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# FREE EXERCISE OF RELIGION WITHIN THE PUBLIC SCHOOL? *MOZERT V. HAWKINS COUNTY BOARD OF EDUCATION*

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## INTRODUCTION

Any discussion of religion in the public school raises suspicion. While religious materials can be studied in literary contexts,<sup>1</sup> decisions prohibiting school prayer,<sup>2</sup> the teaching of creation science,<sup>3</sup> and public and private school teachers from teaching remedial classes to children in leased rooms of private schools<sup>4</sup> have tended to exacerbate those suspicions. Yet, the United States Constitution gives religion a unique position among individual liberties.<sup>5</sup> The first amendment expressly provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise

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1. "[The] study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition. . . ." *Ep-person v. Arkansas*, 393 U.S. 97, 106 (1968).

[I]t is worth noting that the Establishment Clause does not prohibit *per se* the educational use of religious documents in public school education. Although this Court has recognized that the Bible is "an instrument of religion," . . . it has also made clear that the Bible "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."

*Edwards v. Aguillard*, 107 S.Ct. 2573, 2590 (1987) (Powell, J., concurring) (citation omitted). In an earlier case, the Court noted "an unbroken history of official acknowledgement . . . of the role of religion in American life. . . ." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984), and recognized that these references to "our religious heritage" are constitutionally acceptable. *Id.* at 677.

2. *Wallace v. Jaffree*, 472 U.S. 87 (1985).

3. *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987) (striking down a Louisiana law which provided for equal teaching time of creation science in the public schools).

4. *Grand Rapids v. Ball*, 473 U.S. 373 (1985).

5. The religious liberty as described by the free exercise clause provides a greater freedom from governmental interference than any other segment of the Constitution. Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 301.

thereof . . . ."<sup>6</sup> At one time, the free exercise and establishment clauses were seen as mutually compatible<sup>7</sup>—both working towards securing religious liberty. Now they are seen as separate and distinct, perhaps even in opposition to one another.<sup>8</sup>

Within the public school context, the primary focus of the religion clauses has been on avoiding an impermissible establishment of religion. Little concern has been raised with respect to secular requirements which may impede free exercise rights.<sup>9</sup> This concern, however, was raised recently in *Mozert v. Hawkins County Board of Education*.<sup>10</sup> Specifically, the plaintiffs alleged that the school board's requirement of the mandatory use of a particular reading textbook series signifi-

6. U.S. Const. amend. I.

7. "To the Framers, the religion clauses were at least compatible and at best mutually supportive." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 14-2, at 814 (1978).

8. The resulting tensions have transformed the religion clauses "into dual monsters lurking on either side of a narrow channel of constitutionality, rather than twin manifestations of an identical principle." Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 314 (1986). "By broadly construing both clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." Thomas v. Review Board, 450 U.S. 707, 721 (1980) (Rehnquist, J., dissenting).

9. A free exercise case arises when a governmental requirement, secular in its purpose, is seen by a religious individual as violative of a sincerely held religious belief. Under certain circumstances, the free exercise clause requires that religious beliefs be accorded special protection. Of course, if the government is too accommodating, claims of impermissible advancement or establishment of religion may arise. But to the contrary,

The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the clause is directed at governmental interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion.

*Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring). See also *McConnell, Accommodation of Religion*, 1985 SUP. CT. REV. 1, 31 (arguing that accommodation of religion is consistent with the political theory underlying the Constitution).

10. 579 F. Supp. 1051 (E.D. Tenn.) (dismissing all but one allegation in plaintiffs' complaint), *aff'd in part and rev'd in part*, 582 F. Supp. 201 (E.D. Tenn. 1984) (granting summary judgment dismissing sole remaining allegation in complaint), *rev'd and remanded*, 765 F.2d 75 (6th Cir. 1985), 647 F. Supp. 1194 (E.D. Tenn. 1986) (on remand, granting injunctive relief and damages for plaintiffs), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1029 (1988).

cantly burdened their free exercise rights.<sup>11</sup> In a plurality decision, the Sixth Circuit Court of Appeals disagreed.<sup>12</sup>

This case comment addresses the holding and rationale of the Sixth Circuit's decision and argues that the court failed to properly apply Supreme Court precedent. Focusing on the *Sherbert v. Verner*<sup>13</sup> line of cases, this note first sets forth the basic free exercise principles enunciated by the Court. Part II gives the background of the *Mozert* case, including relevant facts and the disposition in the district court. Part III reviews the analysis of the Sixth Circuit's decision. The three appellate judges agreed on the result, but in separate opinions, sharply disagreed as to the proper constitutional approach. None of the appellate opinions is found to be fully consistent with interpretations enunciated by the Supreme Court. Finally, the note concludes by highlighting the special role of the parents and the needs of children in the education process; the importance of both went unaddressed in the appellate forum.

## I. FREE EXERCISE CLAIMS AND THE SUPREME COURT

In early free exercise cases, the Supreme Court construed the free exercise clause as a protection for religious belief and opinion only.<sup>14</sup> Such protection did not extend to

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11. The plaintiffs were Fundamentalist Christians. From the testimony as reported in the cases, the plaintiffs maintain some belief in separationism — that is, the faithful must avoid exposure to teachings and views which contradict basic tenets of their faith and tend to alienate one from God. The plaintiffs never expressly called their belief separationism. I use this term, however, in an attempt to make their position more understandable. Separationism is described in further detail below. See *infra* note 91 and accompanying text.

12. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987).

13. 374 U.S. 398 (1963).

14. *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming the conviction of a Mormon for bigamy); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (the freedom to hold religious beliefs and opinions is absolute); *United States v. Ballard*, 322 U.S. 78 (1944) (the truth of one's religious beliefs is not a matter which may be submitted to a jury); *Torasco v. Watkins*, 367 U.S. 488 (1961) (state government may not make public office conditional upon a religious belief); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (government cannot penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (government may not employ the taxing power to inhibit the dissemination of particular religious views).

any claim based upon religiously-motivated conduct.<sup>15</sup> It was not until 1963, in *Sherbert v. Verner*,<sup>16</sup> that the Court made a significant departure from this belief-practice dichotomy.<sup>17</sup> There, the Court expanded its previously narrow construction of the free exercise clause.<sup>18</sup> Although greater protection was still accorded to the freedom of religious belief, after *Sherbert* the Court extended some degree of protection to religiously-motivated conduct.

In *Sherbert*, the Court ordered a state unemployment board to pay compensation to Adell Sherbert, a Seventh-Day Adventist, who had been fired for refusing to work on Saturdays.<sup>19</sup> The Court held that a burden upon an individual's

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15. *Braunfield v. Brown*, 366 U.S. 599 (1960) (upholding the validity of a state's "Sunday Closing Law" even though such a law interfered with those Orthodox Jewish merchants whose religion compelled its faithful to close down their businesses from sundown on Fridays until sundown on Saturdays). This free exercise case also merits a note. The Court said that "the Sunday law simply regulates a secular activity and, as applied to the appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605.

This belief-action dichotomy was a result of the dominant of two distinct views of religion, each of which were represented in the religion clauses. The establishment clause represents the view that government should be protected from religion, while the free exercise clause reflects the view that religion needs to be protected from the state. The establishment clause became the dominant view, restricting the free exercise clause in its application. The protection of the government from religious encroachment was characteristic of the early religion clause jurisprudence of the Supreme Court. Pepper, *supra* note 5, at 300-307.

16. 374 U.S. 398 (1963).

17. Some suggested that the reason for this change was ever-increasing governmental involvement, both socially and economically, into society. As the government undertakes a more active role in allocating resources and structuring social order, the contexts in which religion and state interact are multiplied. *Developments in the Law — Religion and State*, 100 HARV. L. REV. 1607 (1987). Among those sharing this opinion is Justice Rehnquist. In his dissent in *Thomas v. Review Board*, he expressed the same sentiment while also suggesting that the tension which now exists between the establishment and the free exercise clauses is also due to this more active governmental role. 450 U.S. 707, 721 (1980) (Rehnquist, J., dissenting).

18. "[N]o liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause . . . ." *Sherbert v. Verner*, 374 U.S. 398, 413 (1963) (Stewart, J., concurring in result).

19. The relevant unemployment law provided that to be eligible for benefits, a claimant must "be able to work and . . . available for work"; and, further, that a claimant is ineligible for benefits "[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . ." *Id.* at 400.

religiously-motivated *conduct* could only be justified by a compelling state interest.<sup>20</sup>

The ruling of the unemployment board that the plaintiff must either work on Saturdays or forgo unemployment benefits created an impermissible burden on free exercise. This ruling "forced her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."<sup>21</sup>

The Court next balanced this burden against the state interest. It stated that "in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."<sup>22</sup> While South Carolina alleged an interest in preventing fraudulent claims, dissolution of the unemployment fund, and disruption of work schedules,<sup>23</sup> the Court was unconvinced. Moreover, even if such claims did constitute a compelling enough interest, the Court noted, "it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights. (footnote omitted)."<sup>24</sup>

#### A. *The Importance of Sherbert v. Verner*

As already suggested, *Sherbert's* importance lies in its extension of protection to religiously-motivated conduct.<sup>25</sup> This

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Because Adell Sherbert refused to work on Saturdays, the unemployment board found that she fell within the benefits disqualifying provision.

20. *Id.* at 407. This balance test approach was not a new invention. In formulating the free exercise test, the Court drew from other first amendment cases. See *Sherbert*, 374 U.S. 398, 407-08. The *Sherbert* Court cited *NAACP v. Button*, 371 U.S. 415 (1963) and *Thomas v. Collins*, 323 U.S. 516 (1945) (both free speech cases) for its compelling state interest requirement.

21. *Sherbert*, 374 U.S. at 404. A later case phrased the burden requirement in the following manner: "Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, . . . a burden upon religion exists. While the compulsion may be indirect, the infringement upon the free exercise is nonetheless substantial." *Thomas v. Review Board of the Indiana Employment Security Div.*, 450 U.S. 707, 717-18 (1980).

22. *Sherbert*, 374 U.S. at 406.

23. *Id.* at 407.

24. *Id.* For the least restrictive means test, the Court cited *Shelton v. Tucker*, 364 U.S. 479 (1960) (freedom of association), *Martin v. Struthers*, 319 U.S. 141 (1943) and *Schneider v. New Jersey*, 308 U.S. 147 (1939) (both freedom of speech and press).

25. This is not to say that the Court has itself always applied the *Sher-*

gave the clause some independent significance, for prior to *Sherbert*, free exercise meant little more than freedom of worship, press, or speech.<sup>26</sup> By protecting Adell Sherbert's religious practice of refusing to work on her Sabbath, the Court essentially held that religiously-motivated conduct can be burdened by a state practice.<sup>27</sup>

*Sherbert* also ostensibly departed from the distinction between direct and indirect burdens<sup>28</sup> articulated in the earlier case of *Braunfield v. Brown*.<sup>29</sup> In *Braunfield*, the Court differentiated between legislation that had the purpose and effect of making a religious practice unlawful and legislation which, although directed at a secular purpose, indirectly imposed a burden on a religious practice.<sup>30</sup> In *Sherbert*, however, the Court showed concern that certain purely secular state regulations which conditioned the receipt of public benefits could

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*bert* test consistently. For a criticism of the application in subsequent cases, see Note, *Religious Exemptions under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 354 (1980). In each of these cases, however, the Court has at least applied the entire *Sherbert* test, although finding an overriding state interest.

Professor Michael McConnell suggests a rationale for why the Court has appeared inconsistent in its approach. McConnell, *Neutrality under the Religion Clauses*, 81 NW. U.L. REV. 146 (1986). He argues that certain situations allow for deciding issues of whether a religious exemption should be permitted (the unemployment context, for example). Other situations would require an additional procedural determination, often times requiring the government to evaluate the merits of the religious claim. Thus, where there is a built-in mechanism for individual considerations, a free exercise claim has a better chance of being accommodated. *Id.* at 154-57. McConnell cautions, however, that this argument must not be treated as an excuse for denying all free exercise claims. *Id.* at 157.

26. Pepper, *supra* note 5, at 309. Until *Sherbert*, the free exercise clause had little distinction as an independent first amendment right. Pepper suggests that the Supreme Court is moving towards taking the Free Exercise Clause more seriously and points out that the clause's history and simple construction demonstrate that it offers broad protection. Religious conduct itself is not inherently limited to communication and worship, but it can extend to all aspects of human life. See *id.* at 301.

27. The specific burden at issue in *Sherbert* was the denial of unemployment benefits for Adell Sherbert. The unemployment board refused to acknowledge that a religious reason is a valid excuse for refusing to work.

28. *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963).

29. *Braunfield v. Brown*, 366 U.S. 599 (1961).

30. *Id.* at 606-07. The Court in *Braunfield* said that indirect burdens were not protected. However, the Court also noted that a State could enact legislation whose "purpose and effect" is to "advance the State's secular goals, [and that] statute is valid despite its indirect burden on religious observance, unless "the State may accomplish its purpose by means which do not impose such a burden." *Id.* at 607 (citation omitted) (emphasis added).

significantly inhibit or deter the exercise of first amendment rights. The Court said,

It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . [T]o condition the availability of benefits upon [plaintiff's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.<sup>31</sup>

After *Sherbert*, laws which create an indirect burden on religious conduct can be constitutionally invalid<sup>32</sup> if the state fails to meet its required showing. The plaintiff must, of course, make the threshold showing that a substantial burden<sup>33</sup> upon a sincerely held religious belief<sup>34</sup> exists.

*Sherbert* also instructs as to the showing the state must make. The Court made clear that "only the gravest abuses, endangering paramount interest, give occasions for permissible limitation."<sup>35</sup> In other words, only a "compelling [state] interest" will justify the imposition of a burden on religious

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31. *Sherbert*, 374 U.S. at 404-06 (footnote and citations omitted).

32. This conclusion appears directly to contradict *Braunfield*. And yet, the Supreme Court has never expressly overruled *Braunfield*, nor even reconciled it with *Sherbert*. See *Sherbert*, 374 U.S. at 417, 421 (Stevens, J., concurring in result) (Harlan, J., dissenting), *Thomas v. Review Board*, 450 U.S. 707, 722-23 (1980) (Rehnquist, J., dissenting).

33. "Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, . . . a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 717-18. A state action will be a substantial burden if it has the effect of undermining religious beliefs or inhibiting religious practices. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (state statute requiring display of license plate motto that was religiously offensive to appellees violated free exercise clause because it undermined their religious beliefs).

34. Although this is clearly a requirement, "religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit first amendment protection." *Thomas*, 450 U.S. at 714. Some hold that there must also be a showing that the religious belief is central to the religion. See Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Student's Religious Freedom, 47 OHIO ST. L.J. 333, 385-96 (1986), for a good review of the Supreme Court precedents giving guidelines for prima facie requirements. If a particular belief is not central (as in important and necessary) it is questionable whether such a belief would meet the substantial burden requirement.

35. *Sherbert v. Verner*, 374 U.S. 398, 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).



practice.<sup>36</sup> The state must show both the compelling state interest involved and the harm affecting the interest in the event of a religious exemption.<sup>37</sup> Moreover, in showing a compelling interest, the state must indicate why it cannot be accomplished through less restrictive means. The evidence which supports this claim must not be merely speculative in nature; the state must present facts. The *Sherbert* Court made it clear that the mere possibility of fraudulent unemployment claims was insufficient to warrant the substantial infringement of religious liberties.<sup>38</sup>

### B. *Sherbert's Progeny: Yoder, Thomas, and Hobbie*

Nine years after *Sherbert*, in *Wisconsin v. Yoder*,<sup>39</sup> the Court held that enforcing Wisconsin's compulsory education law against the Amish burdened their free exercise rights. In applying *Sherbert*, the Court stressed that the state must show a *specific* interest of sufficient magnitude to justify imposing a burden on religion.<sup>40</sup> The imposition of the burden must be essential, and it must be the least restrictive means to achieve the state interest, *as applied to those* religious plaintiffs. "[W]e must searchingly examine the interests that the State seeks to promote by its requirement . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exception."<sup>41</sup> In *Yoder*, the Court was not convinced by the state's general interest in compulsory education. Although the Court recognized that such a general interest existed, the state had to demonstrate a *specific* interest in compelling Amish children to attend school past the eighth grade. It was not able to do this.<sup>42</sup>

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36. *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

37. *Id.* at 407.

38. *Id.*

39. 406 U.S. 205 (1972). *Yoder* held that the Amish parents and children were exempt from Wisconsin's Compulsory School Attendance laws. The Amish believed that any exposure to any public or private schooling beyond the eighth grade would endanger the salvation of the children. This is due to the belief that higher education tends to develop values which alienate men from God. Salvation for the Amish, therefore, requires a life in their religious community separate and apart from the world community.

40. *Yoder*, 406 U.S. at 221. For additional commentary on this aspect of *Yoder*, see Paulsen, *supra* note 8, at 350 n. 173; Pepper, *supra* note 5, at 310; Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1228.

41. *Yoder*, 406 U.S. at 221 (citations omitted).

42. *Id.* at 240-41. The state failed to demonstrate that the Amish

In *Thomas v. Review Board*,<sup>43</sup> by a vote of 8-1,<sup>44</sup> the Supreme Court again affirmed the *Sherbert* approach. *Thomas* involved a Jehovah's Witness whose religious beliefs forbade him from contributing to the production of weapons.<sup>45</sup> The Indiana Employment Review Board denied Thomas unemployment benefits because he terminated his job for reasons which the Board found did not amount to "good cause." Rejecting the Board's ruling, the Court stated, "Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith . . . a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."<sup>46</sup>

Despite the broad language in *Thomas* describing situations where a burden can exist, the Court has been hesitant to extend free exercise protection in more recent cases.<sup>47</sup> To some, this suggests a step back from the seemingly expansive approach implied from the *Thomas* language.<sup>48</sup> In two of the

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children would be intellectually undeveloped if they leave school after the eighth grade. The Court also noted that the state's valid interest in education has already been largely satisfied in the particular case of the Amish children and, further, that the Amish community itself provides the vocational education necessary for life in their community.

43. 450 U.S. 707 (1980). The Supreme Court said: "Unless we are prepared to overrule *Sherbert*, *Thomas* cannot be denied the benefits due to him. . . ." *Id.* at 720.

44. Justice Rehnquist wrote the only dissenting opinion. He wrote: "Because I believe that the decision today adds mud to the already muddied waters of First Amendment jurisprudence, I dissent." *Id.*

45. The plaintiff worked in a steel foundry. When the department he was initially employed in closed down, his employer transferred him to another department which was engaged in the fabricating of turrets for military tanks. Since all of the employer's remaining departments were directly engaged in the production of weapons, Thomas quit his job.

46. *Thomas*, 450 U.S. at 717-18.

47. *Goldman v. Weinberger*, 106 S.Ct. 1310 (1986) (upholding validity of an Air Force regulation which prevented the wearing of a yarmulke by the plaintiff while on duty and in uniform); *Bowen v. Roy*, 106 S.Ct. 2147 (1986) (statutory requirement that a state agency utilize Social Security numbers in administering welfare programs does not violate the free exercise clause); *United States v. Lee*, 455 U.S. 252 (1982) (Amish employer's objection to mandatory participation in the Social Security system was outweighed by the broad public interest in maintaining a sound tax system). *But see Jensen v. Quaring*, 105 S.Ct. 3492 (1985) (per curiam) (a 4-4 decision upholding a lower court's decision requiring the State of Nebraska to make a photo-less drivers' license available to a woman who held a religious belief against the use of a photo) *aff'd by an equally divided Court* *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984).

48. Despite the state's heavy burden in the *Sherbert* test, the Court has found only four times in the past 25 years that neutral governmental

recent cases, the Court departed from the *Sherbert* standard and employed a reasonableness test when considering the state's interest.<sup>49</sup> In those cases<sup>50</sup> the government met its burden by showing that the challenged regulation was a "reasonable means of promoting a legitimate public interest."<sup>51</sup> However, in *Hobbie v. Unemployment Appeals Commission*,<sup>52</sup> decided in 1987, the Court once again expressly affirmed the *Sherbert* approach.

In *Hobbie*, Paula Hobbie was discharged from her job at a jewelry store when she refused to work certain scheduled hours due to religious convictions.<sup>53</sup> Once again, the Court

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policies violate the free exercise clause. (*Sherbert*, *Yoder*, *Thomas* and *Hobbie*). *Hobbie v. Unemployment Appeals Comm'n*, 107 S.Ct. 1046 (1987). McConnell suggests that the reason for this is the exercise of judicial restraint.

Given the numerous opportunities for conflict between faith and government, the free exercise clause would become a serious infringement on the government's ability to perform its functions were the Clause not confined to the most serious burdens on religious exercise and did not take into account the government's legitimate interest in denying religious exemptions.

McConnell, *supra* note 9, at 30.

McConnell also attempts to explain why the Court has been seemingly inconsistent. He draws from statements of Justice Stevens in *Goldman*, 106 S.Ct. 1310 (1986), and *Lee*, 455 U.S. 252 (1982). McConnell, *supra* note 25, at 154-57. In *Lee*, Justice Stevens' concurrence stated that the principal reason for rejecting the claim was to keep government out of the business of evaluating the relative merits of differing religious claims. *Id.* at 154. McConnell quotes the Court in *Bowen v. Roy*, 106 S.Ct. 2147 (1986), as explicitly stating this principle:

Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference.

*Roy*, 106 S.Ct. at 2156.

The inference that McConnell draws from this statement is that where the government is already involved in case-by-case determinations, then accommodation for legitimate religious needs is appropriate. Moreover, the *Roy* Court itself stated that in some instances the religious claim for exemption will be so strong that the government may be required to establish procedures for its recognition. *Id.*

49. *Goldman v. Weinberger*, 106 S.Ct. 1310 (1986), and *Bowen v. Roy*, 106 S.Ct. 2147 (1986).

50. The lower standard in these cases may be explained by the somewhat idiosyncratic circumstances involved—the military or the ability of the government to organize its own operations.

51. See *Roy*, 106 S.Ct. at 2156.

52. 107 S.Ct. 1046 (1987).

53. Paula Hobbie was a Seventh-Day Adventist. However, it was not

found that the denial of unemployment benefits by the unemployment board violated the free exercise clause.<sup>54</sup> Most importantly, in evaluating the state interest, the *Hobbie* Court expressly rejected the reasonableness standard of *Goldman* and *Roy* and once again applied the *Sherbert* strict scrutiny and compelling state interest test.<sup>55</sup> Thus, with some inconsistency the Supreme Court subjects indirect governmental burdens on the free exercise of religious conduct to strict scrutiny.

## II. BACKGROUND OF THE *Mozert* CASE

The plaintiffs in *Mozert v. Hawkins County Board of Education* were Fundamentalist Christian school children and their parents.<sup>56</sup> The children attended public schools in Hawkins County, Tennessee. The plaintiffs challenged the Hawkins County School Board's policy ordering the exclusive use of the Holt reading series. They argued that the use of the series<sup>57</sup> was fundamentally at odds with the religious teachings and beliefs of the students and parents and, absent a compelling state interest, the school board must provide an accommodation for their religious practice. Specifically, the plaintiffs requested that they be allowed to opt-out of the "critical reading" course and to fulfill the requirement of the course through the use of some other state approved texts.

The Hawkins County Board of Education adopted the Holt reading series in 1983 for use in its elementary and middle schools.<sup>58</sup> This series would serve as the basic reader for

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until two years after her hiring that she became a Seventh-Day Adventist.

54. *Thomas*, 450 U.S. at 1048.

55. *Hobbie*, 106 S.Ct. at 1049.

56. The plaintiffs consisted of seven families—14 parents and 17 children. The children attended various elementary and middle schools within the Hawkins County School District in Tennessee.

57. The textbook series in this case was the Holt Basic Readers textbook series [hereinafter Holt series] published by Holt, Rinehart & Winston. This is the textbook which the Hawkins County School Board has chosen for use in the first through the eighth grades. This textbook is just one of several Tennessee state-approved readers.

58. The Holt series was recently part of a nation-wide survey whose purpose was to investigate systematically how religion and traditional values are represented in today's public school textbooks. The detailed findings are given in P. VITZ, *CENSORSHIP: EVIDENCE OF BIAS IN CHILDREN'S TEXTBOOKS* (1986). A summary is given in Vitz, *A Study of Religion and Traditional Values in Public School Textbooks*, in *DEMOCRACY AND THE RENEWAL OF PUBLIC EDUCATION* (R. Neuhaus ed. 1987).

The summary of the findings stated, "Altogether, the basic readers in

its critical reading course<sup>59</sup> required to fulfill a state statutory requirement calling for "character education" in their curricula.<sup>60</sup> This statutory requirement is designed "to help each student develop positive values and to improve student conduct as students learn to act in harmony with their positive values to become good citizens in their school, community, and society."<sup>61</sup> According to the testimony of the school board's witnesses, the development of critical reading skills required students to "read and discuss complex, morally and socially difficult issues."<sup>62</sup>

Soon after the reading series was adopted, one of the parent-plaintiffs examined the Holt reader and discovered a number of subjects, including witchcraft, magic, secular humanism, feminism and socialism, which were offensive to her family's religious beliefs.<sup>63</sup> She organized a meeting attended by similarly situated parents and two Hawkins County school principals. In addition to this, a group of Hawkins County residents (which included most of the plaintiff-parents) formed an organization called Citizens Organized for Better Schools (COBS). This group informed the school board of their objections to the Holt series.<sup>64</sup>

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the sample . . . clearly represent a systematic denial of the history, heritage, beliefs, and values of a very large segment of the American people." *Id.* at 140.

59. The local school boards are empowered with the ability to choose their local textbooks from state approved lists. In theory, this method of local action is consistent with the ideal that schools ought to be locally run, in order to meet the needs of the individual communities in which they reside. One commentator claims this is a myth. He claims that in recent years, the state boards of education are the ones determining the curricula, selecting textbooks, and certifying teachers. Moreover, the federal government also maintains control in that it requires schools to follow certain mandates in order to qualify for the needed federal aid. Baer, *American Public Education and the Myth of Value Neutrality*, in *DEMOCRACY AND THE RENEWAL OF PUBLIC EDUCATION*, 1, 3-4 (R. Neuhaus ed. 1987).

60. TENN. CODE ANN. § 49-6-1007 (Supp. 1986).

61. *Id.* at § 49-6-1007(a) (Supp. 1986).

62. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1071 (6th Cir. 1987).

63. The Sixth Circuit opinion states several things which the plaintiffs find offensive. These topics include witchcraft, magic, secular humanism, feminism, one-world government, and socialism. However, plaintiffs also testified that the books contained several stories which directly contradicted teachings of the Fundamentalists' belief. One example is the viewpoint that there are many roads to God—not simply a belief in Christ. *Id.* at 1065.

64. Although COBS also petitioned the school board for removal of the Holt series, the *Mozert* plaintiffs did not seek removal in their subse-

Six of the plaintiff families directly contacted the principal of the Church Hill Middle School and requested alternative reading material for the children. The school acceded to these requests. Other children at some of the other Hawkins County schools were also provided with alternative texts.<sup>65</sup> On November 10, 1983, however, the school board adopted a resolution requiring teachers to "use only textbooks adopted by the Board of Education as regular classroom texts."<sup>66</sup> Following this, the student-plaintiffs refused to read from the Holt series. The schools, in response, suspended the students. Most of the parents then enrolled their children in private schools.<sup>67</sup>

The *Mozert* plaintiffs filed an action under 42 U.S.C. § 1983 alleging that the school board's regulation mandating use of the series burdened their free exercise of religion.<sup>68</sup>

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quent action against the school board.

65. To be exact, seven of the student-plaintiffs from the Church Hill Middle School, one from Church Hill Elementary School, and one from Mt. Carmel Elementary School were given alternative reading textbooks. However, two other plaintiff families were denied such accommodations by the principal at Carter Valley Elementary School.

66. *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194, 1197 (E.D. Tenn. 1986).

67. Despite the resolution, two of the students were allowed to return to the public schools and were not required to read from the Holt series.

68. Plaintiffs alleged the following reasons for the books being objectionable. The books:

1. teach witchcraft and other forms of magic and occult activities;
2. teach that some values are relative and vary from situation to situation;
3. teach attitudes, values, and concepts of disrespect and disobedience to parents;
4. depict prayer to an idol;
5. teach that one does not need to believe in God in a specific way but that any type of faith in the supernatural is an acceptable method of salvation;
6. depict a child who is disrespectful of his mother's Bible study;
7. imply that Jesus was illiterate;
8. teach that man and apes evolved from a common ancestor; and,
9. teach various humanistic values.

Perhaps the most important of these claims are the fifth, sixth, and seventh allegations. The reason for this is the plaintiffs' explicit fundamental belief that Jesus Christ is the only means of salvation. The Holt series, it was alleged, embodied a world-view according to which all religions are so many different roads to God. See *Mozert*, 579 F. Supp. at 1052; *Mozert*, 582 F. Supp. at 202.

The parents also claimed interference with their parental right to control the religious and moral upbringing of their children.<sup>69</sup> The plaintiffs sought, as relief, to enjoin the de-

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69. The parents in the *Mozert* case alleged a violation of their free exercise rights and also a violation of their fundamental right to control the religious and moral upbringing of their children. (The parents' claims were never separately addressed by the courts.)

The Supreme Court has decided cases which support this right of the parents. Such a claim has been supported by the fourteenth amendment's liberty clause. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (upholding the right of parents to send their children to private schools), *Meyer v. Nebraska*, 262 U.S. 390 (1922) (invalidating a law which made it illegal for a school teacher to teach foreign language to school children).

At common law, however, the state recognized a fundamental right of the parents to have their children excused from certain courses. This right was conditioned upon the fact that the parent's request to have the children excused was reasonable and consistent with the best interests of the child, as well as that of the efficiency and good order of the schools and the equal rights of the other students not to be affected by the parental control. See Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?* 50 S. CAL. L. REV. 871, 886 (1977). Two basic assumptions supported this right. First, the law recognized the parent's equal or superior knowledge of the child's physical and mental capabilities and future prospects in comparison to the school authorities. Second, due to the natural affections of a parent for a child, the parent is more likely to act in the best interest of the child. *Id.* at 889. Modern statutory laws, however, have eroded this common law right. The recognized compelling state interest in education has weakened any absolute parental control over the education of children.

It is common, however, for a state statutorily to provide for the right of a parent to exempt their children from such courses as health and/or sex education classes which they find objectionable, for whatever reason. See, e.g., Mich. Stat. Ann. § 15.41507(4) (1979).

The state's interest in education has allowed state interference with parental liberty. However, for very good reasons, the judiciary does give a large degree of deference to parental control of a child's education and welfare. First, parents are more aware and sensitive to their children's needs. Secondly, in a normal family setting, parents will act in the child's best interest because of the close familial relationship. Finally, the parental right to control the child's upbringing preserves the diversity of American society and serves as a barrier to state indoctrination. *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1354 (1980).

Although some commentators would argue that the parental right to control their child's education is a constitutional right, see, e.g., Devins, *A Constitutional Right to Home Instruction?* 62 WASH. L. REV. 623 (1975), Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 WILLAMETTE L. REV. 563 (1982), Moskowitz, *Parental Rights and State Education*, 50 WASH. L. REV. 623 (1975), one clause of the Constitution does provide for a limited right — the free exercise clause.

The *Yoder* decision contains very strong language supportive of the parent's free exercise claim. The Court held that states should respect parental decisions unless it appears that their decisions "will jeopardize the

fendants from compelling the children to attend the reading course in which the Holt series was used and to order the schools to allow the children to read alternative state approved texts in place of the Holt readers.<sup>70</sup>

### III. THE DISTRICT COURT OPINION

After some procedural maneuvering,<sup>71</sup> the district court

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health or safety of the child or have a potential for significant social burdens." *Yoder v. Wisconsin*, 406 U.S. 205, 234 (1972). As one commentator put it: "*Yoder* is pregnant with possibilities for constitutional protection of parental autonomy." Stocklin-Enright, *supra*, at 563. The consideration of the fundamental right of parents to guide the education of their child, coupled with the free exercise claim, formed the basis for the Court holding that the Amish parents had the right to remove their children from the public school. The Court itself acknowledged the impossibility of reconciling the state's interest with that of the Amish parents and clearly found that a burden upon the free exercise rights of the parents existed. "This primary role of the parents in the upbringing of their children is now clearly established beyond debate as an enduring American Tradition." *Yoder*, 406 U.S. at 232.

70. The *Mozert* plaintiffs did not seek a ban on the Holt series or attempt to show that the Holt series was teaching the religion of secular humanism.

Those who bring a claim under the free exercise clause generally seek as relief something along the lines of a religious exemption from the state requirement. This notion of accommodation, which began in *Sherbert v. Verner*, 374 U.S. 398 (1963), runs through the free exercise cases. See Note, *supra* note 25, at 353-54 (1980). The Supreme Court has already allowed the opt-out or released-time concept. See *Zorach v. Clauson*, 343 U.S. 306 (1952) (the Court upheld a released-time program of public school children for religious instruction).

According to Tribe, this notion of accommodation is arguably required by the religion clauses in general. TRIBE, *supra* note 7, § 14-4 at 822.

71. The *Mozert* case began in the district court in July of 1983 where the court heard defendant's Fed. R. Civ. P. 12(b)(6) motion for dismissal. In the trial court's first opinion it dismissed all but one of the plaintiffs' allegations. The court stated that the first amendment does not protect "from exposure to merely offensive value systems or . . . to antithetical religious ideas." 579 F. Supp. 1051, 1053 (E.D. Tenn. 1984). However, if the plaintiffs could show that the books "teach a particular religious faith as true . . . or that the students must be saved through some religious pathway, or that no salvation is required . . .," then the motion for dismissal would be denied. *Id.* In its second opinion, the same court dismissed the final allegation, finding that no constitutional burden existed. 582 F. Supp. 201, 203 (E.D. Tenn. 1984). In 1985, the plaintiffs appealed to the Sixth Circuit Court of Appeals. Finding that the pleadings presented genuine issues of fact, the Sixth Circuit reversed the summary judgment and remanded for findings consistent with the opinion. 765 F.2d 75, 78-79 (6th Cir. 1985). The court specifically directed the district court to apply the two-step free exercise analysis regarding the questions of the burden and the counter-



for the eastern district of Tennessee granted an injunction in favor of the plaintiffs.<sup>72</sup> The injunction prohibited defendants from requiring the plaintiff-students to read from the Holt series and ordered the defendants to allow the students to attend the Hawkins County public schools, but to opt-out of the regular reading course.<sup>73</sup> This latter requirement was conditioned upon the willingness of the parents to instruct the children in reading at home in accordance with the provisions of the Tennessee Home Schooling Statute.<sup>74</sup>

Relying upon Supreme Court precedent,<sup>75</sup> the district court found that since the school board had effectively required the students either to read from the Holt series or to forgo their free public education, the school board's compulsory reading requirement impermissibly burdened the plaintiffs' free exercise of religion. Since the school board's action was essentially the conditioning of a receipt of a public benefit upon forgoing a religious belief, "the case was clearly in line with *Thomas, Sherbert* and their progeny."<sup>76</sup>

The district court next examined the state interest to determine whether it was compelling and whether the means used to achieve that interest were the least restrictive possible. The compelling state interest—education of the youth—was undisputed.<sup>77</sup> The means chosen by the school board to achieve this end, however, was problematic. The district court phrased the issue in this manner: "whether the state can achieve literacy and good citizenship for all students without forcing them to read the Holt series."<sup>78</sup> The court answered this in the affirmative, finding that the mandatory use of one textbook series was not the least restrictive means available.<sup>79</sup> Proceeding to fashion relief in a manner which

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balancing state interest. *Id.* Judge Hull's final opinion, 647 F. Supp. 1194 (E.D. Tenn. 1986), is the opinion treated in the text above.

72. *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986).

73. *Id.* at 1203.

74. *Id.*

75. *Id.* at 1199-1200. In his burden analysis, Judge Hull relied on *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 450 U.S. 707 (1980). He also looked to two lower court decisions involving free exercise claims within the public school curriculum: *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972), and *Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979).

76. *Mozert*, 647 F. Supp. at 1200.

77. *Id.*

78. *Id.* at 1201.

79. *Id.* In making this finding, the court noted that Tennessee, as a

would avoid entanglement with the establishment clause,<sup>80</sup> the district judge ordered that the student-plaintiffs be allowed to opt-out of the regularly scheduled reading program. He emphasized, however, that the "opinion shall not be interpreted to require the school system to make this option available to any other person or to these plaintiffs for any other subject."<sup>81</sup>

#### IV. THE SIXTH CIRCUIT OPINION: *Mozert* REVIEWED AND REVERSED

On appeal, the United States Court of Appeals for the Sixth Circuit reversed.<sup>82</sup> Finding that the necessary element of coercion<sup>83</sup> was missing, the appellate court held that "the

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state, has already acknowledged that its compelling interest in education may be accomplished in other ways. Both private schooling and home schooling are permissible. Moreover, as the court pointed out, the defendant's arguments for uniformity in the classroom instruction is weakened by several other factors: the defendant's own expert witness testified that "teaching is best accomplished through individualized means," the evidence of accommodations already practiced in the schools, and the narrowness of the plaintiffs' complaints (as directed against the Holt series alone). Perhaps one of the biggest holes in the defendant's arguments was the complete lack of evidence showing the adverse and detrimental effects on either the school's efficiency or the children's performance that defendants continued to allege against the opt-out remedy. In fact, the court remarked, the student-plaintiffs performed above average despite their refusal to use the Holt series.

80. *Id.* at 1203.

81. *Id.*

82. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987). Chief Judge Lively wrote the opinion of the court; Judge Kennedy concurred in the analysis and the result, but decided to write a separate decision to consider the mooted "compelling state interest" issue; Judge Boggs concurred only in the result and accepted neither argument. He reasoned that no constitutional burden exists because the Supreme Court precedents do not extend so far as to cover the particular facts of the case. Instead, he considered the case as one dealing with the limits on school boards to determine curricula. Since he concluded that the only limitation is the establishment clause, the plaintiffs had no claim. Yet, even with three separate opinions, no explanation of the result commanded the adherence of these three judges in a majority opinion.

83. *Id.* at 1066. In discussing the aim of the free exercise clause, Judge Lively stated,

It is clear that 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, is the evil prohibited by the Free Exercise Clause. In *Abington School District v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572,

requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion."<sup>84</sup> Each of the three opinions in *Mozert* are discussed below.

### A. Judge Lively's Opinion for the Court

The district and appellate courts disagreed principally over whether there was a burden upon a religious belief or practice. The appellate court found no burden to exist. As Judge Lively wrote, since the "students were not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion," the plaintiffs' failed to demonstrate the element of compulsion necessary to the finding of a burden.<sup>85</sup>

Defining compulsion narrowly, Judge Lively stated that the plaintiffs must show that "an objecting student was required to participate beyond reading and discussing assigned materials, or was disciplined for disputing assigned materials."<sup>86</sup> Faulting the district court for "erroneously appl[ying] decisions based on governmental requirements that objecting parties make some affirmation or take some action that offends their religious beliefs,"<sup>87</sup> Judge Lively distinguished the cases relied upon by the district court. Specifically referring to *Sherbert*, *Thomas*, and *Hobbie*, Lively stated that each of those cases involved governmental compulsion which forced

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10 L.Ed.2d 844 (1963), the Court described the Free Exercise Clause as follows:

Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. . . .

84. *Mozert*, 827 F.2d at 1070. The district court, in *Mozert*, 647 F. Supp. at 1204, made several findings in accordance with the remand instructions of the Sixth Circuit. The Sixth Circuit, in *Mozert*, 827 F.2d 1058, reversed the specific finding that a burden existed. Judge Lively's opinion, the opinion of the court, never addressed the other finding required in the remand instructions — that the state could achieve its compelling state interest (achieving student literacy and citizenship) through a less restrictive means. However, both of the "concurring" opinions do address this second finding.

85. *Mozert*, 827 F.2d at 1070.

86. *Id.* at 1064.

87. *Id.* at 1065.

the plaintiff to engage in conduct which constitutes affirmation or denial of a religious belief.<sup>88</sup>

Judge Lively's opinion is contrary to both *Sherbert* and *Thomas* because it fails to recognize that the free exercise clause protects religiously-motivated conduct.<sup>89</sup> In this regard, the district court made a specific finding that the "[p]laintiffs' religious beliefs compel them to refrain from exposure to the Holt series."<sup>90</sup> While the plaintiffs' religious belief is a separationist belief,<sup>91</sup> this characterization does not make it less religious. For these Fundamentalist Christians, mere exposure to views and practices (from which the "faith" requires them to remain separate and insulated) can be a substantial burden on their religious exercise.<sup>92</sup> Judge Lively's

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88. *Id.*

89. See *supra* Part I.

90. *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194, 1200 (E.D. Tenn. 1986). Moreover, as Judge Boggs pointed out, "[t]he plaintiffs provided voluminous testimony of the conflict (in their view) between reading the Holt readers and their religious beliefs, including extensive Scriptural references." *Mozert*, 827 F.2d at 1076 (Boggs, J., concurring).

91. The *Mozert* plaintiffs sincerely believe that they must not be exposed to the contents of the Holt series. They never refer to this belief as separationism. However, I use the term broadly to refer to a religious belief that the faithful must avoid or keep separate from those views or practices which conflict with their religious beliefs. I use separationism in two senses. The first is an absolute separationism, requiring a complete and separate existence from the world community. The Amish are perhaps the best example of such a belief. The second sense in which separationism can be understood is partial separationism. This requires an avoidance of certain practices or views from which a religion requires, for whatever reasons, its believers to abstain. Catholics are one example of religious believers who hold some kind of belief in partial separationism. As Judge Boggs pointed out, at one time the Roman Catholic Church specified a list of books in the "Index Librorum Prohibitorum," the reading of which was a sin. *Mozert*, 827 F.2d 1058, 1075 (Boggs, J., concurring) (citing 7 NEW CATHOLIC ENCYCLOPEDIA, 434-35 (1967); 2 *id.* at 699-701.) A school requirement which would require the mandatory use of one of the prohibited books would certainly violate the belief in avoiding sin. The mandatory use of those books would certainly be a burden upon a Catholic child's free exercise.

92. The district court found that "[p]laintiffs' religious beliefs compel them to refrain from exposure to the Holt series." *Mozert*, 647 F. Supp at 1200 (emphasis added). According to Judge Boggs, "[t]he plaintiffs provided voluminous testimony of the conflict (in their view) between reading the Holt readers and their religious beliefs, including extensive Scriptural references." *Mozert*, 827 F.2d at 1076 (Boggs, J., concurring). See also Strossen, *supra* note 34, at 390 & n. 288 (arguing that mere exposure can constitute a substantial burden).

analysis of the *Mozert* claim, therefore, is seemingly predicated on a denial that "mere exposure" is a religious belief.<sup>93</sup> This runs directly counter to the Supreme Court's "hands off" attitude toward the issue whether particular beliefs are religious or not. As a general matter, a court may not inquire into the truth of a belief nor may a court decide the particular importance of a belief. The court may only consider the sincerity of the belief.<sup>94</sup>

Religious beliefs similar to those at issue in the *Mozert* case have been brought before the Supreme Court earlier. In this regard, separationism (in the sense of absolute separationism)<sup>95</sup> as religiously-motivated conduct was recognized in *Yoder*.<sup>96</sup> In *Yoder*, the Old Order Amish believed that salva-

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93. Although Lively did not expressly dismiss the validity of such a belief, the Judge's treatment and characterization of the *Mozert* plaintiffs' testimony and claims suggests an impatience with their position. See generally text of opinion, *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1060-65 (6th Cir. 1987).

94. The Supreme Court has generally taken a hands-off attitude towards inquiring into the truth of religious beliefs, holding that such inquiry is in itself violative of individual religious autonomy. In *United States v. Ballard*, 322 U.S. 78 (1944), Justice Douglas' majority opinion held that the first amendment barred submission to the jury of the truth or verity of respondents' religious doctrine or beliefs. See also *Thomas v. Review Board*, 450 U.S. 707, 715 (1980) ("We see, therefore, that *Thomas* drew a line, and it is not for us to say that the line he drew was an unreasonable one."). This position has also been supported by various commentators, suggesting that such inquiries are beyond the practical and institutional competence of the courts. See, e.g. *TRIBE*, *supra* note 7, § 14-6; Paulsen, *supra* note 8, at 332 & n. 104; Note, *supra* note 25, at 359-61 & nn. 60-61; Weiss, *Privilege, Posture, and Protection: "Religion" in the Law*, 73 *YALE L.J.* 593, 622 (1964) (assessing religious beliefs in itself intrudes into religious freedom).

95. For a description of the ways "separationism" is used in this note, see *supra* note 91.

96. The *Mozert* plaintiffs heavily relied upon *Yoder v. Wisconsin*, 406 U.S. 205 (1972). Judge Lively dismissed its importance, however, stating that in no way does *Yoder* announce the general principle regarding exposure. *Mozert*, 827 F.2d at 1067. Perhaps *Yoder* does not stand for such a general principle. However, *Yoder* need not be restricted to its facts. As one commentator argued, the emphasis in *Yoder* upon the lengthy and consistent history of the Amish faith was not set forth in the opinion as the *sine qua non* for the religious exemption. Taken in this light, the emphasis demonstrated "the sincerity of their religious beliefs [in separationism], the interrelationship of belief with their mode of life . . . and the hazards presented by the State's enforcement of a statute generally valid as to others." *Yoder*, 406 U.S. at 235. "Viewed in this context, and read in conjunction with *Sherbert*, *Yoder* may be said to have substantially expanded the area in which free exercise claims may be viably asserted." Marcus, *supra* note 40, at 1230.

tion required an existence separate from the world and its influences.<sup>97</sup> This separationist belief dictated that the Amish children be protected from views and values taught in the schools which would alienate them from God and deny them salvation. Judge Lively rejected the use of *Yoder* as a general precedent that mere exposure is protected conduct. However, *Yoder's* importance to the particular claim in *Mozert* is to show that religiously-motivated avoidance of certain views and teachings *can* be protected conduct.<sup>98</sup> Moreover, there is no reason to believe that the Amish are the only religious sect to believe in separationism.<sup>99</sup>

The *Sherbert* approach recognized that religiously-motivated conduct can be burdened. According to *Sherbert*, to condition the receipt of a public benefit (here, public education) upon some conduct which is contrary to a person's religious belief is essentially to burden religiously-motivated conduct. While *Sherbert* may not protect *all* religiously-motivated conduct, if a plaintiff makes a showing of burdened conduct,<sup>100</sup> a thorough examination of the state's interest and a

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97. *Yoder*, 406 U.S. at 216-18. The Court, quoting from the Bible, states that the biblical command from the Epistle of Paul to the Romans, "be not conformed to this world . . .," is fundamental to the Amish faith. The Court recognized this belief as requiring that the Amish children not attend school past the eighth grade.

98. See *supra* note 95. The first amendment religion clauses do not generally protect against the mere exposure to ideas or beliefs that are offensive to or supportive of any religion. See Strossen, *supra* note 34, at 374-75 & n. 221 (citing *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (The fact that Congressional funding restrictions upon abortions "may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.")). *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (constitutional guarantees of free speech and press prevent state from banning film on basis of censor's conclusion that it is "sacrilegious," because "the state has no legitimate interest in protecting any or all religions from views distasteful to them . . ."). Strossen also claims that exposure to ideas inconsistent with arguably religious beliefs generally does not violate the free exercise clause. Note the word "generally." Strossen argues that if a plaintiff could show a religious belief in avoiding exposure, then mere exposure could violate the free exercise clause. Strossen, *supra* note 34, at 390 n. 288.

99. See Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 524-25 (1978).

100. Strossen suggests that within the public school curricula decision context the plaintiff must make an initial showing that the challenged curricula decision imposed a substantial burden upon a sincerely held religious belief which is centrally important and that any compelling interest in that curricula decision is substantially achieved even if the proposed accommodation remedy is granted. Strossen, *supra* note 34, at 390.

consideration of whether that interest can be furthered by less burdensome means is required. Rejection of the religious belief behind the conduct (other than its sincerity) is improper.<sup>101</sup>

Furthermore, Judge Lively's opinion effectively resurrects the direct-indirect distinction abandoned in *Sherbert*.<sup>102</sup> In *Mozert*, the school board clearly conditioned access to the public schools upon the requirement that a student use the Holt series in the reading course. Although the plaintiffs were never *directly* compelled to violate a religious belief, they were *indirectly* compelled through the condition on being allowed to attend the public school. After *Sherbert*, "[w]here the state conditions receipt of an important benefit upon conduct proscribed by religious belief, . . . a burden upon religion exists. While the compulsion may be indirect, the infringement upon the free exercise is nonetheless substantial."<sup>103</sup>

Judge Lively's inquiry into the existence of a burden through compulsion is contrary to the approach adopted in recent Supreme Court rulings.<sup>104</sup> Moreover, his dismissal of

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Strossen also suggests what the required showing for a plaintiff who challenged a curricula requirement should be. Strossen, *supra* note 34, at 385. These criteria are based upon Supreme Court decisions. Within the specific context of schools, she proposed the following:

Any student asserting a free exercise challenge to a public school curricular decision, and proposing an accommodation measure to remedy the alleged violation, would bear the initial burden of making a *prima facie* showing that: (1) the challenged decision imposes a significant burden upon an arguably religious belief, which is both sincerely held and centrally important; (2) any compelling interest that is promoted by the curricular decision could be substantially achieved even if the proposed accommodation remedy is granted; and (3) the proposed accommodation remedy is no more extensive than necessary to eliminate any free exercise violation, would not cause significant inconvenience, and would not for any other reason violate the establishment clause.

*Id.* at 390 (footnotes omitted).

101. See *supra* note 94.

102. *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).

103. *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1980).

104. Two recent Supreme Court decisions cast doubt on Judge Lively's analysis. In *Goldman v. Weinberger*, 106 S.Ct. 1310 (1986), the plaintiff contended that the free exercise clause protected his right to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel. Although Goldman did not prevail due to the finding of an overriding interest, the Court's reasoning did not involve an inquiry into whether this kind of religiously-motivated conduct was protected. In fact, the court did find a substantial bur-

the claim that reading and discussion (mere exposure) burdens a religious belief leads one to conclude that Judge Lively does not himself believe that this is a valid religious belief.<sup>105</sup> Judge Lively never reached the question of whether the state interest justifies the burden by a compelling state interest. It was, however, the centerpiece of Judge Kennedy's concurrence.

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den on Goldman's religious practice. The Court found instead that the Air Force had a compelling interest which outweighed the imposition of the burden. *See id.* at 1314.

Similarly, in *Bowen v. Roy*, 106 S.Ct. 2148 (1986), the Court addressed a claim that the required use of a Social Security number, in order for the plaintiffs to obtain welfare benefits, violated the plaintiffs' free exercise rights. The plaintiffs in this case were Native Americans whose religious beliefs dictate that the assignment of a number to their two-year-old daughter would prevent her from attaining greater spiritual power. A key fact in the case was that although the parents had refused to apply for a Social Security number, it was disclosed after the initial trial that the government had already assigned the child a number. Since this was the case, the remainder of plaintiffs' claim was directed at enjoining the state welfare agency from using it. The majority of the Court held that the statutory requirement that a *state agency* (as opposed to the plaintiffs) use the number in administering the welfare programs did not violate the Free Exercise Clause. *See Id.* at 2151-53. Importantly, five justices indicated that a burden on plaintiffs' free exercise rights would have existed had the plaintiff, rather than a state agency, been required to use the number. *See Id.* at 2154 (opinion of Burger, C.J.) *Id.* at 2165-69, (O'Connor, J., concurring in part and dissenting in part, joined by Brennan and Marshall, JJ.) *Id.* at 2169, (White, J., dissenting). Moreover, the Court once again recognized that an indirect burden arising from a facially neutral law can involve compulsion when it requires a person to engage in a religiously forbidden practice in order to receive benefits. *See Id.* at 2154 (opinion of Burger, C.J.) ("we do not believe that no government compulsion is involved").

Both of these recent decisions reflect the Court's approach to the burdened conduct issues. They show the willingness of the Court to accept a plaintiff's claim as to the religious reasons behind the burdened conduct, and to concentrate instead on a strict scrutiny analysis of the state's interest. Even in these two cases where the plaintiffs were not successful, the Court did not engage in any in-depth analysis of compulsion.

105. *But see, Thomas*, 450 U.S. at 714, "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Also, as Justice Douglas stated in his concurring opinion in *Sherbert*, "The result turns not on the degree of the injury, which may indeed be non-existent by ordinary standards. The harm is the interference with the individual's scruples of conscience — an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given second-class citizenship, resulting in harm though perhaps not measurable damages." *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring).



### B. Judge Kennedy: Overriding Compelling State Interest

Judge Kennedy wrote "even if I were to conclude that requiring the use of the Holt series or another similar series constituted a burden on [plaintiffs'] free exercise rights, I would find the burden justified by a compelling state interest."<sup>106</sup> This conclusion is questioned here, however, because under *Sherbert*, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."<sup>107</sup>

According to Judge Kennedy, the state has a compelling state interest in achieving both literacy and citizenship for the children.<sup>108</sup> Moreover, she accepted the proposition that the state has an additional compelling interest in teaching students how to think critically about complex and controversial subjects and to develop their own ideas and make judgments about these subjects.<sup>109</sup> As Judge Kennedy argued, critical reading skills in themselves were necessary ingredients to "good citizenship" as that type of discussion helps to develop respect and tolerance for other views.

Even if this interest is compelling, however, the question

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106. *Mozert*, 827 F.2d at 1070 (Kennedy, J., concurring).

107. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Other cases have described the state's interest requirement as "compelling," *Thomas v. Review Board*, 450 U.S. 707, 718 (1980); "overriding," *United States v. Lee*, 455 U.S. 252, 258 (1982); "of the highest order," *Yoder v. Wisconsin*, 406 U.S. 205, 215 (1972); and "especially important," *Bowen v. Roy*, 106 S.Ct. 2147, 2167 (1986).

108. The district court made this specific finding as to the state interest involved. *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194, 1202 (E.D. Tenn. 1986). Contrast this state interest with what Judge Kennedy described as the state interest: the state has a compelling interest not only in teaching children how to read, but a further interest in teaching them how to read critically. This premise is crucial to Judge Kennedy's finding of an overriding state interest. If one accepts Judge Hull's view from the district court opinion, then clearly no argument could be made that the mandatory use of one textbook is absolutely the least restrictive means available to teach children literacy and good citizenship. Indeed, the testimony of one teacher showed that teaching is best accomplished through individualized instruction, sometimes requiring students to use different books to receive specialized instruction. *Id.* at 1201 and n.12.

However, if one accepts Judge Kennedy's view, then it is easier to accept that one textbook should be used. If the children are expected to read and discuss moral and social issues as they arise in stories, then it makes sense to have the children reading the same material.

109. *Mozert*, 827 F.2d at 1071 (Kennedy, J., concurring in result). Undoubtedly, this type of discussion is a social good; it teaches tolerance for others in our pluralistic democratic society. One must question, however, whether first grade or elementary students in general will be discussing "complex and controversial moral and social issues."

remains as to whether the Holt reader is the least restrictive means of furthering it. Would this compelling state interest be harmed by allowing the plaintiffs to read another reader?<sup>110</sup> Like the children in *Yoder*,<sup>111</sup> it can be argued that the plaintiff-children in this case would learn to form judgments about moral and social issues, even with alternative readers. If this is not the case, then some showing is required that this particular reading series is necessary to good citizenship and the related skill to think critically.

It is apparent that the Holt series was not the only or least restrictive means to achieve the state's interest. Prior to the compelled use of the Holt readers, accommodation was taking place, with no evidence whatsoever of alleged bad effects. Judge Kennedy disagreed<sup>112</sup> and made a number of observations. She found mandatory participation to be the least restrictive means since plaintiffs would object regardless of which series was selected.<sup>113</sup> She also said that use of the Holt series (or one similar) promotes cohesion among a democratic people<sup>114</sup>; that any accommodation would promote disruption in the classroom, religious divisiveness, and a flood of future claims<sup>115</sup>; and finally, that any accommodation would not solve the plaintiffs' problems given the integrated nature of the school's reading programs.<sup>116</sup>

Each of these objectives is highly speculative and is the type of speculation which the *Sherbert* line of cases expressly

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110. Note that in *Yoder* the Court stated that "[w]here fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its validity in the generality of cases, we must searchingly examine the interests that the state seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption." 406 U.S. at 222.

111. Such alternative means furthering the state objective were important to the *Yoder* Court. *Id.* at 223-24.

112. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1071-72 (6th Cir. 1987) (Kennedy, J., concurring in result).

113. *Id.* at 1071 (Kennedy, J., concurring in result). This statement directly contradicts the plaintiffs' own testimony which stated that their objections were specifically against the Holt series and that they would accept another state-approved text.

114. *Id.* at 1072 (Kennedy, J., concurring in result).

115. *Id.* (Kennedy, J., concurring in result).

116. Judge Kennedy referred to the approach that teachers take to reinforce information taught in different subject areas. Students may be called upon to discuss one of the Holt stories later in the day. Thus, schools would be able to utilize effectively the critical reading method and also accommodate the plaintiffs' religious beliefs.

rejected.<sup>117</sup> Speculation as to future claims, administrative inconvenience, efficiency, and cost-saving reasons are not in themselves sufficient to justify a substantial (although indirect) intrusion upon religious freedom.<sup>118</sup> The *Sherbert* test requires proof of least restrictive means. As Judge Boggs pointed out in his concurring opinion, "[t]he test for a compelling interest is quite strict, and requires far more than this or other speculations on possible future evils. Once again, to be compelling, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"<sup>119</sup>

In contrast to the speculation in *Mozert*, the *Yoder* Court focused on *specifics*. While compulsory education may have presented a substantial state interest, forcing the Amish children specifically to go to school beyond the eighth grade was not required to satisfy the state's interest.<sup>120</sup> In fact, the Court stated that there was no basis, other than the state's allegations, to find that education past the eighth grade would better prepare the Amish children for society, *even* for society *outside* the Amish community.<sup>121</sup> "Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fail."<sup>122</sup> Similarly, in the *Mozert* case, no facts in

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117. See, e.g., *Yoder v. Wisconsin*, 406 U.S. 205, 222 (1972). "Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim."

118. See *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *TRIBE*, *supra* note 7, § 14-10, at 853.

119. *Mozert*, 827 F.2d at 1077 (Boggs, J., concurring) (quoting *Sherbert*, 374 U.S. at 406 (1963)).

120. The *Yoder* Court could not find any particular state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause. The State could not show how "its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." 406 U.S. at 214, 237. The Amish believed that education after the eighth grade would expose the children to views which would alienate them from God, endanger the community and the parents and children's salvation. See *Id.* at 218-19.

121. "There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the state's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist." *Yoder*, 406 U.S. at 225-26.

122. *Id.*

the record establish with the required specificity that alternative textbooks would be less effective in developing the plaintiff-children as good citizens.

Given the state's heavy burden and the strict scrutiny analysis the Supreme Court applies, the evidence relied upon by Judge Kennedy, based, as it was, on educational policy speculation and administrative conveniences, should not be sufficient to overcome a substantial burden on religious beliefs.

### C. Judge Boggs: Burdened Conduct, But No Constitutional Protection

Judge Boggs also wrote a separate concurring opinion,<sup>123</sup> in which he made two major points: first, he found a burden on free exercise which was beyond constitutional protection; second, he wrote that the school board has the freedom to say "my way or the highway."<sup>124</sup>

Judge Boggs found what he called a common sense burden on the plaintiffs' religious beliefs.<sup>125</sup> In fact, he stated, "there is a much stronger economic compulsion in public schooling than by any unemployment system."<sup>126</sup> His refusal to extend the principles of *Sherbert* to cover this case, however, stems from his belief that not all religiously-motivated conduct is deserving of protection.<sup>127</sup> This belief was bol-

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123. *Mozert*, 827 F.2d at 1073 (Boggs, J., concurring in result).

124. *Id.* at 1074 (Boggs, J., concurring in result).

125. "In any sensible meaning of a burden, the burden in our case is greater than in *Thomas* or *Sherbert*. . . . Here, the burden is many years of education, being required to study books that, in plaintiffs' view, systematically undervalue, contradict and ignore their religion." *Id.* at 1079 (Boggs, J., concurring in result).

126. *Id.* (Boggs, J., concurring in result).

127. Much of the same criticisms against Judge Lively's treatment of the burden issue apply to Judge Boggs' treatment of the case. His summary dismissal of the burden claim avoids proper application of the *Sherbert* test. Both Judge Boggs's and Judge Lively's analysis prevented consideration of the particular facts and circumstances of the parties involved and hence applied only a personal judgment as to what constituted a valid religious practice.

Another factor in Judge Boggs decision not to "expand" the free exercise clause to protect plaintiffs' religious practices was that the Supreme Court has "almost never interfered with the prerogatives of school boards to set curricula, based on free exercise claims." *Id.* (Boggs, J., concurring in result).

stered by his further belief that the only limitation on a school board is the establishment clause.<sup>128</sup>

In deciding whether or not to give constitutional protection to the plaintiffs' burdened religious practices, Judge Boggs discussed a distinction between kinds of religiously motivated conduct: conduct which is *required* by a religious belief and conduct which is merely *better* according to a religious belief. The free exercise clause, according to Judge Boggs, only protects conduct which is required by a religious belief. Judge Boggs rejected the view that true protection of religious beliefs means that protection must be accorded for all "arguably religious" beliefs.<sup>129</sup> Judge Boggs' approach is flawed, however, in that it necessarily involves a judgment as to how important a particular practice is to a religion. A court is not qualified to judge how essential a particular belief is to a religion. This type of inquiry is the very type the Court has always avoided.<sup>130</sup>

Although the Supreme Court has protected conduct under the free exercise clause, it has never expressly adopted either the "arguably religious" approach or the narrow view Judge Boggs adopted. The only express guidelines, other than the general rule of avoiding inquiry into what is a religious belief, are those from the *Sherbert* approach, in which the conduct is evaluated in terms of whether there is a state interest sufficiently compelling to override the burdened religious beliefs.<sup>131</sup>

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128. *Id.* at 1080 (Boggs, J., concurring in result). Judge Boggs emphasized that the Supreme Court typically avoids becoming involved with school boards and their decisionmaking. However, where a constitutional question is involved, the Court does not hesitate to get involved.

By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools."

*Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (citing *Shelton v. Tucker*, 364 U.S. 479 (1960)).

129. Laurence Tribe takes this approach and argues for protection for all "arguably religious beliefs." *TRIBE*, *supra* note 7, § 14-6, at 828.

130. See *supra* note 93 and accompanying text.

131. The Court has, however, stated that certain religiously-motivated acts are not totally free from restrictions. Yet those practices which traditionally have not received protection "have invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (citing *Gillette v. United States*, 401 U.S. 437 (1937); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Reynolds v. United States*, 98 U.S. 145 (1879)).

Judge Boggs' concurrence also stated that "the school board is indeed entitled to say, 'my way or the highway.'" <sup>132</sup> In the early part of his opinion, Judge Boggs criticized both Judge Lively's and Judge Kennedy's treatment of the case. Both, he said, ignored the real issue, namely, "the extent to which school systems may constitutionally require students to use educational materials that are objectionable, contrary to, or forbidden by their religious beliefs."<sup>133</sup> According to Boggs, "[s]chool boards may set curricula bounded only by the establishment clause."<sup>134</sup>

This statement is at least troubling, if not inaccurate. Initially, it puts the school board on a pedestal, virtually allowing it to do as it pleases. Moreover, it implies that the only possible objections to curriculum requirements are religious objections. This is not the case. For example, the *selection* and the *required use* of a textbook<sup>135</sup> which was obscene, racist or discriminatory would be subject to constitutional attack.<sup>136</sup>

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132. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1074 (6th Cir. 1987) (Boggs, J., concurring in result).

133. *Id.* (Boggs, J., concurring in result).

134. *Id.* at 1080 (Boggs, J., concurring in result).

135. This situation is distinguished from *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982), where the Court held that local school boards may not remove books from the library shelf simply because they dislike the ideas contained in those books and seek their removal in order to prescribe what the school board believes should be orthodox in politics, nationalism, religion or other matters of opinion. Important to the *Pico* Court was that the school board intended to deny access to ideas with which the school board disagreed. Such action substantially implicated and infringed upon the first amendment rights of the students. Moreover, the Court emphasized the unique role of the school library — that the use of the books was completely voluntary on the part of the students.

*Pico* is distinguishable from any case involving a claim for the removal of books from the curriculum for such reasons as obscenity, racism or the like. First, even in *Pico*, the court noted that the school board could remove books from the library which were "pervasively vulgar" or educationally unsuitable. *Id.* at 871. But most significant is the fact that the *Pico* Court was concerned with the denial of access to ideas. No such right is implicated in the choice of one required textbook for a particular course. If so, then every textbook choice would be invalid. Finally, the Court also noted that the school board might be able to defend their claim of absolute discretion with respect to *curriculum* by reliance upon their duty to inculcate community values. *Id.* at 869.

136. If a textbook contained stories and passages alleged to be obscene, or racist, it is unlikely that such a textbook would withstand a constitutional attack. For example, in *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980), a court held that a textbook selected for use in the

There is no constitutional basis to justify exempting a school board's curricular choice from any portion of the constitution.<sup>137</sup> Perhaps for this reason, Judge Boggs himself admits that he would not completely rule out a free exercise claim in this context.<sup>138</sup>

### CONCLUSION

In its treatment of the *Mozert* claim, the Sixth Circuit court appears to dismiss the reality and sincerity of the plaintiffs' religious beliefs. The idiosyncrasies of the plaintiffs' beliefs should be irrelevant. Yet, in holding that particular reli-

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state's 9th grade Mississippi history course was unconstitutional as it intended to perpetuate segregation. The court found that there was a motive to discriminate.

California is an example of a state which recognizes that a textbook may be subject to claims other than the establishment clause: "No textbook or other instructional materials shall be adopted by the school board or any governing board for use in the public schools which contain any matter reflecting adversely upon persons because of their race, sex, color, creed, national origin or ancestry." Cal. Educ. Code Ann. § 51501 (Special Pamphlet 1978).

137. Strossen takes the position that school board curriculum choices are also subject to free exercise analysis.

Even if a curricular decision withstands scrutiny under the establishment clause analysis, . . . it does not follow that every student must be affected uniformly by that decision, notwithstanding objections based upon arguably religious beliefs. Under free exercise clause precedents, individual students whose arguably religious beliefs are violated by exposure to certain curricular material may be protected from such exposure.

Strossen, *supra* note 34, at 385.

Moreover, objections to curriculum requirements have succeeded under free exercise claims. *See, e.g.,* Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (where a high school student, who had a religiously-based conscientious objection to war, refused to take a state-required ROTC course; the Sixth Circuit held that the school's requirement violated the plaintiff's free exercise rights since it compelled the student to engage in training contrary to religious beliefs). *See also* Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (where elementary school children refused to participate in co-ed physical education classes based on religious objection to exposure to the opposite sex in immodest attire; the court found that the children's free exercise rights had been violated). Judge Hull, in the district court opinion, cited and relied upon both of these cases in reaching the decision that a burden existed in the *Mozert* case.

138. *Mozert*, 827 F.2d at 1075 (recognizing that exposure to or use of books could be conduct prohibited by a religion, and, consequently, a burden on religious exercise.); *id.* at 1079 n.8 (agreeing with the court's opinion that forcing students to participate in a religious ritual contrary to their beliefs would be a violation of their free exercise rights).

gious beliefs are not deserving of constitutional protection, the court made an impermissible judgment about the merit of religious belief. Moreover, in its abstract discussion of compulsion and incomplete evaluation of state interests, the Sixth Circuit failed to consider the particular facts and characteristics of the plaintiffs involved.<sup>139</sup> It would not have required a significant step in free exercise jurisprudence to protect the plaintiffs' free exercise rights. The court needed only faithfully to apply the principles in *Sherbert* and *Yoder*. *Mozert* exemplifies the problems which parents may encounter with the public school system. Since education is viewed as a matter of state and local concern, the Supreme Court has emphasized that courts ought not to interfere except in clear cases of constitutional violation.<sup>140</sup> Where no violation is shown, then the school board may be entitled to say "my way or the highway." But the prospect of leaving one's free exercise rights at the schoolhouse door is troubling.<sup>141</sup>

The district court's opinion in *Mozert* evidenced that a

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139. Although curriculum disputes involve the parents and the schools, the children are the ones affected by such conflicts. Unfortunately, the Sixth Circuit failed to mention this aspect when looking at the free exercise claim. Perhaps if the court had evaluated the claim, in light of the particular characteristics of the children, it would have reached a different result.

For instance, in the past, the Supreme Court has based part of its analysis on the needs of the particular subjects involved, acting to protect children in the elementary school context. See, e.g., three cases which demonstrate the degree of protection the Court sees necessary to protect children's autonomy, depending on their age and special characteristics: *Grand Rapids v. Ball*, 473 U.S. 373 (1985) (in invalidating a state's Shared Time program on establishment clause grounds, the Court paid particular attention to the impressionability of the elementary school children and the possibility of indoctrination, that violates a youth's religious autonomy); *Bellotti v. Baird*, 443 U.S. 622 (1979) (in recognizing that adolescents are capable of making informed choices, the Court held that a state cannot require parental or judicial consent for non-emergency abortions); *Widmar v. Vincent*, 454 U.S. 263 (1981) (recognizing that college students are capable of appreciating that a university's policy of allowing religious groups equal access to meeting rooms on campus was one of neutrality). The Court no doubt recognized the need to protect the autonomy of these children, since, left to their own devices, children do not have the resources or the ability to protect it for themselves. See Assaf, *Autonomous Adolescents, Sexual Responsibility, Religious Organizations, and Congress: An Illicit Church/State Relationship?*, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y 425 (1988).

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

141. Some cases have been decided with regard to other areas of the curricula. See, e.g., *Spence v. Bailey* and *Moody v. Cronin*, *supra* note 137. See Strossen's article, *supra* note 34, for claims against textbook choices based on the establishment clause and the free exercise clause.



reasonable balance in this case could be reached in complete accordance with the existing Supreme Court free exercise precedents. But where does the Sixth Circuit's decision leave us? At most in a state of confusion. The fact that none of the three judges' explanations commanded a majority demonstrates a confusion about the free exercise clause in general and about the *Mozert* claim in particular. Unfortunately, this confusion will remain until the Supreme Court decides to offer further guidance in the application of the *Sherbert* approach.<sup>142</sup>

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142. As Justice Stewart said in *Sherbert*, "our Constitution commands positive protection by government of religious freedom — not only for the minority, however small — not only for the majority, however large — but for each of us . . . [T]he guarantee of religious liberty embodied in the free exercise clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief." *Sherbert*, 374 U.S. at 415 (Stewart, J., concurring in result).