

Constitutional Law—School’s Use of Books Depicting Same-Sex Couples Does Not Violate Parents’ Constitutional Rights—*Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008)

At times in United States history, religious freedom and the right to a public education have been at odds, and these disputes have frequently spilled into the federal courts.¹ Particularly, federal courts have often heard claims from parents who argue that public schools violated their First Amendment right to the free exercise of religion and Fourteenth Amendment right to direct the upbringing of their children.² In *Parker v. Hurley*,³ the United States Court of Appeals for the First Circuit considered whether a public school violated parents’ constitutional rights when it exposed young students to picture books depicting same-sex couples without affording parents the opportunity to exempt their children.⁴ The First Circuit affirmed the district court’s dismissal of the parents’ claims, holding that the claims were constitutionally insignificant.⁵

When the suit was filed, David and Tonia Parker and Joseph and Robin Wirthlin were parents in Lexington, Massachusetts, who described themselves as devout Judeo-Christians and who believed that homosexuality violated their religious beliefs.⁶ The Parkers’ sons, Jacob and Joshua, and the Wirthlins’ son, Joseph, Jr. (Joey), attended a public elementary school.⁷ In January 2005, kindergarten student Jacob Parker brought home a book depicting many different types of families, including one with two fathers and another with two mothers.⁸ Over the following four months, the Parkers thrice asked various

1. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1109-11 (1990) (noting frequent debates in federal courts over conflict between religious freedom and government action).

2. See Malcolm Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23, 86 (1989) (listing different types of claims brought by parents alleging First and Fourteenth Amendment violations); see also U.S. CONST. amend. I (guaranteeing free exercise of religion); U.S. CONST. amend. XIV, § 1 (requiring states to comply with Constitution’s due process protections); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (acknowledging Fourteenth Amendment provides parental right to control upbringing of children).

3. 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 126 S. Ct. 56 (2008).

4. *Id.* at 90 (noting homosexuality offended parents’ religious beliefs).

5. *Id.* at 107 (concluding plaintiffs did not allege facts to support constitutionally significant claims).

6. *Id.* at 92 (explaining parents’ religious beliefs consider homosexual behavior a violation of God’s law).

7. 514 F.3d at 92 (stating they attended Lexington’s Estabrook Elementary School).

8. *Id.* (providing factual basis for Jacob’s constitutional claims). Jacob brought home the book *Who’s in a Family?* as part of a “Diversity Book Bag.” *Id.* The book does not explicitly mention gay marriage. *Id.* Nonetheless, the Parkers were concerned that the school was attempting to make Jacob believe homosexuality and gay marriage are moral. *Id.* That belief is contrary to the parents’ religious beliefs. *Id.* at 92-93.

school administrators to not mention homosexuality to Jacob, to give the Parkers notice of any upcoming discussions on homosexuality, and to allow them to remove Jacob from such discussions.⁹ Not only did the administrators refuse these requests, but the Lexington Superintendent of Schools stated that the school district would not give notice to parents of any activities that referred to the existence of different sexual orientations.¹⁰ After the Parkers learned that the book collection in Jacob's first-grade classroom included two books depicting same-sex parents, they again requested advance notice of the use of such books, and the superintendent again denied their request.¹¹

In March 2006, Joey Wirthlin was in second grade when his teacher read his class *King and King*, a picture book which shows the marriage of two princes, as well as them kissing with a red heart covering their mouths.¹² Joey told his parents about the books, and they met with Joey's teacher and Joni Jay, the school's principal, to object to the school's use of the book.¹³ Jay told the Wirthlins that Lexington's policy was not to give parents prior notice of the use of materials like *King and King* and not to allow parents to exempt their children from such activities.¹⁴

In April 2006, the Parkers and Wirthlins sued various school officials and the Town of Lexington in the United States District Court for the District of Massachusetts on behalf of themselves and their children.¹⁵ The complaint alleged violations of the parents' First Amendment right to the free exercise of religion and their Fourteenth Amendment right to direct the upbringing of their children.¹⁶ These alleged violations resulted from the school district requiring

9. *Id.* at 93 (providing three occasions when Parkers presented their objections to school administrators). The Parkers initially met with the school's principal, Joni Jay, on January 21, 2005. *Id.* In March, they directed their second request not only to Jay but also to the Superintendent of Lexington schools at the time, William Hurley, and two other high-level administrators. *Id.* In April 2005, the Parkers attended another meeting at Jacob's school to discuss their objections. *Id.* It was at this meeting that Mr. Parker was arrested when he refused to leave until the school met his demands. *Id.*

10. *Id.* (providing Ash's statement and explanation of school district's policy).

11. 514 F.3d at 93 (discussing Parkers' renewed request). The two books were *Who's in a Family?* and *Molly's Family*, which is about a girl with two mothers who learns that there are many different types of families. *Id.*

12. *Id.* (providing factual basis for Wirthlin's constitutional claims). In *King and King*, a queen orders her son to get married. *Id.* The prince meets several princesses, only to reject them and fall in love with another prince. *Id.*

13. *Id.* The Wirthlins described Joey as "agitated" on the evening after his teacher read him *King and King* and stated that Joey called the book "so silly." *Id.* They felt that the book taught Joey that gay marriage is moral, which is a teaching that conflicts with their religious beliefs. *Id.*

14. *Id.* (reiterating policy not requiring parental notification for classroom discussions of same-sex parents).

15. 514 F.3d at 93 (listing defendants whom Parkers and Wirthlins sued). The named defendant William Hurley was the Lexington school Superintendent prior to Paul Ash. *Id.*

16. *Id.* at 93-94 (summarizing complaint's allegation that Lexington's schools were "systematically indoctrinating" children contrary to parents' faith). The Parkers and Wirthlins brought their federal claims under 42 U.S.C. § 1983. *Id.* at 94. They also alleged violations of their, and their children's, related state rights. *Id.* The parents further claimed that the defendants violated the Massachusetts "opt out" statute, which

students to attend activities where they would hear about same-sex relationships.¹⁷ The defendants moved to dismiss the Parkers' and Wirthlins' claims under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted, and the district court granted the motion.¹⁸ The Parkers and Wirthlins subsequently appealed to the United States Court of Appeals for the First Circuit.¹⁹ The First Circuit affirmed the order of dismissal, holding that the challenged conduct did not violate the parents' or children's substantive due process rights or their right to freely exercise their religion.²⁰

The Fourteenth Amendment to the United States Constitution protects citizens from "government interference with certain fundamental rights" without appropriate justification—a protection known as substantive due process.²¹ One of these fundamental rights is a parent's right to control the upbringing of his or her child.²² Part of controlling a child's upbringing is choosing a specific educational program, such as public or private education, and the state cannot prevent parents from making that choice.²³ A majority of

requires schools to notify parents and to allow parents to exempt their children from lessons "primarily involv[ing] human sexual education or human sexuality issues." *Id.* (quoting chapter 71, section 32A of the Massachusetts General Laws). According to the Parkers and Wirthlins, their children were too young to be exposed to the topic of gay marriage. 514 F.3d at 94. The parents feared that because of the in-school instruction, they would not be able to teach their children that gay marriage is immoral. *Id.* The parents sought compensatory and punitive damages and an injunction requiring the school to make several accommodations: to allow parents to exempt their children from adult-initiated classroom discussion of sexual orientation, to permit parents to observe such discussion, and not to show students graphic depictions of homosexual physical contact before the seventh grade. *Id.*; *Parker v. Hurley*, 474 F. Supp. 2d 261, 267 (D. Mass. 2007) (describing damages sought by plaintiffs).

17. 514 F.3d at 94 (describing plaintiffs' theory of constitutional violation).

18. *Id.* at 94; *Parker v. Hurley*, 474 F. Supp. 2d 261, 263, 278 (D. Mass. 2007) (granting motion to dismiss). District Court Judge Mark Wolf found the plaintiffs' claims indistinguishable from those of the parent plaintiffs in an earlier First Circuit case, *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995). *Parker v. Hurley*, 474 F. Supp. 2d 261, 263, 271 (D. Mass. 2007).

19. 514 F.3d at 90, 94 (presenting procedural history and summarizing plaintiffs' claims).

20. *Id.* at 95, 100, 107 (employing reasoning different from district court's reliance on *Brown*). Like the district court, the First Circuit dismissed the Parkers' and Wirthlins' state-law claims without prejudice, leaving the Parkers and Wirthlins free to pursue those claims in state court. *Id.* at 107.

21. U.S. CONST. amend. XIV, § 1 (prohibiting states' deprivation of life, liberty, or property without due process); *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997) (listing fundamental rights protected by Due Process Clause, deeming such claims substantive due process claims, and providing analytical framework). The Supreme Court's opinion in *Glucksberg* lists the following rights it has determined to be fundamental and protected by the Due Process Clause, in addition to those enumerated in the Bill of Rights: the rights to marry, to have children, and to direct the upbringing and education of one's children, and the rights to marital privacy, usage of contraception, bodily integrity, and abortion. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted).

22. *See Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (examining Court precedent in determining fundamental parental right to control upbringing).

23. *See Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (relying on precedent in holding state lacks power to require identical education for all children). In *Brown*, parents unsuccessfully claimed that the school system's failure to notify them of and provide an exemption from a high school assembly on human sexuality violated the parents' substantive due process and free exercise rights. *See id.* at

federal courts, including the First Circuit in *Brown v. Hot, Sexy and Safer Productions*,²⁴ have held that the Constitution does not, however, give parents control over the methods or materials used by a public school.²⁵

The First Amendment to the Constitution prohibits Congress from making any “law respecting an establishment of religion, or prohibiting the free exercise thereof”; the Supreme Court has extended this prohibition to the states.²⁶ To prove that a state action violates the right to free exercise of religion, a person must show that the action has a coercive effect on the individual practice of religion.²⁷ When a challenged state action targets a particular religious group, courts must apply “strict scrutiny,” and the action is constitutional only if the state can show both a compelling justification and the use of narrowly tailored means.²⁸ If the challenged action is religiously neutral and generally applicable, however, courts use “rational basis” review and will uphold the action if it is rationally related to a permissible goal.²⁹ In the

529-30; see also *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925) (holding parents and guardians have liberty interest in directing upbringing of children); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) (holding legislation prohibiting public schools’ teaching of non-English languages violates parents’ liberty interests). In *Pierce*, private schools challenged an Oregon statute that forced children to attend public schools, and the Court overturned the statute because it unreasonably interfered with the parents’ liberty interest to direct their children’s education. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 530-31, 534-35 (1925).

24. 68 F.3d 525 (1st Cir. 1995).

25. See *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005) (concluding no fundamental parental right to order how public schools educate their child); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995) (concluding Constitution does not grant parents authority to dictate public-school curriculum); see also *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) (distinguishing fundamental parental rights claims from other constitutionally insignificant claims); *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) (reasoning *Meyer* and *Pierce* do not provide parents fundamental right to dictate public-school curriculum); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) (deciding fundamental right to direct upbringing not inclusive of objection to public-school uniform policy).

26. U.S. CONST. amend. I (establishing constitutional right to freedom of religion); see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (reasoning “states as incompetent as Congress to enact” laws establishing religion or prohibiting free exercise).

27. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988) (refusing free exercise claim, despite significant interference with religious practices, because state action uncoercive); *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (stating Free Exercise Clause does not require government actions to further individuals’ spiritual development); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963) (distinguishing Free Exercise Clause from Establishment Clause, which does not require coercion); *Bauchman v. W. High Sch.*, 132 F.3d 542, 557 (10th Cir. 1997) (reiterating free exercise rights do not require schools to mesh curriculum with individual’s religion). The threshold question for any free exercise claim is whether the challenged action interferes with the plaintiff’s free exercise rights at all. See Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 592-93 (1993) (noting developments in free exercise jurisprudence do not alter threshold question).

28. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (noting laws targeting specific religious conduct receive strict scrutiny and rarely survive).

29. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (stating compelling interest not necessary even when law incidentally burdens “particular religious practice”); *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 878-79 (1990) (concluding individuals’ free

context of public schools, the Free Exercise Clause does not require schools to protect students from potentially offensive religious ideas.³⁰

The Supreme Court has stated in dicta that rational, neutral, and generally applicable laws violate the Free Exercise Clause only where plaintiffs claim violations of both their free exercise rights and other constitutional rights.³¹ This concept, known as “hybrid rights” (because of the combination of a free exercise claim and another, distinct constitutional claim), has generated much discussion and disagreement among both federal appellate courts and scholars.³² Regardless of the debate, no circuit court opinion has applied strict

exercise rights provide no excuse from compliance with laws of general applicability).

30. See *Fleischfresser v. Dirs. of Sch. Dist.* 200, 15 F.3d 680, 690 (7th Cir. 1994) (determining schools cannot successfully educate students if all religiously based objections to materials were granted). The court found that there was no obligation to protect students, particularly where there was no requirement to affirm or discuss ideas. *Id.*; see also *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) (concluding no constitutional burden when reading assignments require neither affirmation nor denial of religious belief); *Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311, 1318 (8th Cir. 1980) (stating public schools not required to delete any possibly religiously offensive material from curriculum). While the age of students has not affected courts’ reasoning in the context of Free Exercise Clause claims, courts have focused on the age of students when analyzing Establishment Clause claims. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (noting concern of “subtle coercive pressure” of state endorsing religion in elementary and secondary schools); *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971) (reasoning danger of indoctrination enhanced by “impressionable age” of primary-school students); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring) (questioning constitutionality of prescribing prayer and Bible reading for “young impressionable children”); *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 8 F.3d 1160, 1164 (7th Cir. 1993) (noting alleged Establishment Clause violations in elementary schools trigger heightened concern). Professor Maxine Eichner suggests courts should accord significant weight to the age of children when determining whether a challenged education requirement is rational under a substantive due process analysis. Maxine Eichner, *Who Should Control Children’s Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1382 (2007) (advocating for “searching,” not simply “superficial,” inquiry into government actions’ reasonableness in rational-basis review).

31. See *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 881 (1990) (distinguishing cases in which Court required more than rational basis to uphold neutral law); see also *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (striking down on combined First and Fourteenth Amendment grounds mandatory school attendance until age sixteen); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (invalidating, on free speech grounds, statute requiring students to salute flag after Jehovah’s witnesses challenged statute). Parents’ claims that a state action violates both parental substantive due process rights and free exercise rights generally fall into three categories: “suits for exemption from compulsory education laws, demands for the removal of offensive materials, and claims to a constitutional right of excusal.” Malcolm Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23, 86 (1989).

32. See *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (noting hybrid situation exception to *Smith* rational-basis test); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (noting difficulty of applying *Smith*’s exception). Some commentators believe that *Smith*’s discussion of hybrid situations created a new doctrine, while others see the discussion only as a way of distinguishing cases like *Pierce* and *Yoder* from *Smith*. Compare Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2223-24 (2005) (opining *Yoder*’s reasoning requires hybrid rights exception), with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring) (calling idea of hybrid claims “untenable” and arguing idea fails to distinguish *Yoder*), and Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121-22 (1990) (suspecting hybrid claims’ sole purpose to distinguish *Yoder*). Further debate exists over how viable the accompanying constitutional claim must be to trigger heightened scrutiny. See *Miller v. Reed*, 176 F.3d at 1202, 1207-08 (9th Cir. 1999) (holding

scrutiny to a hybrid-rights claim without being vacated or resting its holding on other, more substantial grounds.³³

In *Parker v. Hurley*, the First Circuit considered whether to dismiss parents' claims that an elementary school's refusal to provide notice to parents of or the opportunity to exempt children from discussion of same-sex couples violated both the parents' free exercise rights and their right to direct the upbringing of their children.³⁴ Holding that the parents and their children failed to allege constitutionally significant free exercise or substantive due process claims, the court affirmed the district court's dismissal of the claims.³⁵ Notably, the First Circuit did not consider the two constitutional claims as hybrid-rights claims and thus apply the higher standard of strict scrutiny to Lexington's education policy, but rather considered them as interdependent because the claims informed each other.³⁶ Significantly, in assessing the merit of the interdependent claims, the court considered the children's young age and the greater potential for their indoctrination, as compared to junior-high or high-school students.³⁷ Despite its consideration of the children's young age, the

hybrid-rights claim requires colorable showing of infringement of constitutional right); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (holding companion constitutional claim must at least be colorable). See generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.3.2.3 (2d ed. 2002) (describing federal courts ongoing debate over *Smith*, *Lukumi*, and their application).

33. See, e.g., *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 19 (1st Cir. 2004) (concluding parents of disabled private-school student did not present hybrid claim); *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999) (refusing plaintiff's attempt to establish hybrid-rights claim); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (denying plaintiff's free exercise and parental due process hybrid-rights claim); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (distinguishing facts from *Yoder* and holding no hybrid claim presented); see also *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 704-07, 714-17 (9th Cir. 1999) (applying strict scrutiny to free exercise and takings hybrid-rights claims and striking down law), *rev'd en banc*, *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1137 (9th Cir. 2000) (vacating earlier panel opinion and holding plaintiffs' challenge to law not ripe); *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (implying case presented hybrid-rights claim but grounding holding on alternate grounds). In *Catholic University*, the D.C. Circuit held that the EEOC's attempt to enforce a government regulation against Catholic University violated the First Amendment absent any hybrid claim, and the court relegated its discussion of hybrid rights to a short section at the end of its opinion. *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996). The Second and Sixth Circuits explicitly reject the idea of a hybrid category of claims that requires strict-scrutiny review. See *Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003) (reasoning *Smith* statement simply dicta and does not require heightened standard of scrutiny); *Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993) (refusing to use standard stricter than *Smith's* until Supreme Court explicitly requires it).

34. See 514 F.3d at 90 (summarizing parents' claims and procedural history). The court viewed the evidence in the light most favorable to the plaintiffs, using the required standard of review for the appeal of a Rule 12(b)(6) dismissal. *Id.* (stating court considers plaintiffs' allegations as true and draws inferences in plaintiffs' favor).

35. *Id.* at 99 (reasoning Lexington's justification for challenged action irrelevant because constitutional burden not alleged satisfactorily).

36. *Id.* at 98-99 (using Supreme Court's *Yoder* analysis because parents asserted First and Fourteenth Amendment claims).

37. *Id.* at 100-01 (distinguishing prior case applying rational-basis review because children here younger). The court noted that other courts considered children's ages as relevant to Establishment Clause claims and

court determined that the school's actions did not prevent the Parkers or Wirthlins from freely exercising their religion or directing the upbringing of their children; therefore, the court never determined what standard of review—strict scrutiny, rational basis, or a middle ground—applied.³⁸ Ultimately, the court upheld the dismissal of all federal claims for failure to state claims upon which a federal court could grant relief.³⁹

In *Parker v. Hurley*, the First Circuit correctly determined that the Parkers and Wirthlins failed to state a claim upon which federal courts could grant relief.⁴⁰ Parents like the Parkers and Wirthlins may still teach their children that homosexuality is contrary to their religious beliefs when their children's school refuses to give parents notice of or the opportunity to exempt their children from classroom discussions of same-sex couples.⁴¹ Simple exposure at school to ideas contrary or objectionable to one's religion does not amount to an infringement on one's free exercise rights.⁴² Despite protecting both free exercise of religion and parental direction of childrearing, the Constitution's substantive due process protections do not necessarily permit parents to dictate what public schools teach or to exempt children from any lesson which the parents find objectionable.⁴³

Prudently, the First Circuit avoided applying a hybrid-rights analysis to the Parkers' and Wirthlins' claims.⁴⁴ Primarily, courts should avoid the hybrid-rights doctrine because it rests on a highly debatable interpretation of Supreme Court free-exercise jurisprudence.⁴⁵ The First Circuit, like numerous sister

reasoned that age should be relevant to the free exercise claim here. *Id.* As the court wrote, "We see no principled reason why the age of students should be irrelevant in Free Exercise Clause cases." *Id.* at 101.

38. 514 F.3d at 99, 102-03, 105 (reasoning plaintiffs' claims unsuccessful whether analyzed individually or interdependently because children never coerced). The Parkers and Wirthlins alleged that the school's actions constituted indoctrination of the children. *Id.* at 105. The court held that there was no indoctrination here; but even if there were, indoctrination is not necessarily a violation of the Parkers' and Wirthlins' free exercise rights. *Id.*

39. *Id.* at 107 (dismissing state-law claims without prejudice). The court noted that Lexington's actions "deeply offended" the Parkers' and Wirthlins' "sincerely held religious beliefs." *Id.* The court then observed that although federal courts could not grant relief to the Parkers and Wirthlins, the plaintiffs could use the local political process to alter Lexington's policies. *Id.*

40. *See id.* (affirming district court's dismissal of complaint for failure to state proper claim).

41. *See id.* at 105-06 (noting parents knew about lessons and could discuss them with children); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3d Cir. 2005) (reasoning parents may provide supplemental material and discuss sensitive topics to which children are exposed at school).

42. *See* 514 F.3d at 106 (stating required reading of book not coercion in violation of free exercise); *Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311, 1318 (8th Cir. 1980) (holding Constitution does not require deletion of possibly religiously offensive material from public-school curriculum).

43. *See* 514 F.3d at 102-03 (concluding parents' substantive-due-process-derived authority cannot control children's public education to extent plaintiffs desire); *supra* note 25 (discussing cases holding no fundamental parental right to control public-school curriculum).

44. *See* 514 F.3d at 97-99 (discussing hybrid-rights doctrine, disagreement over it, and refusal to use it); *supra* note 32 and accompanying text (describing different views on meaning of hybrid rights and required standard of review).

45. *See* 514 F.3d at 98 (electing to avoid controversial hybrid-rights debate but analyzing claims

circuits and legal scholars, understood that the hybrid-rights doctrine is more fiction than reality.⁴⁶ By denying the Parkers' and Wirthlins' claims with its threshold determination that the claims lacked constitutional significance, the First Circuit wisely avoided the confusion of the hybrid-rights doctrine.⁴⁷

Although the First Circuit came to the correct conclusion, it erred by differentiating the facts of this case from those of *Brown v. Hot, Sexy and Safer Productions, Inc.* by emphasizing the children's age in its analysis of the plaintiffs' claims.⁴⁸ The First Circuit noted other courts' consideration of children's ages when analyzing First Amendment claims under the Establishment and Free Speech Clauses and determined that it should consider the children's age in analyzing this free exercise claim.⁴⁹ Relying on *Brown*, the district court concluded that the school district had a rational basis for its actions and dismissed the parents' complaint.⁵⁰ With *Brown's* well-settled analysis available, the First Circuit did not need to make a change, albeit a minor one, to its free exercise jurisprudence.⁵¹

The First Amendment protects the free exercise of religion, while the Fourteenth Amendment protects, among other rights, parents' rights to direct the upbringing of their children. In *Parker v. Hurley*, two families claimed that their children's public school violated the parents' and children's First and Fourteenth Amendment rights by using books depicting gay couples and by refusing to allow the parents to exempt their children from discussion of the books. In affirming the district court's dismissal of the parents' complaint, the First Circuit correctly held that the parents' and children's claims were

interdependently); *supra* note 32 and accompanying text (comparing commentators' conflicting opinions on meaning of hybrid rights); *supra* note 33 (citing cases refusing to apply hybrid-rights doctrine).

46. See 514 F.3d at 98 (citing decisions from other circuits explicitly holding *Smith* did not create possibility of hybrid claims); McConnell, *supra* note 32, at 1121-22 (noting Court's discussion of hybrid claims in *Smith* possibly due solely to desire to distinguish *Yoder*).

47. See 514 F.3d at 99 (reasoning plaintiffs failed to plead constitutionally meaningful burden on their rights); Stolzenberg, *supra* note 27, at 592-93 (emphasizing threshold question for free exercise claim whether any interference at all); *supra* note 32 and accompanying text (demonstrating courts' and scholars' differing interpretation of hybrid-rights concept).

48. See 514 F.3d at 100-01 (concluding age of students relevant in free exercise cases). *But see* Eichner, *supra* note 30 at 1382 (suggesting courts consider students' age a significant factor in educational issues analysis).

49. See 514 F.3d at 100-01 (comparing chosen analysis to other courts' analyses of coerciveness of state action); *supra* note 30 (discussing Establishment Clause cases considering students' age as factor in analysis).

50. See *Parker v. Hurley*, 474 F. Supp. 2d 261, 268-69, 275 (D. Mass. 2007) (reasoning case analogous to *Brown* in all significant respects); see also *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (holding, without discussion of student age, school did not violate parents' constitutional rights). The district court's decision notes that neither the Supreme Court nor the First Circuit had suggested differing analyses depending on student age. *Parker v. Hurley*, 474 F. Supp. 2d 261, 272 (D. Mass. 2007).

51. See *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (relying on *Pierce* and *Meyer* in holding plaintiffs failed to allege constitutionally significant claims); *Parker v. Hurley*, 474 F. Supp. 2d 261, 268 (D. Mass. 2007) (noting *Brown's* reasoning never questioned by later decisions). *But see* 514 F.3d at 100 (reasoning *Brown* parents' claims factually and legally distinct from Parkers' and Wirthlins' claims).

constitutionally insignificant because the school's policy did not burden either their free exercise or substantive due process rights. The court's reasoning, however, focused too much on the young age of the students instead of relying solely on First Circuit precedent. By doing so, the court cast doubt on what appeared to be controlling First Circuit precedent.

Gabriel T. Thornton