AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion/Free Exercise

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Parker v. Hurley, 514 F. 3d 87 (1st Cir. 2008)

Jacob Parker, Joshua Parker, and Joseph Robert Wirthlin, Jr., were students at Estabrook Elementary School in Lexington, Massachusetts. The kindergarten and first grade book collections at Estabrook included works that celebrated diverse families, including gay and lesbian families. After the second grade teacher at Estabrook read a fairy tale of a prince who married another prince, the Parker and Wirthlin families insisted that their children not be further exposed to these materials. The school principal rejected that demand and that decision was supported by William Hurley, the superintendent of the Lexington schools. The Parkers and Wirthlins sued Hurley, claiming that their children were being indoctrinated with beliefs inconsistent with their religious practices. A federal district court rejected their suit. The Parkers appealed to the Court of Appeals for the First Circuit.

The First Circuit sustained the lower court decision. Judge Lynch's unanimous opinion held that parents had no right to be notified about library books promoting tolerance for gay marriage and that their children had no right to exemptions from reading those books. How did Judge Lynch distinguish this case from Yoder v. Wisconsin *(1972). Was his distinction sound? Judge Lynch did not rule out the possibility that indoctrination could violate the religious freedom of parents or children. What might the Parkers have to prove to make a valid claim of indoctrination?*

LYNCH, Circuit Judge.

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The plaintiffs argue that their ability to influence their young children toward their family religious views has been undercut in several respects. First, they believe their children are too young to be introduced to the topic of gay marriage. They also point to the important influence teachers have on this age group. They fear their own inability as parents to counter the school's approval of gay marriage, particularly if parents are given no notice that such curricular materials are in use. As for the children, the parents fear that they are "essentially" required "to affirm a belief inconsistent with and prohibited by their religion." . . . The parents assert it is ironic, and unconstitutional under the Free Exercise Clause, for a public school system to show such intolerance towards their own religious beliefs in the name of tolerance.

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If *Employment Division v. Smith*'s (1990) mere rationality test were the applicable standard, this case would easily be dismissed. Plaintiffs do not contest that the defendants have an interest in promoting tolerance, including for the children (and parents) of gay marriages. . . . Given that Massachusetts has recognized gay marriage under its state constitution, it is entirely rational for its schools to educate their students regarding that recognition.

In plaintiffs' favor, however, we will assume their case is not necessarily subject to this general *Smith* rule. First, the case does not arise in the same context as *Smith*. Plaintiffs have not engaged in conduct prohibited by state law or otherwise sought to avoid compliance with a law of general applicability. Nor does state law or a formal policy require that the defendants take the actions they did. Indeed, there is not even a formal, district-wide policy of affirming gay marriage through the use of such educational materials with young students.

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In contrast to the mere rationality standard for neutral laws of general applicability, *Smith* and its progeny require a compelling justification for any law that targets religious groups. . . . This case also does not fit into the "targeting" category, as the Supreme Court has used the phrase. The school was not singling out plaintiffs' particular religious beliefs or targeting its tolerance lessons to only those children from families with religious objections to gay marriage. The fact that a school promotes tolerance of different sexual orientations and gay marriage when such tolerance is anathema to some religious groups does not constitute targeting.

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Smith, by its terms, also carved out an area of "hybrid situations." Plaintiffs argue this is where their claim fits. *Smith* described such hybrid situations as involving free exercise claims brought in conjunction with other claims of violations of constitutional protections. Smith gave as one example of a companion claim "the right of parents . . . to direct the education of their children" . . . .

No published circuit court opinion . . . has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim. . . .

. . . We do not need to resolve the hybrid rights debate because the level of justification the government must demonstrate—a rational basis, a compelling interest, or something in between—is irrelevant in this case. While we accept as true plaintiffs' assertion that their sincerely held religious beliefs were deeply offended, we find that they have not described a constitutional burden on their rights, or on those of their children.

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. . . [T]here are substantial differences between the plaintiffs' claims in [*Wisconsin v. Yoder* (1972)] and the claims raised in this case. One ground of distinction is that the plaintiffs have chosen to place their children in public schools and do not live, as the Amish do, in a largely separate culture. There are others. While plaintiffs do invoke *Yoder*'s language that the state is threatening their very "way of life," they use this language to refer to the centrality of these beliefs to their faith, in contrast to its use in Yoder to refer to a distinct community and life style. Exposure to the materials in dispute here will not automatically and irreversibly prevent the parents from raising Jacob and Joey in the religious belief that gay marriage is immoral. Nor is there a criminal statute involved, or any other punishment imposed on the parents if they choose to educate their children in other ways. They retain options, unlike the parents in *Yoder*.

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We turn afresh to plaintiffs' complementary due process and free exercise claims. Plaintiffs' opening premise is that their rights of parental control are fundamental rights. They rely on a Supreme Court decision recognizing a substantive due process right of parents "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville* (2000) *Troxel* is not so broad as plaintiffs assert. The cases cited by the Court in *Troxel* as establishing this parental right pertain either to the custody of children, which was also the issue in dispute in *Troxel*, or to the fundamental control of children's schooling, as in *Yoder*. . . .

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[P]laintiffs' argument runs afoul of the general proposition that, while parents can choose between public and private schools, they do not have a constitutional right to "direct how a public school teaches their child." . . .

. . . [W]e have found no federal case under the Due Process Clause which has permitted parents to demand an exemption for their children from exposure to certain books used in public schools.

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Generally, the fundamental parental control/free exercise claims regarding public schools have fallen into several types of situations: claims that failure to provide benefits given to public school students violates free exercise rights, claims that plaintiffs should not be subjected to compulsory education, demands for removal of offensive material from the curriculum, and, as here, claims that there is a constitutional right to exemption from religiously offensive material. . . .

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In *Mozert v. Hawkins County Board of Education* (6th Cir.1987), the Sixth Circuit rejected a broader claim for an exemption from a school district's use of an entire series of texts. The parents in that case asserted that the books in question taught values contrary to their religious beliefs and that, as a result, the school violated the parents' religious beliefs by allowing their children to read the books and violated their children's religious beliefs by requiring the children to read them. The court, however, found that exposure to ideas through the required reading of books did not constitute a constitutionally significant burden on the plaintiffs' free exercise of religion. In so holding, the court emphasized that "the evil prohibited by the Free Exercise Clause" is "governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion," and reading or even discussing the books did not compel such action or affirmation.

In the present case, the plaintiffs claim that the exposure of their children, at these young ages and in this setting, to ways of life contrary to the parents' religious beliefs violates their ability to direct the religious upbringing of their children. . . . The parents do not allege coercion in the form of a direct interference with their religious beliefs, nor of compulsion in the form of punishment for their beliefs, as in *Yoder*. Nor do they allege the denial of benefits. Further, plaintiffs do not allege that the mere listening to a book being read violated any religious duty on the part of the child. There is no claim that as a condition of attendance at the public schools, the defendants have forced plaintiffs—either the parents or the children—to violate their religious beliefs. In sum there is no claim of direct coercion.

The heart of the plaintiffs' free exercise claim is a claim of "indoctrination": that the state has put pressure on their children to endorse an affirmative view of gay marriage and has thus undercut the parents' efforts to inculcate their children with their own opposing religious views. The Supreme Court, we believe, has never utilized an indoctrination test under the Free Exercise Clause, much less in the public school context. . . . Plaintiffs' pleadings do not establish a viable case of indoctrination, even assuming that extreme indoctrination can be a form of coercion.

[T]he mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently. A parent whose "child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials." . . .

Turning to the children's free exercise rights, we cannot see how Jacob [Parker]'s free exercise right was burdened at all: two books were made available to him, but he was never required to read them or have them read to him. Further, these books do not endorse gay marriage or homosexuality, or even address these topics explicitly, but merely describe how other children might come from families that look different from one's own. There is no free exercise right to be free from any reference in public elementary schools to the existence of families in which the parents are of different gender combinations.

Joey has a more significant claim, both because he was required to sit through a classroom reading of *King and King* and because that book affirmatively endorses homosexuality and gay marriage. It is a fair inference that the reading of *King and King* was precisely intended to influence the listening children toward tolerance of gay marriage. That was the point of why that book was chosen and used. Even assuming there is a continuum along which an intent to influence could become an attempt to indoctrinate, however, this case is firmly on the influence-toward-tolerance end. There is no evidence of systemic indoctrination. There is no allegation that Joey was asked to affirm gay marriage. Requiring a student to read a particular book is generally not coercive of free exercise rights.

Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them. . . .

On the facts, there is no viable claim of "indoctrination" here. Without suggesting that such showings would suffice to establish a claim of indoctrination, we note the plaintiffs' children were not forced to read the books on pain of suspension. Nor were they subject to a constant stream of like materials. There is no allegation here of a formalized curriculum requiring students to read many books affirming gay marriage. . . .

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We do not suggest that the school's choice of books for young students has not deeply offended the plaintiffs' sincerely held religious beliefs. If the school system has been insufficiently sensitive to such religious beliefs, the plaintiffs may seek recourse to the normal political processes for change in the town and state. . . .

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