted the content of their teaching.[51]

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[47] *Id.* at 218-19.

[48] 450 U.S. 707, 718 (1981).

[49] *Id.* at 714, 716; *see also* Employment Div. v. Smith, 494 U.S. 872, 887 (1990) ("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

[50] *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1060-61 (6th Cir. 1987) (setting forth parents' claim that requiring reading from objectionable text violated Free Exercise Clause); Windsor Park Baptist Church, Inc. v. Arkansas Activities Ass'n, 658 F.2d 618, 620 (8th Cir. 1981) (presenting school's claim that requiring state accreditation to participate in interscholastic activities violated First Amendment by subjecting school to something other than divine governance).

[51] *See* Roberts v. Madigan, 921 F.2d 1047, 1057 (10th Cir. 1990) (interpreting reading of Bible by teacher in classroom objectively and subjectively) (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)); Friedman v. Board of County Comm'rs, 781 F.2d 777, 781 (10th Cir. 1985) (stating that whether government's communication involves religious promotional effect must be judged objectively).

This approach may seem sensible in recognizing different degrees of restriction on religious exercise. But some courts have taken it to an extreme, seizing on the discussion in *Yoder* to limit constitutional challenges to those cases where the state's restriction went so far as to threaten the destruction of the faith (as *Yoder* suggested might happen to the Amish). For example, as will be discussed later, the First Circuit in *Brown v. Hot, Sexy, and Safer Productions*[52] held that public school students compelled to attend an explicit and religiously offensive sex-education program could raise no constitutional challenge because the program did not "threaten[ ] their entire way of life."[53]

Plainly, courts should not reduce protection for religious freedom to those cases where a law threatens to destroy a religious community. Even at much earlier stages, restrictive laws can cause believers and groups to suffer and can distort how their faith develops. It is unlikely that judges will ever completely defer to the believer and ignore their own independent assessment of how a particular law affects religious exercise. But SRFAs would be strengthened if their proponents were to include language, in the text or legislative history, that to be "substantial," a government burden need not threaten the existence of a religious faith. It should be enough that the regulation significantly interferes with religious activities or contravenes religious tenets as the believer or group understands them.

2. Compelling Interest and Least Restrictive Means

Yoder's approach exemplifies the general logic of the compelling-interest/least-restrictive-means test. Since the challenger is seeking only an exemption, the question is not whether the law is important in the abstract, but whether applying it in the particular case is necessary. If the particular conduct of the religious believer does not implicate the important purposes underlying the law, then application of the burden is not necessary to serve a compelling interest. The evidence of necessity must be based on specific evidence, not speculation or generalizations. And if some less restrictive form of regulation would still substantially serve the state's important goals, it must be pursued.[54]

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[52] 68 F.3d 525 (1st Cir. 1995).

[53] *Id.* at 539.

[54] As the Court put it in *Yoder*: "Where fundamental claims of religious freedom are at

However, courts do have to consider the consequences of their reasoning not only for the particular exemption claim before them, but also for other exemption claims that would have to be granted under the same principles if the first exemption were granted. An exemption claim is troublesome if it is especially broad in its scope, for example, a claim that any state regulation of religious schools is unconstitutional, or if it coincides with secular self-interest so much that many people are likely to have an incentive to raise the claim, sincerely or insincerely. In such cases, denying even a single exemption may be the least restrictive means of serving an overriding state interest. But courts should not just assume that an overwhelming number of exemptions will arise; the state must produce either actual evidence of such results or a convincing argument why they will necessarily follow. And the parade of exemptions must do more than just make it more costly to administer a government program; they must actually undermine the program's purposes.

Opponents of SRFAs have attacked the requirement of least restrictive means on the ground that it is an addition to the pre-*Smith* test and would transform the new statutes into a radical attack on the regulatory power of state governments. The Court in *Boerne* did say that RFRA's least restrictive means prong went beyond pre-*Smith* law.[55] But that remark was simply wrong and should not mislead state legislators about the content of previous law or the likely effect of SRFAs. The least restrictive means prong or equivalent language is part of the test articulated in *Yoder*, *Sherbert*, and *Thomas v. Review Board*, the three major Supreme Court decisions granting free exercise exemptions.[56] It also appears in decisions rejecting exemption claims.[57] It is only logical that such language should have appeared, because the need for a burdensome restriction on religious exercise cannot be compelling if a less burdensome regulation will serve the state's important interest. In the lower court

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stake, . . . we cannot accept such a sweeping claim [by a state]; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . ., and the impediment to those objectives that would flow from recognizing the claimed Amish exemption." Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

[55] *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

[56] *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (using "least restrictive means"); *Yoder*, 406 U.S. at 215 (stating "interests of highest order and those not otherwise served"); Sherbert v. Verner, 374 U.S. 398, 407 (1963) (holding "no alternative forms of regulation").

[57] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (stating "no 'less restrictive means' are available") (quoting *Thomas*, 450 U.S. at 718).

decisions in almost any area of free exercise disputes, including education, one can find the same repeated articulation of the least restrictive means test.[58]

Admittedly, however, previous free exercise decisions seldom applied the least-restrictive-means test in the most stringent fashion. As Justice Blackmun once noted, any kind of regulation could always be countered by a slightly "less restrictive" form (if only a slightly lower dollar fine or shorter term in prison).[59] Rather, this factor has produced (as has the *Sherbert/Yoder* test generally) more of a balancing approach, with the government's regulation qualifying as the least restrictive means if, but only if, other courses of regulation would significantly undercut the state's ability to protect those of its goals that are important.[60] That seems a sensible, moderate but religion-protective approach.

C. *Does Protection of "Hybrid-Rights" Claims Make SRFAs Unnecessary Concerning Education?*

One general issue in free exercise law has particular relation to educational disputes. In *Employment Division v. Smith*, the Court distinguished *Yoder* by stating that it had rested on a "hybrid" claim involving the Free Exercise Clause "in conjunction with" the right of parents to direct their children's education.[61] Although the language may have been inserted in *Smith* solely to avoid overruling *Yoder*, it suggests that a hybrid claim of religious conscience and parental rights would continue to justify heightened scrutiny of generally applicable laws. But if the compelling interest test still

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[58] *See, e.g.*, New Life Baptist Church v. Town of East Longmeadow, 885 F.2d 940, 946 (1st Cir. 1989); Moody v. Cronin, 484 F. Supp. 270, 277 (C.D. Ill. 1979) (finding less restrictive alternatives to compelled participation in co-ed physical education classes); People v. DeJonge, 501 N.W.2d 127, 135 (Mich. 1993) (finding less restrictive alternatives to requiring certification of home-school teachers); State v. Delabruere, 577 A.2d 254, 261 (Vt. 1990); State v. Anderson, 427 N.W.2d 316, 322 (N.D. 1988) (citing *Sherbert*, 374 U.S. at 398); Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d 373, 382-83 (Mich. 1986) (holding "no less intrusive method" to satisfy state's education interests).

[59] *See* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring).

[60] *See New Life Baptist Church*, 885 F.2d at 946-47 (least restrictive means test must be flexible because of possibility of cumulative exemptions); Blount v. Department of Educ. and Cultural Servs., 551 A.2d 1377, 1382 (Me. 1988) ("Despite its categorical phrasing, the 'least restrictive means' analysis amounts to a balancing test: the State must prove that all less restrictive means advanced by the Blounts would cause too much harm to the public interest in educational quality to justify the increased benefit to the Blounts' exercise of religion.").

[61] *See* Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990).

applies to educational disputes under the Constitution, what would a SRFA statute add?

It would add something. For one thing, the hybrid-rights language of *Smith* is an exception to the decision's general themes that restrictions on religious conduct should not trigger heightened scrutiny and that such scrutiny cannot be applied in a principled fashion. The hybrid-rights exception is based more in expediency than in principle, and therefore it is questionable whether it will be applied vigorously. Sensing this uncertain status, some courts after *Smith* have rejected the hybrid-rights analysis or given it very little force. For example, the Sixth Circuit dismissed a veterinary student's claim that being forced to kill animals in a surgery course would violate her religious beliefs combined with other constitutional rights.[62] The court said:

> We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights. . . . Such an outcome is completely illogical; therefore, at least until the Supreme Court holds [otherwise], we will not use a stricter standard than that used in *Smith*.[63]

Other courts have given more content to the hybrid-rights doctrine,[64] but the parental-rights hybrid may be especially unlikely to produce strong protection. The author of *Smith*, Justice Scalia, is hardly a fan of textually enumerated doctrines like parental rights.

Second, even if the parental-right hybrid survives, it might not trigger heightened scrutiny for claims made by educational institutions instead of families. The language about parental rights did not specifically include claims raised by religious schools as institutions. After *Smith*, the Minnesota Supreme Court held that only parents enjoy the right of educational freedom, that religious schools cannot assert the parent's rights, and thus that schools had

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[62] *See* Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993).

[63] *Id.* at 180; *see also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-67, (1993) (Souter, J., concurring) (criticizing hybrid-rights approach as incoherent). But other decisions apply heightened constitutional scrutiny in education cases even after *Smith*. *See, e.g.*, Peterson v. Minidoka County Sch. Dist., 118 F.3d 1351 (9th Cir. 1997) (no mention of hybrid right); *Delabruere*, 577 A.2d at 261 (adopting hybrid-right approach).

[64] *See, e.g.*, Thomas v. Anchorage Equal Rights Comm., 165 F.3d 692 (9th Cir. 1999) (using hybrids of religion, free speech, and property rights to protect religious landlords' right to refuse to rent to unmarried couples).

no free exercise objection to being compelled to bargain with a teachers' union under state labor laws.[65] The court said that "the rights of parents in the education of their children as outlined in *Yoder* are altogether different than the rights of a religiously affiliated" school concerning its teachers.[66] The New Mexico Supreme Court reached the same conclusion.[67]

This reasoning overlooks that respecting a religious school's autonomy is often crucial to preserving the distinctive kind of education for which parents send their children to the school. As Justice Brennan once recognized, believers "'exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause.' . . . [F]urtherance of the autonomy of religious organizations often furthers individual religious freedom as well."[68] Religious schools may be able to circumvent the Minnesota and New Mexico rationale by bringing in parents as parties to the lawsuit. But that strategy might not satisfy all courts, especially if some parents at the school support the particular state regulation. The institution's own interest adds an important dimension to cases about regulation of schools, and a religious freedom statute provides the clear legal ground for considering that interest. The institutional claim might not prevail, of course, but it should be considered.

II. SRFA CLAIMS IN THE PUBLIC SCHOOLS

I now turn to look at educational disputes in more detail — beginning with the public schools, where (for reasons that I will describe) SRFA statutes have somewhat more room to bolster the rights of religious believers than in private education. It must be conceded, however, that free exercise claims in the public schools have had only mixed success even under the compelling interest test as the courts interpret it. Some of the results could be im-

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[65] *See* Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 863 (Minn. 1992) (holding that free exercise of religion right did not entail right to be free from regulation of secular activities for nonsecular institutions).

[66] *Id.*

[67] *See* Health Servs. v. Temple Baptist Church, 814 P.2d 130, 135-36 (N.M. 1991) (applying *Smith II* and rejecting church day care center's free exercise challenge to application of general state regulations).

[68] Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 341-42 (1987) (Brennan, J., concurring) (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)) (citation omitted).

proved by SRFAs if more vigorously religion-protective principles are adopted under them. I will also suggest how even under moderate principles, the results could be more protective than they have been. In any event, because of the courts' impulse towards moderation, there is little danger that SRFAs will impose radical restrictions on the ability of public school officials to administer their programs.

A. *Student Religious Group Meetings and Membership*

First, it is worth briefly considering what in the past has been the widespread and prominent kind of dispute over religious activity in public schools: the right of religious groups, students or outsiders, to meet and speak on school grounds on the same terms as other, similarly-situated groups. Many of these disputes have already been resolved, giving religious groups equal rights of access and expression, under the Free Speech Clause[69] or (for high school student groups) the Federal Equal Access Act of 1984.[70] Thus a SRFA would not likely change student group rights dramatically, but it would add protections at the margin.[71]

One valuable function of a SRFA would be to guarantee student religious groups the right to require religious commitments from their officers and members. Groups in both high schools and colleges have been prevented from doing so by the application of school policies against religious discrimination.[72] The schools as-

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[69] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845-46 (1995) (barring content-based exclusion of religious magazine from university funding program for student publications); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 396-97 (1993) (barring content-based exclusion of religious group from use of school rooms open to community groups at night); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (barring content-based exclusion of religious student group from meeting in state university facilities).

[70] 20 U.S.C. §§ 4071-4074 (1994) (upheld in Board of Educ. v. Mergens, 496 U.S. 226, 253 (1990)).

[71] For example, a SRFA is not likely to give religious groups the right to speak in schools in circumstances where other groups cannot speak; SRFAs are not likely to give religious speech exemptions from content-neutral time, place, and manner restrictions on speech. *See* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999). The legislative history of the Federal RFRA stated that "where religious exercise involves speech, as in the case of distributing religious literature, reasonable time, place, and manner restrictions are permissible." S. REP. NO. 103-111, at 13 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903.

[72] *See* Hsu v. Roslyn Free Sch. Dist., 85 F.3d 839 (2d Cir. 1996); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 668 (1996) (noting

sert that the Equal Access Act protects only the right to meet and speak, and that setting religious criteria for participation in the group is a form of conduct subject to restriction under *Smith*. The courts have agreed that, at least to some extent, the Equal Access Act does not apply.[73]

This is a matter of importance for religious groups. As the Supreme Court recognized in *Corporation of Presiding Bishop v. Amos*, religious groups have a significant interest in having their religious mission carried out by those who are members of the faith community and committed to its tenets.[74] When done by religious groups, religious discrimination differs from race and sex discrimination. It discriminates based on the ideology and beliefs of the group, which is a right that nonreligious ideological groups enjoy: the Sierra Club chapter at a public high school may require that employees sign a statement of commitment to environmentalism. For these reasons, federal law exempts religious organizations, particularly schools, from Title VII's prohibitions on religious discrimination in employment.[75] A student religious group might argue that applying a no-religious-discrimination policy to it unconstitutionally disfavors religion because it denies to religious groups the ability to select employees by ideology that other ideological groups enjoy. But there is danger that courts would view religious discrimination laws as simply generally applicable to all groups, religious and nonreligious. A SRFA is necessary to protect the ability of student groups to require commitments of belief from leaders and members.

B. Opt-Outs from Objectionable Curriculum

Another common religious freedom claim is that religious students are forced to hear or read objectionable material in the public school curriculum. Religious claimants have asserted a right to

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this "recurrent problem"); E-mail letter from Gregory S. Baylor, Center for Law and Religious Freedom, to author (March 3, 1999) (listing difficulties faced by religious student groups) (on file with author).

[73] *See Hsu*, 85 F.3d at 873 (finding Act protects group's right to set religious criteria for president and music director, but not for secretary or activities counselor).

[74] *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987); *id.* at 342 (Brennan, J., concurring) (explaining that religious groups only want people that are committed to their missions to conduct activities).

[75] *See* 42 U.S.C. § 2000e-1(a) (1994) (exempting religious organizations); *id.* § 2000e-2(e) (providing religious schools may hire employees of only particular religion); *see also Amos*, 483 U.S. at 339-40 (upholding 42 U.S.C. § 2000e-1).

"opt out" from classroom assignments that allegedly promote "secular humanism," from sex education programs that allegedly push promiscuity, and from physical education classes that expose students to allegedly immodest dress. The families have lost many of these claims in court, but the reasons behind the decisions have been flawed. A more robust interpretation of a SRFA would make room for opt-outs in some, though probably not all, cases.

Several courts have ruled that the exposure to objectionable materials in the schools creates no significant burden on family rights or religious exercise. Sometimes the school has made materials, such as condoms, available to children without compelling the children to use them, but also without notifying parents or permitting them to object to their child's receiving the condom. Courts in Massachusetts and New York have held that such a program imposed no constitutional burden on religion because the Free Exercise Clause only forbids acts of state compulsion.[76]

However, the New York court did find that the condom-distribution program infringed on general parental rights because it went beyond merely exposing students to materials and actually offered them a means to engage in objectionable behavior without parental approval.[77] By rejecting for free exercise claims the very theory that it accepted for general parental-rights claims, the court provided a striking example of hostility to free exercise rights. But it also set forth a theory that might equally apply to state religious freedom claims and allow challenges to "noncompulsory" programs like condom distributions. No program in a public school should be seen as wholly voluntary, for any such program takes place in the context of a public school system that the government places financial pressure on parents to use, by requiring school attendance but refusing to pay for private school education. As the New York court stated: "Parents must send their children to school, and unless they pay for private education (something the [parents in question] assert they are financially unable to do) that school must be one controlled by [the government]; [thus there was] state compulsion to send their children into an environment where they

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[76] *See* Curtis v. School Comm. of Falmouth, 652 N.E.2d 580, 586-89 (Mass. 1995) (finding condoms available upon request and in high school vending machines does not violate parents and students' free exercise of religion right); Alfonso v. Fernandez, 606 N.Y.S.2d 259, 267-68 (App. Div. 1993) (finding condom availability's potential temptation to children to stray from religious beliefs does not violate parents' free exercise of religion right).

[77] *See Alfonso*, 606 N.Y.S.2d at 266.

had unrestricted access to free contraceptives."[78]

I confess that I do not think most courts interpreting a SRFA will hold that every program in a public school is by nature compulsory. But courts should keep the fact of the tax-supported preference for public schools in mind when they assess religious freedom claims. This fact should make them more willing to accept the claim that the schools are burdening religious freedom.

Other public school programs, moreover, are unquestionably coercive, in that they do not merely make religiously objectionable materials available, but actually require students to be exposed to them. This is the most common sort of battle over curricular opt-outs. The students in *Mozert v. Hawkins County Board of Education*[79] were required by the school to read literature to which they and their families objected.[80] In other important reported decisions, students were required to attend an explicit sex education assembly,[81] and a student was required to attend co-ed physical education classes where students of the opposite sex wore what he regarded as "immodest" gym clothes.[82] But despite the undeniably compulsory nature of these programs, several courts have held that they imposed no constitutional burden on religion. Those holdings on burdens are wrong in two ways and could be corrected by SRFAs.

First, in *Mozert* and other decisions, courts of appeals held that no significant burden existed because the students were compelled only to read and discuss the materials and not to agree with or verbally endorse them.[83] This ignores the fact that, as a concurring judge in *Mozert* pointed out, the parents honestly believed that even reading the materials violated their religious obligations (much as the Catholic Church once maintained a blacklist of prohibited, sinful books).[84] Thus *Mozert* presented a strong case of a

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[78] *Id.* (distinguishing case where contraceptives were distributed at state clinic that children were not pressured to attend).

[79] 827 F.2d 1058 (6th Cir. 1987).

[80] *See id.* at 1065.

[81] *See* Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 529-30 (1st Cir. 1995) (accepting allegations that school-hired speaker simulated masturbation, had student lick an oversized condom, and told one student he was wearing "erection wear" and another that he had "nice butt").

[82] *See* Moody v. Cronin, 484 F. Supp. 270, 277 (C.D. Ill. 1979) (holding that requirement imposed burden on student's religious tenets and was unconstitutional).

[83] *See Mozert*, 827 F.2d at 1069; *see also* Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 690 (7th Cir. 1994) ("[T]he use of the [Impressions reading] series [does not] compel the parents or children to do or refrain from doing anything of a religious nature.").

[84] *See Mozert*, 827 F.2d at 1075-76 (Boggs, J., concurring on other grounds) (arguing that court erred in its finding that there was no evidence that material in issue was against

"subjective" burden under *Yoder*. For the courts to assert that the parents really had no such tenet was simply indefensible under the principle of *Thomas v. Review Board* that courts should not second-guess believers' understanding of their religious duties.[85] Second, even if the courts do their own "objective" evaluation of the seriousness of the burden, as I have suggested they might, they should not dismiss the burden from compelled exposure as minimal. To do so is to assume the false baseline of a rational student being exposed "neutrally" to all ideas and choosing among them, which I criticized in Part I-A. The goal of religious exemptions is to reduce the divisiveness and suffering that comes when people are forced to act contrary to the tenets of their faith. One could hardly imagine a more divisive or anger-inducing policy in the public schools than to force students to attend sex-education classes when they and their families object. It is ironic to say that exposure to a objectionable short prayer at graduation imposes a constitutional burden on dissenters for Establishment Clause purposes,[86] but exposure to objectionable materials in classes imposes no burden on religious dissenters under the other religion provision of the First Amendment.

SRFAs thus should be read to apply to claims for opt-outs from objectionable curriculum materials. There were indications that RFRA was intended to give such claims at least a chance;[87] SRFA proponents may want to include similar indications in their legislative records. The example of *Mozert* will probably lead some state courts to reject such claims out of hand, but there are also precedents reflecting a more sympathetic understanding of burdens from forced exposure. The federal district court in *Moody v. Cronin* held that there was a constitutional burden on the Pentecostal stu-

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parents and children's religious beliefs).

[85] *See* Thomas v. Review Bd., 450 U.S. 707, 714 (1981) (stating that religious belief need not be comprehensible, acceptable, logical, or consistent to others to merit First Amendment protection).

[86] *See* Lee v. Weisman, 505 U.S. 577, 599 (1992). For the record, I agree with *Weisman*'s conclusion that the graduation prayer imposes an unconstitutional burden.

[87] For example, in introducing RFRA one of its chief sponsors expressly condemned "school boards . . . forc[ing] children to attend sex education classes contrary to their faith." 139 CONG. REC. S2822 (statement of Sen. Kennedy) (1993). Both the Clinton administration and a politically diverse committee of religious and civil liberties organizations suggested that some claims for opt-outs from objectionable curriculums would involve substantial burdens under RFRA. *See* "Statement of Principles Regarding Religious Expression in Public Schools," Department of Education, Letter from Secretary Richard Riley (August 10, 1995); "Religion in the Public Schools: A Joint Statement of Current Law" (1995) (joined by organizations from ACLU to National Association of Evangelicals).

dents who were forced to attend co-ed gym classes.[88] And although the Ninth Circuit held that a student was not burdened simply by the presence of a book in a reading curriculum, the court specifically noted that the student had been assigned another book when she objected.[89]

The interpretation of SRFAs could also correct an even more narrow understanding of constitutional burdens, reflected in the *Hot, Sexy, and Safer* decision. There, as I noted earlier, the First Circuit held that rights of religious freedom in education under *Yoder* were limited only to those situations where the state's compulsory rule "threatened their [the family's] entire way of life."[90] In other words, the court not only ignored burdens on religious tenets as the families understood them, it also refused to act on "objective" threats to the students' faith except in the most extreme case. That kind of approach would effectively wipe SRFAs off the books in education cases, and as I suggested above, SRFA proponents may want to expressly disavow such restrictive interpretations in the legislative history. Courts should recognize that even a single event that pushes objectionable views on students can cause real disruption to a family's religious identity.

The compelling interest test does not necessarily mean that parents will win all claims for opt-outs from the curriculum. But several of the interests that the courts have accepted are too weak. Some courts have been almost willfully obtuse in characterizing claims for opt-outs. They have quoted Justice Jackson's dictum that "[i]f we are to eliminate everything that is objectionable to any [sect] or inconsistent with any of their doctrines, we will leave public education in shreds."[91] But that cautionary statement, which came in an Establishment Clause case seeking to bar religiously-oriented teaching, has no application to these cases, since the plaintiffs seek not to eliminate books or materials, but merely to be exempted from reading them and to be assigned alternatives.

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[88] *See* Moody v. Cronin, 484 F. Supp. 270, 275-76 (C.D. Ill. 1979) (finding environment with immodest attire could violate Pentecostal students' religious teaching about not being party to lust).

[89] *See* Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1533 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

[90] Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 539 (1st Cir. 1995) (holding that parents and students did not allege that mandatory attendance at sex education assembly threatened their whole way of life).

[91] McCollum v. Board of Educ., 333 U.S. 203, 235 (1948) (Jackson, J., concurring) (quoted in Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 690 (7th Cir. 1994), and Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1069 (6th Cir. 1987)).

The courts have advanced various compelling interests in denying opt-outs: the need to "teach students how to think critically" about ideas, the need to teach tolerance, and the need to avoid "unmanageable disruptions" and "resentments" that might occur if some students were excused from core subjects and multiple, perhaps conflicting objections were raised.[92] But each of this rationales has weaknesses. It is doubtful that anything could cause more resentment to some students than to force them to violate their conscience or give up a free public education, and to refuse to make any accommodation for their conscience is hardly a lesson in tolerance. The asserted compelling interest in teaching students to "think critically," as school officials understand that term, is undermined by the fact that students are allowed to exit to private schools where the teaching is free to conflict with that understanding — although, since one of the public school's basic reasons for existence is assertedly to expose students to different currents in a diverse society, widespread opt-outs may undermine their purpose more than that of private schools. The concern about disruption from opt-outs is a real one, not because materials will be removed from the basic curriculum but because administering a host of opt-outs fairly may be difficult. But under the compelling interest test, the school cannot just speculate about administrative difficulties; it must prove that they are happening and that they are so severe as to undermine the curriculum.

A number of factors could go into analyzing whether the state has a compelling interest in denying a particular opt-out: whether the plaintiffs have given sufficient notice of their objections, how broad-based their objections are, whether the plaintiffs could propose or have proposed an alternative set of materials that would demand just as much work from their children, whether many other claims for opt-outs are being made, and whether opt-outs have proved workable in the past (as they had in *Mozert*).[93]

Although I have argued why claims for opt-outs should be supported by a SRFA, the record of the courts is admittedly mixed at best. Courts may remain reluctant to recognize any right to object to materials in core curriculum subjects like reading or math. But

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[92] *See* Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 690 (7th Cir. 1994) (finding material in issue helped students' reading skills and creativity); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070-73 (6th Cir. 1987) (Kennedy, J., concurring).

[93] *See* Mozert v. Hawkins County Pub. Sch., 647 F. Supp. 1194, 1201-02 (E.D. Tenn. 1986), *rev'd sub nom. Mozert*, 827 F.2d 1058.

even if the courts are inclined to defer to the school, they still are more likely to protect objections to less traditional curriculum matters such as sex education programs than objections to core subjects. Past decisions have ordered opt-outs from co-ed gym classes and from mandatory ROTC training programs and have allowed parents to refuse permission for their children to receive condoms at school.[94] In the cases of sex-education assemblies or condom distributions, unlike the case of classroom materials, an opt-out by objecting students would not require the school to provide any alternative program to them, nor would it interfere with the administration of the program for others (that is, with making condoms available or conducting an assembly). The precedents suggest that some programs are less central to public schools' educational purposes and thus can be more easily outweighed by family rights.[95] The common practice of permitting excusals from sex-education programs confirms this notion.[96] As one of the *Mozert* judges conceded, the state has less of an interest in compelling students to participate in noncore subjects, partly because "there is less divisiveness in excusing someone from [them] then [sic] in excusing [him] from discussing a multitude of ideas" in core subjects.[97]

To be sure, there would be difficulties in drawing lines as to what is "core" to the educational purpose of schools. But the state can hardly assert a compelling need in making every student participate in those physical education classes that are coeducational. And it is indeed doubtful that the use of condoms by teenagers should go "from misdemeanor to compelling interest in one generation."[98] Under the test of *Yoder*, the state must show that its policy is necessary to prepare students to participate intelligently in civic affairs and be self-reliant members of society. If public

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[94] *See* Moody v. Cronin, 484 F. Supp. 270, 277 (C.D. Ill. 1979) (finding Free Exercise Clause allows students to opt-out of physical education class for religious reasons); Spence v. Bailey, 465 F.2d 797, 800 (6th Cir. 1972) (ROTC class); Alfonso v. Fernandez, 606 N.Y.S.2d 259, 267 (App. Div. 1993) (condom distribution).

[95] *See e.g.*, *Moody*, 484 F. Supp. at 277 ("If this Court had to prioritize the rights in conflict in this case, the First Amendment religious freedom would be found to be of greater importance than the state's interest in physical education.").

[96] *See* George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 924 & n.337 (1988) (listing statutes and decisions excusing students from sex-education and other classes).

[97] *Mozert*, 827 F.2d at 1072 (Kennedy, J., concurring).

[98] Laycock & Thomas, *supra* note 5, at 223 (making same point concerning ordinances forcing religious landlords to rent to unmarried cohabiting couples).

schools are to maintain the ideal of being open to all citizens, and sufficiently "neutral" between viewpoints to claim a broad consensus in their favor, they will have to accept some limits on their ability to intrude on religious conscience in the most controversial areas, at least in those a few steps removed from the traditional accepted core subjects of education.

C. *Student Dress*

Issues also recur over the religious obligations of students to wear certain clothes or display symbols or ornaments. SRFAs could provide real protection in such cases. Displaying religious ornaments is a form of expression given strong protection by the Free Speech Clause and by hybrid rights of speech and religion under *Smith*, as one court has held concerning the wearing of rosaries by students.[99] But courts do not always accept the expressive nature of such conduct,[100] and they are less likely to do so with the wearing of clothing in general than with the wearing of symbols or ornaments. So SRFAs may often be necessary to trigger heightened scrutiny of school policies.

A primary distinction in regulations of student dress is between regulations directed at protecting student health and safety and those directed at other goals. Courts that have applied the compelling interest test have been reluctant to accept regulations of dress aimed at "maintaining discipline, fostering respect for authority, and projecting a good public image."[101] At the least, they have required the least restrictive means of serving those goals. Even prison dress codes have been treated with skepticism when they have been based simply on the need for uniformity. Even more then, schools should not be allowed to trump students' consciences simply by an undifferentiated interest in discipline or "image." On the other hand, regulations designed to preserve health and safety fit much more comfortably with basic principles of religious free-

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[99] *See* Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 670 (S.D. Tex. 1997); *see also* Alabama & Coushatta Tribes v. Trustees of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1333-34 (E.D. Tex. 1993) (recognizing hybrid religious-speech rights in wearing long hair).

[100] *See, e.g.*, East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838, 858 (2d Cir. 1977) (rejecting teacher's claim that First and Fourteenth Amendments protect right not to wear tie); Karr v. Schmidt, 460 F.2d 609, 616 (5th Cir. 1972) (restriction on length of student's hair did not violate his rights of free speech).

[101] *Alabama & Coushatta Tribes*, 817 F. Supp. at 1333.

dom. Long hair might generally be simply offensive to others, but in machine shop class it would be a hazard, and the school could require that the student there tie it in a bun.

As is the case of religious freedom disputes generally, the courts will often look to see if the religious student can modify his dress in a way that does no violence to his conscience but poses less of a safety hazard. Thus, the Seventh Circuit suggested that an Orthodox Jewish high-school basketball player might be able to satisfy his obligation to cover his head before God by wearing something other than a yarmulke during games. If a headgear could be found that would not fall off during games, the court indicated, the state would not have a sufficient interest in preventing the player from wearing it.[102] The parties eventually settled on this basis, exemplifying the positive effect that careful analysis and balancing of the facts can have under a compelling-interest analysis.

Even so, some cases remain difficult. In some cases, a religious practice is obligatory for the student but arguably creates a real safety risk to others. Practices that actually constitute direct physical harm to others, a religious obligation to punch other students, for example, can obviously be regulated. But the state "need not wait for an actual disaster."[103] It should, however, be required to present a convincing record of a substantial degree of risk.

Cheema v. Thompson [104] offers a good summary of the interests at stake in religious freedom cases. There, Sikh students asserted a claim to wear ceremonial knives, or kirpans, in school because young Sikh males have a religious obligation to wear such knives at all times. The school district refused permission under its general policy forbidding students to carry any weapons. This put the children to the choice of violating their basic religious beliefs or losing their ability to attend a free public school. Using the compelling interest test under RFRA, the court of appeals affirmed a preliminary injunction requiring the school to permit the knives as long as the blade was dulled and the knife was "sewn tightly to its sheath" and worn underneath clothing.[105] The court noted that the school district throughout the litigation had relied on its absolute rule and had failed "to build a meaningful record" on why less restric-

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[102] *See* Menora v. Illinois High Sch. Ass'n, 683 F.2d 1030, 1034 (7th Cir. 1982).

[103] *Id.* at 1034.

[104] 67 F.3d 883 (9th Cir. 1995).

[105] *See id.* at 886. The court of appeals "d[id] not endorse" the terms of the injunction but held that the district court had not abused its discretion. *See id.*

tive alternatives would not preserve safety, especially since other school districts had permitted kirpans under restricted circumstances without any incidents.[106]

The dissent argued that the limits on the knives were insufficient to ensure safety (other districts had required that the knives be riveted not just sewn, and some testimony indicated that Sikh children might use the knives as weapons), and that the school had an interest not just in preventing real safety risks, but in ensuring a "fear-free learning environment."[107] The latter interest, though important, cannot be the basis for deferring to unreasonable fears. But on the facts, it was a close question whether wearing the kirpans as limited by the court posed a significant safety threat. I expect that not all courts applying a SRFA would reach the same result as *Cheema*, and few would go further than it in protecting religious conduct in the face of colorable safety concerns in schools.

D. Scheduling of Classes and Events

Finally, students of minority faiths often face difficulties with public school schedules, which are created with the practices of the majority in mind, observing the majority's Sabbath days and religious holidays. But scheduling rules are generally applicable and facially religion-neutral and therefore subject to *Employment Division v. Smith*. SRFAs may therefore be necessary to force schools to make reasonable accommodations where the official schedule places burdens on minority students.

Two factors are likely to play a role in drawing the lines between scheduling accommodations that are required under SRFAs and those that are not. First, courts will likely consider whether the accommodation would change the school's policy or schedule for all students, or whether it would simply allow the objecting student to opt out of attending on the day in dispute. SRFAs generally are far more likely to require opt-outs than to require overall changes in schedule that directly apply to other students as well. Thus, an Orthodox Jewish student failed in his argument that his school could not schedule its graduation ceremony on Saturday, when he could not attend because of Sabbath restrictions.[108] By contrast, if

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[106] *See id.* at 885-86.

[107] *See id.* at 889 (Wiggins, J., dissenting).

[108] *See* Smith v. North Babylon Sch. Dist., 844 F.2d 90, 94 (2d Cir. 1988).

the student had been forced to take a test on Saturday or attend school on a holiday, he could have opted out and the only cost to the school would be the cost of arranging a single separate test or make-up day for him. Thus, another court held that a school district did not have a compelling interest to justify limiting students to two excused religious absences a year and giving zeros for work on other days that the student missed for religious reasons.[109] While even opt-outs can create administrative difficulties for the school, especially if a large number of such claims arise, the difficulties multiply when the school is not just setting a different schedule for one student but is changing the overall schedule for all.

Second, courts will consider the degree of burden that the schedule imposes on the religious claimant. To receive a zero for a missed test or school day is surely a significant burden. But in the Saturday-graduation case, the court held that the student did not suffer a significant burden from simply missing the ceremony since he would still receive his degree.[110] Again, the court seemed to turn to the burden analysis in order to avoid the intrusive remedy of ordering the state to alter its policies, in this case to move the whole graduation ceremony. But the Court's interpretation of burden is strikingly narrow: while *Lee v. Weisman* holds that the graduation ceremony is so important that exposure to a brief prayer there is significantly coercive,[111] the Saturday-graduation decision holds that missing the ceremony altogether for religious reasons is not a serious burden. I would instead rest the decision on the ground that religious freedom provisions generally require only opt-outs, and not a change in the school's program for all students.

III. SRFAs AND RELIGIOUS PRIVATE AND HOME SCHOOLING

A. Curriculum and Teacher Qualifications

Probably the most important area of dispute concerning religious private schooling is over state regulation of the curriculum

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[109] *See* Church of God v. Amarillo Indep. Sch. Dist., 511 F. Supp. 613, 617-18 (N.D. Tex. 1981) (setting forth case of student whose faith required more than one full week of holidays).

[110] *See North Babylon Sch. Dist.*, 844 F.2d at 93-94.

[111] *See* Lee v. Weisman, 505 U.S. 577, 595 (1992) (stating that "graduation is one of life's most significant occasions").

and the qualifications of teachers in religious schools and home schools. But this is also an area in which SRFAs will not have much immediate effect. Most of the protection that religiously motivated education could plausibly receive under SFRAs has already been secured by state legislation or administrative regulation. Private-schooling families challenged state regulations in court from the 1970s into the 1990s — especially the requirement that teachers be state-certified and have college degrees, which effectively outlawed home schooling in many families. These lawsuits enjoyed only mixed success; courts repeatedly affirmed the state's basic oversight power and upheld most regulations, although some, especially concerning teacher qualifications, were struck down. The schools and parents then went to the state legislatures and achieved much of the protection they had sought. The rules on teacher credentials were relaxed in every state to give great leeway to home schooling, and detailed oversight of private school curriculums was largely replaced by reliance on short reports, standardized test results, and simple requirements that certain basic courses be taught.[112] Given this situation, SRFAs probably will not produce any major deregulation of curriculum or teacher credentials that has not already been adopted in most states. This suggests that SRFAs do not pose dangerous risks, but also that giving additional protection from curriculum or teacher regulations is not one of the pressing reasons to enact a SRFA.

It is still worth taking a look at the decisions on teacher and curriculum regulations to see how the burden/compelling-interest analysis has operated in the context of education. At the outset, there is no question that even under a SRFA, states would retain the basic authority to oversee religious schools and, as a corollary, to require basic reports and information from schools and parents. Some courts have said that the reporting requirement alone im-

[112] For the story in more detail, see Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise*, 60 GEO. WASH. L. REV. 818, 826 (1992). With respect to home schooling, no state requires certification to teach (Michigan was last to do so), and only seven explicitly require even a high school diploma (a requirement that almost certainly would be upheld under a SRFA). *See, e.g.*, Home School Legal Defense Association, "Summary of Home School Laws in the Fifty States" (1997) (on file with author); Devins, *supra*, at 819. With respect to private schools, many states require only that a school file annual reports stating the number of students attending, the numbers of days of operation, and the subjects taught; and in the 1980s more than 20 states eliminated teacher-certification requirements in favor of standardized-testing assessments. *See* DWYER, *supra* note 18, at 10-11; *see also* Devins, *supra*, at 826-34 (describing legislative and administrative accommodations in various states).

poses no significant burden on religious conscience,[113] although others have found a burden and instead upheld the requirement on the ground that if the state could not obtain such information, it would be unable to satisfy its most basic interest in overseeing private education (as opposed to the exemption in *Yoder* where "much of the state's interest would have remained intact").[114]

The decisions on basic reporting requirements exemplify the division among courts over what counts as a substantial burden on religious education. The mere act of reporting imposes a relatively minor burden in *Yoder*'s "objective" sense, since by itself it puts no limit on what may be taught or who may teach and thus appears to pose no immediate threat to the transmission of religious identity. But from the "subjective" perspective of many religious parents and schools, the mere act of state regulation is a violation of their religious tenets, since they believe education is solely under the authority of God, church, and family.[115] If courts take the decision in *Thomas v. Review Board* seriously and refuse to second-guess a believer's understanding of his tenets, they will accept the assertion of some parents and schools that any regulation imposes a conscientious burden on them.[116] But as I indicated in Part I, many courts are reluctant to trigger the compelling interest test so readily. I expect that courts applying a SRFA will continue to gauge burdens on a case-by-case basis, and to require more of a showing from the state as the perceived objective burden on the parents increases. But as I have already argued, courts should not exclude claims

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[113] *See, e.g.*, Fellowship Baptist Church v. Benton, 815 F.2d 487, 491 (8th Cir. 1987) (finding burden to be "very minimal"); State v. Newstrom, 371 N.W.2d 525, 531-32 (Minn. 1985) (distinguishing *Yoder* on ground that, unlike reporting requirements, compelled education would have significantly affected Amish faith).

[114] *See* State v. Delabruere, 577 A.2d 254, 267 (Vt. 1990); *id.* at 264 ("Once we recognize that the State can require all children of proper age to attend some school, we must also recognize a method to implement the State's requirement."). Indeed, the court noted, religious educators had often sought a reporting requirement as less intrusive than other regulations. *See id.* at 267.

[115] *See, e.g.*, State v. Rivera, 497 N.W.2d 878, 880 (Iowa 1993) (parents asserted that "Supreme Being must be accorded exclusive authority over their children's home education program"); *Delabruere*, 577 A.2d at 262-63 ("[T]he symbols of state regulation are as religiously important to defendants as the actuality of state control over their religious education."); State *ex rel.* Minami v. Andrews, 651 P.2d 473, 475 (Haw. 1982) (rejecting parents' assertion that "school and church are one and the same" so any regulation would violate religious tenets).

[116] *See, e.g.*, New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940, 944 (1st Cir. 1989) (accepting that any submission to state "approval" process would burden school's religion); *Delabruere*, 577 A.2d at 262 (finding burden on religious tenets in order "not to judge the degree of defendants' beliefs").

from coverage easily, and they should be willing to act to prevent laws that require substantial alterations in religious practice, not just threats to the survival of the religious community altogether.[117]

Disputes over teacher qualifications raise closer questions and exemplify several issues that arise under the burden/compelling-interest analysis. Courts have upheld requirements that teachers in religious schools be certified and/or have college degrees,[118] but some of these rulings have provoked dissents,[119] and two courts have struck down certification and college-degree requirements as applied to parents engaging in home schooling.[120]

The decisions protecting home schoolers from teacher-certification requirements provide a model, much like *Yoder*, of how to apply the compelling interest test to educational disputes in a way that is protective of religious autonomy, but also mindful of important societal needs. Requiring college degrees or state certificates would, of course, effectively prohibit huge numbers of parents from engaging in home schooling at all; is that restriction necessary? The courts in these cases have recognized, and indeed the states conceded, that only general, fundamental interests could qualify as compelling: only the interest in ensuring a decent education, not in dictating the details of the educational process.[121] The main thrust of *Yoder*, as I discussed in Part I, calls for a focus on results: does the evidence show that teacher certification, as applied to home schooling parents, is necessary to produce satisfac-

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[117] Some regulations would impose severe restrictions by most observers' standards. If a state were actually to require religious schools to teach views to which they objected, for example, to teach evolution as truth in a science course, or the permissibility of sex outside of marriage in a "tolerance" course, a SRFA would undoubtedly be triggered and would likely bar the regulation. If Jehovah's Witness children cannot be compelled to salute the flag, *see* Board of Educ. v. Barnette, 319 U.S. 624 (1943), then religious schools cannot be compelled to teach views to which they object. Regulations in the 1970s in Ohio imposed a serious burden on private schools' teaching in a different way: by a host of mandates concerning what courses must be taught and for how many hours, they crowded out any opportunities for religious or other distinctive teaching, and they were struck down by the state supreme court and would also be invalidated under a SRFA. *See* State v. Whisner, 351 N.E.2d 750, 765-67 (Ohio 1976).

[118] *See Town of East Longmeadow*, 885 F.2d at 948-49 (requiring certification); *Fellowship Baptist Church*, 815 F.2d at 494 (requiring certification); State v. Anderson, 416 N.W.2d 276, 323-25 (Wis. 1987) (requiring certification); State v. Faith Baptist Church, 301 N.W.2d 571, 579-80 (Neb. 1981) (requiring college degree); Crites v. Smith, 826 S.W.2d 459, 466-67 (Tenn. Ct. App. 1991) (requiring college degree).

[119] *See Faith Baptist Church*, 301 N.W.2d at 582-83 (Krivosha, C.J., dissenting in part).

[120] *See* People v. DeJonge, 501 N.W.2d 127, 144 (Mich. 1993); Care & Protection of Charles, 504 N.E.2d 592, 602 (Mass. 1987).

[121] *See Care & Protection of Charles*, 504 N.E.2d at 600; *DeJonge*, 501 N.W.2d at 141.

tory results in education? As the Michigan Supreme Court noted, studies show that teacher certification produces no statistically significant difference in student performance.[122] In that case, the approach of other jurisdictions also undercut the state's assertion of necessity: Michigan was virtually the only state that required certification of home school teachers.[123]

With the exception of teacher certification and college-degree requirements in home schools, however, the courts have usually refused, as a constitutional matter, to limit states to standardized testing or informational reporting. Indeed, the Michigan court that freed religious home schools from teacher-certification rules had earlier refused to give that exemption to private schools.[124] Many decisions have reasoned that standardized testing is inadequate because under it the state cannot intervene "until at least a year of inadequate instruction has already done its harm."[125] Such reasoning is highly questionable as a defense for teacher certification requirements — for those requirements themselves rest on the assertion that educational quality will be substantially assured by a certificate or degree received not just one, but many years earlier! Nevertheless, the majority of decisions have allowed the state to reject standardized tests as inadequate if it wishes.

The reason the courts have treated qualifications for home-schooling parents differently than for private schools is again, apparently, the "objective" degree of burden. Certification and college-degree requirements would effectively bar home schooling for many families. Schools have argued that certification and college-degree requirements would limit their pool of available teachers and would force them to hire teachers who had been exposed to instruction and philosophies objectionable to the school.[126] But the burden of finding an ideologically acceptable teacher is less severe, the courts say, than the burden on a parent of getting a

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[122] *See DeJonge*, 501 N.W.2d at 141.

[123] *See id.* at 141 & nn.49-50.

[124] *See* Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d 373, 382-83 (Mich. 1986).

[125] Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377, 1385 (Me. 1988); *accord* New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940, 948 (1st Cir. 1989); Fellowship Baptist Church v. Benton, 815 F.2d 486, 494 (8th Cir. 1987); *Sheridan Road Baptist Church*, 396 N.W.2d at 382; State v. Faith Baptist Church, 301 N.W.2d 571, 579 (Neb. 1981); State v. Shaver, 294 N.W.2d 883,897 (N.D. 1980); Brunelle v. Lynn Pub. Sch., 1997 WL 785595, at *6 (Mass. Super. Ct. 1997).

[126] *See Sheridan Road Baptist Church*, 396 N.W.2d at 381-82.

degree and certificate.[127] Less of a burden, that is, in the "objective" sense, in its actual effect on the survival of the religious community, but not necessarily in the "subjective" sense, for many schools assert that teacher certification per se violates their religious tenets. Courts in education cases have tended to second-guess such broad subjective claims and have required the objecting schools or parents to show that the regulation in question would substantially affect their operations or teaching in an objective sense.

Overall, most of the regulations that the courts would be willing to strike down under a SRFA have already been done away with by state legislation or administrative rules. If one or two states reinstated intrusive regulation of religious schooling, their courts might be more willing to use a SRFA to limit such regulation than they were willing to use the Constitution ten or fifteen years ago. The very fact that so many states have deregulated religious schooling without dire results would tend to show that extensive regulation is not necessary to serve the state's compelling interests in educational quality. But any state legislature that changed its approach so dramatically to re-regulate religious education might also amend its SRFA at the same time.

B. Student Health and Safety

The state also unquestionably has an interest in protecting the health and safety of students in religious schools. Many such regulations, such as fire codes, create no conflict with religious conscience. But states have also prohibited corporal punishment in schools and day-care centers, and that has created conflict with groups that believe the biblical statement "Withhold not correction from the child"[128] mandates spanking as a form of discipline in some situations.

The decisions have generally upheld the state's authority to forbid spanking. But some of the reasons have been weak, and a SRFA would strengthen the legal right of religious schools to engage in limited forms of physical discipline. One line of decisions rejects any constitutional right for schools to spank on the ground

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[127] *See Fellowship Baptist Church*, 815 F.2d at 492-93; *Sheridan Road Baptist Church*, 396 N.W.2d at 381-82; *Faith Baptist Church*, 301 N.W.2d at 579.

[128] *Proverbs* 23:13 (King James).

that parents alone have that right (if one exists at all) and may not delegate it to the schools.[129] As I discussed earlier, such reasoning overlooks the extent to which families in a religious community rely on institutions like schools to carry out conscientiously motivated activities like raising their children in the faith.[130] But in any event, a SRFA would give the institution the chance to assert the right itself. Assuming the compelling interest test applies, the state obviously can prohibit excessive corporal punishment. But it is more doubtful that it can outlaw spanking altogether.[131]

C. Employee Relations

As I have already noted, SRFAs may be important in extending religious freedom claims to schools and not just individual parents or families. Among the most important matters of concern for a religious school is the conduct of its employees, especially teachers, who play a "critical role" in transmitting the school's beliefs and identity to students.[132] But the employment relationship is also regulated by a host of laws requiring collective bargaining, requiring the payment of minimum wages, and forbidding employment discrimination based on race, sex, religion, and other characteristics. Many of these are federal laws beyond the reach of a state religious freedom statute, but states and localities also have their own versions, an example of the fact that a religious activity can face the same sort of restriction over and over from many different sources of governmental power. What would a SRFA mean for the application of state and local employment laws? In this area too, a SRFA probably will not radically restrict state authority, but it should protect the school where its interest is strong and the state's interest is

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[129] *See, e.g.*, Health & Env't Dep't v. Temple Baptist Church, 814 P.2d 130, 135 (N.M. 1991); Cornhusker Christian Children's Home v. Department of Soc. Servs., 416 N.W.2d 551, 562 (N.M. 1987); Johnson v. Department of Soc. Servs., 123 Cal. App. 3d 878, 886, 177 Cal. Rptr. 49, 53 (Ct. App. 1981).

[130] *See supra* Part I.C.

[131] Judges in child-abuse and custody cases have been able to make the distinction between reasonable and excessive punishment. *See, e.g.*, Department of Soc. Servs. v. Father & Mother, 366 S.E.2d 40, 41-42 (S.C. 1988) (noting statute permitting reasonable corporal punishment but finding punishment by these parents excessive). Spanking in schools may be less likely to be administered in love than spanking by parents, but excessive spanking is also easier to police in schools than at home. There is some scientific opinion that even minimal corporal punishment causes emotional harm to children, but hardly such a broad consensus as to satisfy the compelling interest test, if that test is taken seriously.

[132] *See* NLRB v. Catholic Bishop, 440 U.S. 490, 501 (1979).

not.

One recurring dispute involves the duty to bargain with unions of employees, especially teachers, over the terms and conditions of employment. In *NLRB v. Catholic Bishop*, the Supreme Court held that teachers in religious schools were not covered by the federal collective bargaining laws, until Congress explicitly said so, because coverage would create an ongoing entanglement between church and state that would pose serious problems under the Religion Clauses.[133] The Court did not explain its reasoning fully, but collective bargaining does threaten repeated intrusion on school's autonomy. Almost anything the school does is a "term or condition" of employment; the labor board must constantly decide what are the legitimate prerogatives of management in a church-managed institution; and the school's refusal to concede on matters of conscience (such as standards of conduct for teachers or the inclusion of abortion in a health-benefits program) could be taken as evidence of a failure to bargain in good faith.[134]

But the exclusion from federal labor laws has not carried over to state labor laws. Courts have limited *Catholic Bishop* to the interpretation of federal law and have rejected free exercise challenges to state counterparts. SRFAs might counteract those rulings in part. First, several decisions have held that collective bargaining laws imposed no substantial burden on religious schools because the schools had no religious tenet specifically forbidding unionization.[135] But many SRFAs explicitly adopt the broader coverage of religiously motivated conduct, not just religious mandates, and this is the better interpretation even when the language is ambiguous. The regulatory intrusion on the management of religious schools easily qualifies as a substantial burden on religiously motivated activity.[136]

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[133] *See id.* at 503.

[134] "The [Federal Labor] Board's definitions of good faith suggest that willingness to compromise [over policies] is an important if not an essential ingredient." THE DEVELOPING LABOR LAW 620 (Patrick Hardin ed., 3d ed. 1992) (footnotes omitted).

[135] *See, e.g.*, Catholic High Sch. Ass'n v. Culvert, 753 F.2d 1161, 1170 (2d Cir. 1985); Employment Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960, 963-64 (N.Y. 1988).

[136] *See* South Jersey Catholic Teachers Org. v. St. Teresa Church Sch., 696 A.2d 709, 714 (N.J. 1997) (stating that entanglement acknowledged in *Catholic Bishop* could be recognized under Free Exercise Clause as well as Establishment Clause); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1394 (1981) (arguing that regulatory entanglement, while often assigned to Establishment Clause, is also burden on free exercise).

Courts have also found that requiring collective bargaining in religious schools serves a compelling interest in "the preservation of industrial peace and a sound economic order."[137] But surely that is an example of raising the state's interest to its highest level of generality to make it appear compelling, the very ploy that heightened scrutiny forbids. There is no evidence that leaving religious schools and teachers to voluntary negotiations has produced labor strife. Nevertheless, the record of past decisions suggests that courts will refuse total exemptions from the labor laws. But a SRFA would almost certainly be interpreted to bar the state from requiring bargaining on particular matters of conscience like teacher conduct or abortion-related health benefits.[138]

One area where SRFAs would likely play a significant role is in securing schools' right to use religious preferences in employment. As I noted above,[139] this is an interest of particular importance for religious organizations that, while protected under federal law in Title VII, is also subject to restriction under state laws against religious discrimination. Religious organizations should enjoy the same right to demand ideological commitments from their employees that other ideological organizations enjoy, but their right to do so is not secure under the existing constitutional law and would be significantly bolstered under a SRFA. For example, a Michigan court held that RFRA barred a suit under state civil rights law by a Protestant teacher whose contract in a Catholic school was not renewed; the court said that the state has no compelling interest "in requiring church-operated schools to employ teachers of other faiths or of no faith."[140] The right to require religious ideological commitments from employees should also extend, under a SRFA, to requiring that they abide by standards of personal conduct that are religiously grounded.[141]

On the other hand, SRFAs would be much more limited in giving rights to religious schools to discriminate on the basis of race or sex in hiring employees. Claims to engage in race-based discrimination would likely fail on the basis of *Bob Jones University v.*

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[137] *Culvert*, 753 F.2d at 1171; *South Jersey Teachers*, 696 A.2d at 722-23 (quoting *Culvert*).

[138] *See South Jersey Teachers*, 696 A.2d at 723 (upholding application of labor laws but only for "secular" as opposed to "religious" questions).

[139] *See supra* Part II.A.

[140] Porth v. Roman Catholic Diocese, 532 N.W.2d 195, 200 (Mich. 1995).

[141] *Cf.* Little v. Wuerl, 929 F.2d 944, 945 (3d Cir. 1991) (holding that firing of teacher for marrying in violation of Catholic standards was protected by exemption for religious preferences by religious organizations).

United States,[142] except for positions in the school actually held by clergy, since courts have been willing to protect decisions concerning clergy from employment regulation altogether. The case law concerning discrimination on the basis of sex or pregnancy is somewhat more ambiguous. One court of appeals decision held that a state law against sex discrimination could not constitutionally be applied to a school that followed a doctrinal tenet forbidding pregnant women from working as teachers.[143] Other decisions hold that the federal law prohibiting sex discrimination can constitutionally be applied to religious schools. However, those decisions might be read narrowly: in some of them the school had no specific tenet requiring sex discrimination,[144] and in others the courts suggested that forbidding a reduced pay scale for women teachers (a differential arguably required by the school's religious tenets about male authority) would not burden the school's beliefs because the women teachers could simply return part of their paycheck to the school.[145]

D. Denial of Educational Benefits

A final area of possible dispute under SRFAs concerns the provision of tax-supported state financial benefits to religious schools or students attending them: would the denial of such benefits violate the rights of the school or student under a SRFA? The unconstitutional conditions doctrine asserts generally that the state may not punish a constitutional right by withholding a benefit based on assertion of the right.[146] The doctrine applies to the free exercise of religion as well: indeed, *Sherbert v. Verner*[147] itself involved the denial of a benefit based on the recipient's religious motivated conduct, in that case denial of unemployment benefits to a Seventh-day Adventist women because of her refusal to take a job that

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[142] 461 U.S. 574, 604 (1983) (finding compelling interest in eradicating racial discrimination in education).

[143] *See* Dayton Christian Sch. v. Ohio Civil Rights Comm'n, 766 F.2d 961 (6th Cir. 1985), *vacated on other grounds*, 477 U.S. 619 (1986).

[144] *See* EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. 1981).

[145] *See, e.g.*, Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990) (following Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 304 (1985)).

[146] *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 681 & n.29 (2d ed. 1988).

[147] 374 U.S. 398 (1963).

involved working on Saturday.[148] Most recently, *Rosenberger v. Rectors and Visitors of University of Virginia*[149] held that when a state university denied funding to a student magazine solely because its editorial perspective was religious, the university violated the Free Speech Clause.[150] On the other hand, the Supreme Court's line of school-aid decisions from the 1970s and early 1980s held that the state is constitutionally required to withhold many forms of tax-supported funding from religious schools because of the Establishment Clause. The Court has yet to resolve the conflict between these two lines of decisions, although it is becoming more firmly established that the Establishment Clause does not require the denial of educational benefits given to individuals simply because they will use them at religious schools.[151]

Assuming that the Establishment Clause permits the provision of educational benefits to students in religious schools, could a SRFA be the basis for requiring a state to include such students in educational benefit programs available to others? A SRFA might add something to such a claim, but its incremental impact in this area, as with curriculum regulation, would probably be minimal.

A growing line of decisions holds that the denial of educational benefits solely because they would be used at religious schools not only is not required by the Establishment Clause, but actually violates the Free Exercise and Free Speech clauses because it discriminates against religious activities and viewpoints. *Rosenberger* points in this direction by forbidding the discriminatory denial of aid to a religiously oriented magazine. And although the Court qualified its decision and continued to warn of "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions," it focused on the fact that the university funds would have gone not directly to the religious magazine but to third parties,[152] which is precisely the case with

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[148] *See id.* at 400-01; *see also* McDaniel v. Paty, 435 U.S. 618, 629 (1978) (holding that state could not forbid clergy from serving in state legislature, thereby denying them privilege available to other citizens).

[149] 515 U.S. 819 (1995).

[150] *See id.* at 845-46.

[151] *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993) (allowing sign-language interpreter to be used by student at Catholic high school); Witters v. Department of Servs. for the Blind, 474 U.S. 481, 489 (1986) (holding that use of vocational rehabilitation funds at bible college did not violate Establishment Clause); *cf.* Jackson v. Benson, 578 N.W.2d 602, 620 (Wis.), *cert. denied*, 119 S. Ct. 466 (1998) (upholding use of educational vouchers for tuition at religious schools among other private schools).

[152] *See Rosenberger*, 515 U.S. at 842.

educational benefits given to individuals for use at any qualified school. Recently in *Peter v. Wedl*,[153] the Eighth Circuit held that to deny a disabled student state-provided assistance simply because he would use it at a Christian elementary school was unconstitutional discrimination, a violation of his free exercise rights among others.[154] Since SFRAs are meant to protect free exercise rights even against some nondiscriminatory laws, then they should forbid discriminatory burdens on religion as well.

But for a number of reasons, SRFAs may not have much effect on this area. The law requiring equal provision of education benefits is developing under the First Amendment, and perhaps any court willing to require such equality in benefits under a SRFA is also willing to require them under the Constitution. Moreover, a number of courts, adhering to the older line of Supreme Court authority disfavoring aid to religious education, have rejected the claim that the discriminatory denial of benefits imposes a burden under the Free Exercise Clause[155] or the Federal RFRA.[156] Any court that rules the opposite, any court that is willing to mandate equality in benefits as a requirement of religious freedom, is probably willing to do so under the Federal Constitution as well, so a SRFA is not likely to add much force to such a claim. Moreover, many state constitutions explicitly forbid any kind of assistance to religious education, and some have been interpreted even to bar individuals from using their benefits at religious schools.[157] While the Free Exercise Clause or a federal statute could override these state constitutional bars, a state religious freedom statute could not.

Because the coalition supporting RFRA-type legislation includes opponents of financial aid to religious education, some such bills include language stating that the bill does not create (or preclude) a right to government funding.[158] Because SRFAs are not much more likely to mandate benefits than is the Federal Constitution

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[153] 155 F.3d 992 (8th Cir. 1998).

[154] *See id.* at 1001-02.

[155] *See* Nieuwenhuis v. Delavan-Darien Sch. Dist., 996 F. Supp. 855, 863-64 (E.D. Wis. 1998); Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1123 (Wash. 1989) (holding that denial of aid not burden even though it "may make it financially difficult, or even impossible, for [claimant] to become a minister").

[156] *See* Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 173 (4th Cir. 1995).

[157] *Witters*, 771 P.2d 1119-20 (applying WASH. CONST. art. I, § 11, which says that "[n]o public money . . . shall be appropriated for or applied to any religious . . . instruction").

[158] *See, e.g.*, Religious Liberty Protection Act of 1999, § 5(c), H.R. 1691, 106th Cong. (passed by House on July 15, 1999).

itself, such language is not really necessary, but neither is it particularly destructive to the goals of those who would like to see a right to equality in funding guaranteed by law. The question whether to include such a provision in a SRFA should not be treated as a deal-breaker by either side of the religious freedom coalition.

CONCLUSION

State religious freedom statutes should be interpreted vigorously, but the record suggests that there will always be a strong impulse to moderation in applying them to the question of exemptions from generally applicable laws. The key will be for courts to respect and acknowledge the impulse towards moderation without devolving into giving the government total deference. SRFA proponents should try to use the text or legislative history to eliminate some of the most deferentially possible interpretations. Under this approach, SRFAs could have significant effects in certain areas of educational disputes, but they are unlikely to impose radical changes across the board in the authority that states or localities are exercising over public and private education.