

FREE EXERCISE'S OUTER BOUNDARY: THE CASE OF
HASIDIC EDUCATION

*Zalman Rothschild**

The First Amendment is currently being pulled in opposite directions by a group of Hasidic schools in New York. Driven by deeply held religious beliefs, the leaders of these schools refuse to teach virtually any of the secular studies required for children by New York state law. Proponents of these schools point to the Free Exercise Clause and the “hybrid rights” of religion and parental control. However the state also has an interest in ensuring that its students are adequately educated. This Piece provides a roadmap for how these competing interests should be balanced. The legal aspects of Hasidic education have never been studied, and the issues involved provide a unique opportunity to revisit and test the hybrid-rights doctrine developed by Justice Scalia in Employment Division v. Smith. The subject of Hasidic schooling is important in its own right but has far-reaching implications for other, similarly situated, religious communities.

INTRODUCTION

Hasidic schools in New York, in which roughly 110,000 Hasidic students are currently enrolled,¹ often provide little to no instruction in

* Clerk, U.S. Court of Appeals for the Third Circuit; Nonresident Fellow, Stanford Constitutional Law Center; Faculty Fellow, Shalom Hartman Institute of North America; J.D., Harvard Law School; Ph.D., New York University; M.A., Yeshiva University. The author would like to thank the following individuals for insightful comments and feedback: Noah Feldman, Jeannie Suk Gersen, Mary Ann Glendon, Abner Greene, Michael Helfand, Sanford Levinson, Serena Mayeri, Michael McConnell, Martha Minow, Rachel Moran, Nomi Stolzenberg, Mark Storslee, Mark Tushnet, and the editors of the *Columbia Law Review*.

1. See NYS DOE: Jewish Day School and Yeshiva Students Outnumber Other Nonpublic School Groups in NYC, *Yeshiva World* (Oct. 9, 2018), <https://www.theyeshivaworld.com/news/general/1600976/nys-doe-jewish-day-school-and-yeshiva-students-outnumber-other-nonpublic-school-groups-in-nyc.html> [<https://perma.cc/FXX3-LTYN>]; see also Young Advocates for Fair Educ., Non-Equivalent: The State of Education in New York City's Hasidic Yeshivas 45 (2017), https://d3n8a8pro7vhm.cloudfront.net/yaffed/pages/116/attachments/original/1523680597/Yaffed_Report_online_version.pdf?1523680597 (on file with the *Columbia Law Review*) (calculating enrollment in Hasidic schools at about 115,000 in 2013). This number reflects the estimated total number of Hasidic students, both boys and girls. As I address later in this Piece, the education Hasidic students receive differs by gender. See *infra* notes 38–4748 and accompanying text.

mathematics, science, history, or English.² Those who graduate from Hasidic schools typically do not receive high school diplomas; many lack basic math skills, can barely read or write English, and have inadequate to no training in science, literature, or history.³ Although those concerned with the quality of education in America tend to focus on urban public schools, such schools often provide a better secular education than many Hasidic schools in this country.⁴ This fact has for a long time remained unknown because few have access to the Hasidic community, and until recently even fewer have dared to subject it to critical scrutiny. The opacity of the Hasidic community and the reluctance to scrutinize it partially explain why there is little scholarship on Hasidic schools (the majority of which are in New York), no scholarly engagement on the legality of the Hasidic curriculum, and little concern about whether there are harms perpetrated in the name of the free exercise of religion.

The absence of secular studies in the Hasidic community has finally begun to gain a somewhat wider audience. On August 23, 2018, the *New York Times* editorial board issued an op-ed chastising the New York City Department of Education and Mayor Bill de Blasio for allowing Hasidic schools to remain unregulated on their watch,⁵ and countless articles of reporting and opinion have recently appeared in major media outlets, including the *New York Times*, *Wall Street Journal*, *New York Daily News*, *New York Post*, *Washington Post*, *Tablet*, and *Forward*.⁶ A *New York Times Magazine*

2. See Young Advocates for Fair Educ., *supra* note 1, at 31–35; Yermi Brenner, Getting in Face of Ultra-Orthodox on Need for Real World Education, *Forward* (June 19, 2013), <https://forward.com/news/178624/getting-in-face-of-ultra-orthodox-on-need-for-real/> [<https://perma.cc/T4LW-HWSG>]; Leslie Brody, Local Yeshiva Has Ardent Fans and Critics, *Wall St. J.* (Sept. 17, 2018), <https://www.wsj.com/articles/local-yeshiva-has-ardent-fans-and-critics-1537182001?> (on file with the *Columbia Law Review*); Shulem Deen, Opinion, Why Is New York Condoning Illiteracy?, *N.Y. Times* (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/opinion/yeshivas-literacy-new-york.html> [<https://perma.cc/T4LX-2D4F>]; Sonja Sharp, English Is Absent and Math Doesn't Count at Brooklyn's Biggest Yeshivas, *DNAinfo* (Jan. 22, 2013), <https://www.dnainfo.com/new-york/20130122/crown-heights/english-is-absent-math-doesnt-count-at-brooklyns-biggest-yeshivas> [<https://perma.cc/ZHR9-P2L9>]; *infra* note 6.

3. See *id.* at 40 (explaining that many yeshiva graduates do not possess a high school diploma and have extreme difficulty passing the GED high school equivalency test).

4. See Stacy Childress, Richard Elmore & Allen Grossman, How to Manage Urban School Districts, *Harv. Bus. Rev.*, Nov. 2006, at 55, 55–57; Jack Schneider, The Urban-School Stigma, *Atlantic* (Aug. 25, 2017), <https://www.theatlantic.com/education/archive/2017/08/the-urban-school-stigma/537966/> [<https://perma.cc/9HKC-8BWU>]; Naftuli Moster, Here Is Why YOU Should Care About Hasidic Children's Education, *Medium* (Nov. 27, 2016), <https://medium.com/@Yaffedorg/here-is-why-you-should-care-about-hasidic-childrens-education-b08bee4d0f35> [<https://perma.cc/RP5Q-RZPH>].

5. Editorial Bd., Opinion, New York's Yeshiva Students Deserve Better, *N.Y. Times* (Aug. 23, 2018), <https://www.nytimes.com/2018/08/23/opinion/yeshiva-orthodox-jews-deblasio.html> [<https://perma.cc/6Z24-EYDL>].

6. See, e.g., Elya Brudny & Yisroel Reisman, Opinion, New York State Targets Jewish Schools, *Wall St. J.* (Dec. 13, 2018), <https://www.wsj.com/articles/new-york-state-targets->

feature article, for example, details the perils and challenges facing ex-Hasids.⁷ The article centers around the heart-wrenching story of Faigy Mayer, a young ex-Hasidic woman trying to make it on her own in New York City, who jumped to her death from the upscale 230 Fifth Rooftop Bar.⁸ Faigy had struggled to find her place in mainstream society after leaving her Hasidic community of origin; those who knew her reported that this challenge was far beyond her capabilities and available resources.⁹ Faigy's death brought greater attention to the Hasidic community, sparking important conversations about education within the community and the limited opportunities available to those who have left it.¹⁰ Her struggle galvanized a community of ex-Hasids to bring the question of the adequacy of Hasidic education into the mainstream.¹¹

jewish-schools-11544745611 (on file with the *Columbia Law Review*); Deen, *supra* note 2; Michael A. Helfand, *The Case Against Yeshivas and the Future of Religious Liberty*, *Tablet* (Feb. 8, 2019), <https://www.tabletmag.com/jewish-news-and-politics/280239/the-case-against-yeshivas> [<https://perma.cc/MC8T-8H73>]; Doree Lewak, *These Taxpayer-Funded Jewish Schools Are Dooming Young Men to Poverty*, *N.Y. Post* (May 12, 2018), <https://nypost.com/2018/05/12/these-taxpayer-funded-jewish-schools-are-dooming-young-men-to-poverty/> [<https://perma.cc/N527-BNT9>]; Yossi Newfield, *Brooklyn Hasidim Lost a Vote—Which Might Save Their Children from a Life of Poverty*, *Forward: Scribe* (Nov. 12, 2018), <https://forward.com/scribe/414084/the-hasidic-elite-just-lost-a-powerful-swing-vote-and-their-students/> [<https://perma.cc/4WBT-LFBT>]; Eli Reiter, *Opinion, The Bigger Problem with the City's Yeshivas: Inspections Aren't Enough to Fix What Ails Many of Them*, *N.Y. Daily News* (Nov. 28, 2018), <https://www.nydailynews.com/opinion/ny-oped-the-bigger-problem-with-the-citys-yeshivas-20181127-story.html> [<https://perma.cc/Y583-LBCP>]; Valerie Strauss, *Lawsuit Accuses New York State of Giving Special Treatment to Ultra-Orthodox Jewish Schools*, *Wash. Post* (Aug. 3, 2018), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/08/03/lawsuit-accuses-new-york-state-of-giving-special-treatment-to-ultra-orthodox-jewish-schools/> (on file with the *Columbia Law Review*).

7. Taffy Brodesser-Akner, *The High Price of Leaving Ultra-Orthodox Life*, *N.Y. Times Mag.* (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/magazine/the-high-price-of-leaving-ultra-orthodox-life.html> [<https://perma.cc/JEW2-PE5F>].

8. *Id.*

9. See *id.* (“Her friends told me different stories, but ultimately, the only thing I could say about her was that she was sick and didn’t get the care she needed.”); Alexandra Levine, *Faigy Mayer’s Brave Life and Shocking Death*, *Forward* (July 25, 2015), <https://forward.com/news/317900/the-brave-life-and-shocking-death-of-faigy-mayer/> [<https://perma.cc/VBK7-4VMB>] (noting that “emotionally [Faigy] was still fragile” and that her friends reported “she lacked any enduring support from her family”).

10. Faigy’s death was widely reported in Jewish and popular media. See *supra* note 7; see also, e.g., Caitlin Keating, *Former Hasidic Jewish Woman, 29, Jumped to Her Death After Being Shunned by Parents*, *People* (July 22, 2015) <https://people.com/human-interest/woman-jumps-20-stories-to-her-death-from-new-york-city-rooftop-bar/> [<https://perma.cc/G47J-3NEF>]; Levine, *supra* note 9. An opinion piece written by Faigy was published after her death, highlighting the difficulties she and others encountered growing up in a Hasidic community. Faigy Mayer, *‘Leaving the Faith,’ Tablet* (July 23, 2015), <https://www.tabletmag.com/scroll/192412/leaving-the-faith> [<https://perma.cc/7X8T-GHXS>].

11. See Brodesser-Akner, *supra* note 7 (“[After Faigy’s death,] the lights stayed on at Footsteps, and members came in for an impromptu drop-in group.”); Shulem Deen, *Op-Ed: Faigy Mayer’s Suicide is a Jewish Tragedy, Not Just an Orthodox One*, *Jewish*

Pressure on the legislature has mounted due to the surging media attention on the problem of Hasidic education and a lawsuit in federal court challenging the constitutionality of a new amendment to New York's education law purporting to provide special exemptions for ultra-Orthodox Jewish schools.¹² As a result, New York issued guidelines for how New York school districts should handle private schools, including ultra-Orthodox Jewish schools (also called yeshivas), that refuse to abide by New York's compulsory education law and provide adequate instruction in secular subjects.¹³ In response to the issuance of the new guidelines, ultra-Orthodox Jewish leaders, as well as leadership of Catholic schools and private elite schools in New York, filed suit in New York state court against the New York State Education Department (NYSED) challenging the guidelines.¹⁴ Siding with plaintiffs, the New York Supreme Court struck down the "substantial equivalency" guidelines on procedural grounds, finding that by not providing notice and comment, NYSED did not follow the required procedure for enacting new rules.¹⁵

But almost immediately after the court struck them down, the state announced its intent to reissue the guidelines, this time properly classifying them as regulations and abiding by the procedural requirements for

Telegraphic Agency (July 24, 2015), <http://www.jta.org/2015/07/24/united-states/faigy-mayers-fall-is-a-jewish-tragedy-not-just-a-haredi-one> [<https://perma.cc/7L28-E3LC>] (noting that Faigy's death inspired advocacy for "a greater issue: of supporting freedom and choice for those who pursue it despite great costs"); Levine, *supra* note 9 (noting that Faigy Mayer's suicide "left the ex-Hasid community reeling, with many trying to understand not only how her death came to be, but also the effect it had on other ex-Hasids in her shoes").

12. New York City Schools Chancellor Richard Carranza acknowledged this fact in a letter he sent to the state. See Jake Offenhartz, *New Guidelines Could (Slowly) Reform NY's Controversial Yeshivas*, Gothamist (Nov. 21, 2018), http://gothamist.com/2018/11/21/yeshiva_ny_orthodox_jewish.php [<https://perma.cc/X2VU-WLDM>] ("The new regulations come amid ongoing controversy surrounding New York's ultra-Orthodox schools.").

13. The guidelines represented the New York State Education Department's interpretation of the New York state law that requires academic instruction in private schools to be "substantially equivalent" to that provided in public schools. See *infra* note 64 and accompanying text; see also Jeff Bessen, *New York State Supreme Court Strikes Down Private School Guidelines*, LIHerald.com (Apr. 25, 2018), <http://liherald.com/fivetowns/stories/new-york-state-supreme-court-strikes-down-private-school-guidelines-113995> [<https://perma.cc/C97L-Y7ZT>].

14. They sought to enjoin enforcement of the guidelines pursuant to Article 78, which provides a procedure through which citizens can petition for court review of agency actions. See Rich Karlin, *Private Schools Are Suing over New State Ed Regulations*, Times Union: Capitol Confidential (Mar. 7, 2019), <https://blog.timesunion.com/capitol/archives/286084/private-schools-are-suing-over-new-state-ed-regulations/> [<https://perma.cc/QAC3-UENE>].

15. Bessen, *supra* note 13; Rochel Leah Goldblatt, *State Supreme Court Strikes Down 'Substantial Equivalency' Guidelines for Private Schools*, Lohud (Apr. 18, 2019), <https://www.lohud.com/story/news/education/2019/04/18/state-court-strikes-down-substantial-equivalency-guidelines/3507728002/> [<https://perma.cc/2MBC-9DXC>].

enacting new rules.¹⁶ Alarmed, ultra-Orthodox¹⁷ Jewish leaders have since vowed to bring a free exercise challenge to the state's expected regulations.¹⁸ Hasidic schools are not alone; if history is precedent, New York Catholic schools—concerned that the new regulations may interfere with their control over their curriculum—will join forces with ultra-Orthodox Jewish organizations, such as Parents for Educational and Religious Liberty in Schools (PEARLS), in challenging the new rules.¹⁹

This Piece responds to the controversy around Hasidic and other forms of religious education by evaluating the viability of a free exercise claim on behalf of Hasidic schooling in an *Employment Division v. Smith*²⁰

16. See Nancy Cutler, State Education Chief Unveils Retooled 'Substantial Equivalency' Rules for Private Schools, *Lohud* (May 31, 2019), <https://www.lohud.com/story/news/local/rockland/2019/05/31/new-york-puts-forth-new-private-school-education-guidelines/1300079001> [<https://perma.cc/J88A-SZFS>].

17. "Ultra-Orthodox" refers to a general category of highly religious Jews, of which Hasidic Jews are a subset. For a discussion of the terminology used when referring to different denominations of Judaism, see generally Ayala Fader, *Mitzvah Girls: Bringing Up the Next Generation of Hasidic Jews in Brooklyn* 12–15 (2009); Samuel Heilman, *Defenders of the Faith: Inside Ultra-Orthodox Jewry* 11–39 (2d ed. 2000) [hereinafter Heilman, *Defenders*]; Ranaan Geberer, 'Ultra-Orthodox Jews': Who Are They?, *Brooklyn Daily Eagle* (Mar. 27, 2013), <https://brooklyneagle.com/articles/2013/03/27/opinion-ultra-orthodox-jews-who-are-they/> [<https://perma.cc/H2RL-AX3V>] ("All Hasidim are Ultra-Orthodox, but not all Ultra-Orthodox are Hasidim.").

18. See Yochonon Donn, *Snubbed by Court, NY State Takes Aim at Yeshivos Again*, *Yated Ne'emman* (June 7, 2019), <https://yated.com/snubbed-by-court-ny-state-takes-aim-at-yeshivos-again/> [<https://perma.cc/LY8E-5SSF>]. Proponents of yeshiva education vowed to bring suit when the guidelines were announced, too, and they followed through. See, e.g., Yisroel Besser, *No Sitting Out this Battle*, *Mishpacha* (Dec. 17, 2018), <https://mishpacha.com/no-sitting-out-this-battle/> [<https://perma.cc/AW6S-GSQV>]; see also *In the Matter of the 2019 - 2020 Executive Budget on Elementary and Secondary Education: Hearing Before the S. Fin. Comm. and Assemb. Ways & Means Comm., 2019 Leg. 557–62* (N.Y. 2019), https://nystateassembly.granicus.com/MediaPlayer.php?view_id=8&clip_id=4919 [<https://perma.cc/99KW-B726>] [hereinafter *Joint Legislative Budget Hearing*] (noting Rabbi Yeruchim Silber's testimony on behalf of Agudath Israel, in which he criticizes the NYSED guidelines and explains that his organization has retained counsel in anticipation of potential legal action); Naftuli Moster, *The Truth About the Struggle for Secular Education in Yeshivas*, *Medium* (Jan. 6, 2019), <https://medium.com/@Yaffedorg/the-truth-about-the-struggle-for-secular-education-in-yeshivas-67c7f3f4a32c> [<https://perma.cc/Y7Q2-LDUD>] ("Agudath Israel . . . is now gearing up to help failing Yeshivas sue the state in court.").

19. See *infra* note 94. After the NYSED guidelines were issued in November 2018, Catholic schools also refused to follow them. See Helfand, *supra* note 6; see also *Joint Legislative Budget Hearing*, *supra* note 18, at 562–67 (noting the testimony of Jim Cultrara on behalf of the NYS Catholic Conference, in which he echoes Rabbi Silber's concerns about the NYSED similar equivalency guidelines).

20. *Emp't Div. v. Smith*, 494 U.S. 872, 875 (1990) (holding that "because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug"). Of course, this assumes *Smith* remains good law. See Linda Greenhouse, *Opinion, Religious Crusaders at the Supreme Court's Gates*, *N.Y. Times* (Sept. 12, 2019), <https://www>.

world in which free exercise has been declared moribund.²¹ Numerous parties have an interest in shaping the future of Hasidic education: the parents, who have religious and parental rights; the state, which has an interest in providing and enforcing standardized education but must respect religious freedom; and the children, who have, at the very least, a state right to receive a basic secular education.²² These interests are not easily balanced. As Judge I. Leo Glasser wrote in his opinion dismissing the Young Advocates for Fair Education's (YAFFED) Establishment Clause challenge, "Legal formalities aside, it is apparent that the real question in this case is how to balance competing values, both of which must be cherished in a free and democratic society, but either one of which, if allowed to expand to its logical conclusion, would swallow the other."²³ The question Hasidic education presents, and that Judge Glasser shied away from answering, is how the triangular relationship among these parties and their respective interests can and should be balanced. In exploring this question, this Piece investigates whether constitutional law is—and to what extent it should be—involved in the education of people like Faigy. And it brings to light the curricula and educational philosophy of Hasidic schools and subjects them to the normative concerns of constitutional analysis.

The Piece proceeds in three Parts. The first Part describes Hasidic education in New York. The second Part discusses New York education law, how it applies to Hasidic education, and recent litigation over Hasidic education. The third Part outlines current free exercise jurisprudence, explores the constitutional issues implicated by Hasidic education, and provides a roadmap for how the complex case of Hasidic education should be adjudicated.

I. BACKGROUND

A. *Hasidism in America*

Hasidism is a revolutionary Jewish movement that emerged in eighteenth-century Russia and spread rapidly throughout most of Eastern Europe.²⁴ The movement arrived at America's shores just after World

nytimes.com/2019/09/12/opinion/supreme-court-religion.html [https://perma.cc/Y3SR-K3GM].

21. See Shawn Francis Peters, *The Yoder Case: Religious Freedom, Education, and Parental Rights* 176 (2003) (noting that *Smith* "effectively sounded the death knell for *Yoder*"). But see R.F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 877 (2001) ("If [Professor] Volokh is correct . . . religious liberty is indeed dead as a constitutional principle. But Volokh is not correct.").

22. E.g., N.Y. Const. art. XI.

23. *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 226 (E.D.N.Y. 2019); see *infra* notes 74–78 and accompanying text.

24. See Rachel Elior, *The Mystical Origins of Hasidism* 1 (2006).

War II.²⁵ Today, American Hasidim (those who adhere to Hasidism) largely live in close-knit, secluded communities in Williamsburg, Borough Park, and Crown Heights (in Brooklyn) as well as in Monroe, Monsey, New Square, and Kiryas Joel (in upstate New York).²⁶ The movement is premised on Jewish pietistic mystical teachings and, as a result of these proclivities, Hasidim are often referred to as *chareidi*,²⁷ or “trembling,” as in “trembling before God.”²⁸ There are many branches of Hasidism, each led by a different charismatic Hasidic master, or *rebbe*.²⁹ These branches are often ideologically distinct, featuring separate communities and schools;³⁰ nonetheless, all Hasidim adhere to the same principles of radical pietism and insularity.³¹

Hasidim resist acculturation and assimilation at all costs.³² While Hasidism stands for many principles and contains numerous distinctive religious features, its most central value, which represents its core identity, is rejection of modernity and secularism.³³ In the wake of the Holocaust, when many Jews—mistakenly, according to Hasidic *rebbe*s—began to place their hope in securing a secular homeland in Israel,³⁴ the Hasidim opted instead to recommit themselves to their pietistic, sacred way of life.³⁵ If society would not impose segregation upon them and thereby ensure their separateness, as it once had, Hasidic sects would

25. See Jonathan D. Sarna, *American Judaism: A History* 296–97 (2004).

26. See *id.* at 296–98.

27. This term also includes other denominations, such as the so-called “black-hatters,” or ultra-Orthodox Jews. See Sarah Bunin Benor, *Becoming Frum: How Newcomers Learn the Language and Culture of Orthodox Judaism* 9–10 (2012).

28. As a result of their “trembling,” they are highly scrupulous in following traditional Jewish law. See Heilman, *Defenders*, *supra* note 17, at 12–13.

29. See generally Samuel C. Heilman, *Who Will Lead Us: The Story of Five Hasidic Dynasties in America* 1–7 (2017) [hereinafter Heilman, *Who Will Lead Us*] (“[Rebbs] were endowed with what their Hasidim considered remarkable personalities and righteous character that they could and would use for the good of others.”).

30. See Allan L. Nadler, *The Hasidim in America* 9–23 (1994) (detailing “distinctive characteristics” of different Hasidic sects, including location, ideology, education system, degree of religious zealotry, and level of interaction with those outside of the Hasidic community). These distinctions can be significant; as a result, the Hasidic community cannot always be viewed as one homogenous group. See *id.*

31. See William Shaffir, *Boundaries and Self-Presentation Among the Hasidim: A Study in Identity Maintenance*, *in* *New World Hasidim* 31, 40 (Janet S. Belcove-Shalin ed., 1995).

32. See Sarna, *supra* note 25, at 296–98; see also Heilman, *Who Will Lead Us*, *supra* note 29, at 156 (describing the avoidance of “any sort of modernization or acculturation”).

33. See Sarna, *supra* note 32, at 296–98; see also Heilman, *Who Will Lead Us*, *supra* note 29, at 171–76 (describing the actions taken by one Hasidic sect to isolate its members from the modern world in New York City).

34. Zara Steiner, *The Promising Land: Early Zionism*, 69 *History* 238, 238–50 (1984).

35. See Harry Rabinowicz, *Hasidim: The Movement and Its Masters* 397 (rev. ed. 1988). See generally Heilman, *Defenders*, *supra* note 17, at 29–33.

segregate themselves by erecting a parallel system of rules and institutions to protect themselves from modern and secular influences.³⁶

B. *Hasidic Schooling's Curriculum and Its Results*

Due to their religious convictions regarding secular studies, Hasidim reject secular studies fervently and for all intents and purposes do not provide such studies in their schools.³⁷ At the outset, it must be noted that the education provided in Hasidic schools for boys and girls can be substantially different; girls receive more secular education than do boys.³⁸ Therefore, when outlining the education system in Hasidic communities, this Piece focuses on Hasidic boys schools. As part of their amicus brief on behalf of YAFFED, Footsteps, an organization that assists those who have left ultra-Orthodox communities, conducted extensive interviews with its members.³⁹ Based on this research, Footsteps explained that:

[T]he only education in secular subjects that boys in the Hasidic yeshiva system receive occurs while they are in *cheder* (elementary school), and between the ages of 7 and 13. “English” instruction (as the time devoted to secular studies is

36. See generally Sarna, *supra* note 32, at 296–98.

37. VINnews, Satmar Rebbe, Rabbi Aron Teitelbaum Slams NYS Education, YouTube (Nov. 28, 2018), <https://youtube.com/watch?v=w287i6hya40> (on file with the *Columbia Law Review*) (consisting of a speech by the Satmar Rebbe—the leader of the Satmar Hasidic sect—in which he explains that Satmar elementary schools provide little secular education and Satmar high schools none at all); see also Naftuli Moster, Satmar Rabbi's Speech on New “Substantial Equivalency” Guidelines, Medium (Dec. 4, 2018), <https://medium.com/@Yaffedorg/satmar-rabbis-speech-on-new-substantial-equivalency-guidelines-c11f783ee961> (on file with the *Columbia Law Review*) (providing a translation of the Satmar Rebbe's speech, which was given in Yiddish).

38. This is largely because Hasidic education in boys schools is comprised mostly of the study of Jewish religious texts, while in many Hasidic communities, girls are prohibited from studying certain categories of those texts. See Fader, *supra* note 17, at 25; George Kranzler, *Hasidic Williamsburg* 176–78 (1995); see also Yoel Teitelbaum, *Ma'amar Loshon HaKodesh*, in *VaYoel Moshe* 403, §§ 37, 47 (2005–2006) (1961) (discussing the Satmar Hasidic sect's prohibition against women studying many religious texts). But see Menahem Mendel Scheerson, *Al D'var Chiyuv Nshei Yisroel B'Chinuch U'Blimud HaTorah* [On the Matter of the Obligation of Jewish Women in Education and Teaching of Torah] reprinted in *2 Sefer Hasichos* 5750 171, 171–75 (4th prtg. 2010) (presenting the Chabad Hasidic sect's perspective on the importance of emphasizing women's education and study of Jewish religious texts). As some have suggested, the education girls receive may well be inadequate, but for the reasons discussed above, this Piece does not focus on that question. See Brief of Amicus Curiae Footsteps, Inc. in Support of Plaintiff's Motion for a Preliminary Injunction at 5, *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215 (E.D.N.Y. 2019) (No. 18-CV-4167 (ILG) (JO)), 2018 WL 8805266.

39. See Brief of Amicus Curiae Footsteps, Inc. in Support of Plaintiff's Motion for a Preliminary Injunction, *supra* note 38, at 1–4 (“This brief gives voice to more than twenty Footsteps members and volunteers who were interviewed . . . and described their experiences with how Hasidic yeshivas in New York State are systematically failing the young people they are supposed to serve.”).

called) takes place for only 45 to 90 minutes at the end of a long school day (up to 10 hours), four days per week. It is typically limited to rudimentary English reading[,] writing[,] and arithmetic. And, it is often taught by teachers who barely know English themselves.⁴⁰

Dovid Katz, a resident of Monroe, New York, for example, has three sons—ages nine, ten, and twelve—all of whom attend Hasidic schools. For all three, the school day begins at 7:30 AM and ends at 5:45 PM. While Jewish studies are taught from morning until late afternoon, secular studies are taught only from 4:45 PM until 5:45 PM, “one hour, at the end of day after long, long day.”⁴¹ When secular studies commence, “everyone is exhausted, the studies are not enforced, there’s lots of trouble with the kids, no one cares, the kids are just having a great time, and there’s mischief.”⁴² Because Hasidic instructors of secular studies are not only woefully underqualified but are of the belief that secular studies are a waste of time at best,⁴³ during the single hour that secular instruction is provided, the teachers are “not teaching; [rather] they are just containing and trying to get the children to behave, sometimes with a story, [but] just to occupy them. [Yet] there is no emphasis, because no one is pushing it.”⁴⁴ Dovid has not received a report card for his children’s progress in their secular studies in years. When he did receive a report card, it “didn’t say anything; it just said that they are well behaved.”⁴⁵ As if all this were not enough, when the “oldest turns thirteen in the summer, next year . . . he will have absolutely zero secular education.”⁴⁶ This is because according to Jewish law once male students turn thirteen they are responsible for their actions⁴⁷ (including not studying secular subjects).

Because Dovid is unusual in his community and does care that his boys receive a secular education, he has gone out of his way to purchase Rosetta Stone software to teach them English. However, he realizes the irony of young Americans using such software to learn what would otherwise be their native tongue: “[T]his is meant for immigrants,” he says.⁴⁸ His ten-year-old still doesn’t know the English alphabet. Dovid is worried, and for good reason, that “going forward they will know very little. Maybe they will get something on their own, but they won’t be

40. See *id.* at 5.

41. Interview with Dovid Katz, in Monroe, NY (Feb. 21, 2017). I have changed Dovid’s name to protect his anonymity.

42. *Id.*

43. See *supra* note 40 and accompanying text.

44. Interview with Dovid Katz, *supra* note 41.

45. *Id.*

46. *Id.*

47. See Ivan G. Marcus, *The Jewish Life Cycles: Rites of Passage from Biblical to Modern Times* 84 (2004).

48. Interview with Dovid Katz, *supra* note 41.

prepared for real life. I want them to be able to do anything they want to do, but this won't be so."⁴⁹ Thanks to their father's efforts, Dovid's boys may achieve at least some basic literacy in English. Their peers at yeshiva, however, will not. According to Dovid, it is not uncommon for Hasidim to be unable to read highway signs or important government documents found in their mailboxes.⁵⁰ Indeed, many cannot even identify that they have received mail of importance, such as a jury summons.⁵¹ They are "illiterate and are missing the first steps of communication."⁵² If "someone can string together a sentence or type an email, people are wowed. 'You must have gone to college or something!', they say."⁵³ Hasidim's "letters are so full of holes. Even their text messages. You need to decipher what they mean. It's like [they] are from a different country. [They] grew up here but [are] just like immigrant[s]."⁵⁴

II. HASIDIC SCHOOLS AND NEW YORK STATE LAW

Compulsory education laws are primarily in the hands of the states.⁵⁵ The Supreme Court has acknowledged the states' "paramount responsibility" in determining educational norms and in executing them, a responsibility that empowers states "to impose reasonable regulations for the control and duration of basic education."⁵⁶ As a result, they determine and enforce much of education law. All states have compulsory education laws, and many state constitutions provide for a "right" to basic education.⁵⁷ New York is no exception.⁵⁸ New York's Constitution pro-

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. See Samuel M. Davis, *Children's Rights Under the Law* 128 (2011).

56. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

57. See Davis, *supra* note 55; Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 *J.L. & Econ.* 93, 96-97 (1989). Yet, as it stands, there is no federal constitutional right to an education. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court rejected plaintiffs' argument that access to education represents a fundamental right. 411 U.S. 1, 37-39 (1973). Plaintiffs' claim was predicated on education's social importance and the fact that meaningful exercise of other constitutional rights requires an education. See *id.* at 29-30; *id.* at 62 (Brennan, J., dissenting). Rather, the Court held that wealth is not a suspect classification nor is "equal education" a fundamental right, and the school funding system at issue passed rational basis review. *Id.* at 28, 35-36, 41-42, 54-55 (majority opinion). In *Plyler v. Doe*, a case challenging barriers to public education for undocumented children, the Court applied an intermediate level of scrutiny without overruling *Rodriguez*. 457 U.S. 202, 223-24 (1982). Instead of revisiting their prior ruling on the right to an education, the Justices focused on the dangers of discrimination based on alienage and national origin. *Id.* at 221-22.

58. See Davis, *supra* note 55, at 129. Mississippi, which had repealed its compulsory school requirement in 1956 after desegregation had spread in America, reenacted a

vides for “the maintenance and support of a system of free common schools, wherein all the children of this state may be educated”⁵⁹ and entrusts the New York State legislature with the task of delineating and exercising the state’s educational mandate.⁶⁰

According to New York state law, “[i]n each school district of the state, each minor from six to sixteen years of age shall attend upon full time instruction.”⁶¹ English must be the language of instruction, and the textbooks used must be written in English,⁶² so as “to enable [students] to develop academically while achieving competence in the English language.”⁶³ Instruction in private schools must be “substantially equivalent” to that required of public schools in the same district.⁶⁴ This means in part that students in private schools must receive instruction for at least as many hours as provided by public schools.⁶⁵ Twelve subjects must be covered in first through eighth grade: arithmetic, reading, spelling, writing, English, geography, U.S. history, civics, hygiene, physical training, New York history, and science.⁶⁶ For the remaining four years of high school, five subjects are required to be part of the curriculum, including the “English language and its use, civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the Constitution of the United States.”⁶⁷ In addition to these subjects, private schools in New York must offer instruction in patriotism, citizenship, and human rights (with particular attention to the study of genocide, slavery, and the Holocaust) for students over eight years of age.⁶⁸ Lastly, all

mandatory-education statute in 1976, making compulsory education the norm for every single state and the District of Columbia. *Id.* at 129 n.34.

59. N.Y. Const. art. XI, § 1.

60. The laconic language of New York’s Education Clause itself does not describe the level of education that must be provided. See *id.*

61. N.Y. Educ. Law § 3205(1)(a) (McKinney 2017).

62. *Id.* § 3204.2. This is the case except for a limited time (three to six years) for students with limited English proficiency. *Id.*

63. *Id.*

64. *Id.* To determine substantial equivalency courts have looked to: (1) the competency of the instructor(s); (2) “the extent . . . to which a lack of social intercourse with other children,” if applicable, “deprives [the child] of an equivalent education”; and (3) if (1) and (2) are satisfied, “whether the child is, in fact, receiving an equivalent education by means of the materials, curriculum, and methodology provided” by the alternative educational institution. In *re Franz*, 84 Misc. 2d 914, 917 (N.Y. Fam. Ct. 1976); see also In *re Thomas H.*, 78 Misc. 2d 412, 418–19 (N.Y. Fam. Ct. 1974).

65. N.Y. Educ. Law § 3205(1)(a). An education outside of a public school is substantially equivalent “if the child is receiving adequate instruction in all the subject areas required under the law for the periods of time required.” In *re Franz*, 84 Misc. 2d at 922. Worth mentioning as well is that teachers are required to keep accurate records of attendance. See N.Y. Comp. Codes R. & Regs. tit. 8, § 104.1 (2019); N.Y. Educ. Law § 3211.

66. N.Y. Educ. Law § 3204(3)(a)(1).

67. *Id.* § 3204(3)(a)(2).

68. *Id.* § 801(1).

schools in New York must provide health education on alcohol, drugs, and tobacco abuse.⁶⁹

The New York Court of Appeals, the highest court in New York, has outlined the minimum for what constitutes a constitutionally adequate education. Starting with *Campaign for Fiscal Equity, Inc. v. State*, the Court of Appeals has held that the New York State Constitution requires the state to extend to children the opportunity to obtain a basic education⁷⁰ and that this education must consist of the basic literacy, calculation, and verbal skills necessary to enable them to function productively as civic participants capable of voting and serving on a jury.⁷¹ If the pedagogical services and resources made available are not adequate to provide children with the opportunity to obtain these essential skills, the state is deemed to have failed to satisfy its constitutional obligation.⁷²

Virtually all reports indicate that Hasidic schools do not provide this “adequate” education and are in flagrant violation of New York state law.⁷³ In an attempt to shield Hasidic schools from these requirements, an amendment to New York’s education statutes—called the “Felder Amendment,” after the Jewish Orthodox state senator from Brooklyn who

69. *Id.* § 804.

70. 655 N.E.2d 661, 666 (N.Y. 1995). *Campaign for Fiscal Equity* was the first case in which the Court of Appeals dealt with the state’s constitutional education provision, which required the state to provide an adequate education. Plaintiffs in the case requested declaratory judgment on the grounds that the state’s school finance system failed to provide the sound basic education required of it by the New York State Constitution. *Id.* at 664.

71. *Id.* at 666.

72. *Id.* Unfortunately, however, the words of Justice Marshall in his *Rodriguez* dissent, that education adequacy standards are “unintelligible and without directing principle,” still ring true. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 90 (1973) (Marshall, J., dissenting). The exact parameters of what constitutes an adequate basic education under New York state law remain vague. Further, despite New York courts’ sympathies for ensuring that an adequate education is made available to all children, the state seems far less enthusiastic about enforcing its standards when there is religious opposition. See Jake Offenhardt, Report: Cuomo Promised Not to Interfere with Yeshivas Before Receiving Grand Rebbe’s Endorsement, *Gothamist* (Sept. 4, 2018), https://gothamist.com/2018/09/04/cuomo_yeshivas_satmar.php [<https://perma.cc/ESQ6-RJTM>] (reporting that both New York Governor Cuomo and his opponent in the 2018 Democratic primary, Cynthia Nixon, avoided the issue of Hasidic education while campaigning).

73. See, e.g., *Young Advocates for Fair Educ.*, *supra* note 1, at 2–3, 7 (“Tens of thousands of children attending these schools, also known as yeshivas, are being denied the education to which they are entitled under New York State law.”); *supra* notes 2, 6; cf. *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 222 (E.D.N.Y. 2019) (noting the limited secular education that yeshiva students receive). Boys studying at Hasidic yeshivas in New York are taught exclusively in Yiddish and receive an education that is almost singularly focused on religious studies. The secular education they do receive is limited to basic English and arithmetic. *Young Advocates for Fair Educ.*, *supra* note 1, at 4, 31–32.

championed it⁷⁴—was issued in April of 2018 that purportedly provides special exemptions for ultra-Orthodox Jewish schools.⁷⁵ The amendment permits the education department to consider “soft” factors when determining whether such schools are providing a “substantially equivalent” education, including whether the curriculum in question “develops critical thinking skills.”⁷⁶ In July of 2018, YAFFED brought suit in federal court, naming New York Governor Andrew Cuomo and a number of high-level New York education officials as defendants.⁷⁷ YAFFED argued that the new amendment was specifically intended to lower the “substantially equivalent” standard for ultra-Orthodox yeshivas, specifically, and thus ran afoul of the Establishment Clause.⁷⁸ The case was ultimately dismissed by Judge Glasser on the grounds that plaintiff, a nonprofit organization devoted to advocacy, lacked standing.⁷⁹

The dismissal of YAFFED’s case is not the end of the story but rather the beginning. In part due to the mounting pressure on the state from YAFFED’s lawsuit, New York issued new guidelines that purported to give teeth to its education law as applied to Hasidic schools.⁸⁰ As Judge Glasser pointed out in his opinion dismissing YAFFED’s case, the “great irony . . . is that even though YAFFED allege[d] that the Felder Amendment was designed to reduce the amount of secular education provided at Hasidic yeshivas, it may have precisely the opposite effect.”⁸¹ According to the revised guidelines, elementary and middle schools in New York must teach core subjects, such as mathematics, science, English, social

74. Steve Lipman, ‘Felder Amendment’ Challenged in Federal Suit, *N.Y. Jewish Wk.* (July 25, 2018), <https://jewishweek.timesofisrael.com/felder-amendment-challenged-in-federal-suit/> [<https://perma.cc/BKW3-GLM2>].

75. See N.Y. Educ. Law § 3204(2)(ii)–(v) (McKinney 2018) (“[T]he department shall consider the following but not limited to: if the curriculum provides academically rigorous instruction that develops critical thinking skills in the school’s students, the outcomes of which, taking into account the entirety of the curriculum, result in a sound basic education.”).

76. *Id.*

77. See Lipman, *supra* note 74.

78. See *Young Advocates for Fair Educ.*, 359 F. Supp. 3d., at 219.

79. *Id.* at 238.

80. The 2018 Revised Guidelines were available on the NYSED’s website but were later updated in 2019 to reflect the more recent Guidelines. Compare Substantial Equivalency, N.Y. State Educ. Dep’t (Nov. 20, 2018), <https://web.archive.org/web/20181128223937/http://www.nysed.gov/nonpublic-schools/substantial-equivalency> [<https://perma.cc/CC85-XHQL>] (2018 Guidelines), with Substantial Equivalency, N.Y. State Educ. Dep’t (July 3, 2019), <http://www.nysed.gov/nonpublic-schools/substantial-equivalency> [<https://perma.cc/WV3T-WL5C>] (2019 Guidelines); see also Lindsey Christ, NY Outlines New Guidelines for What Private Schools Must Teach, *Spectrum News N.Y.* 1 (Nov. 20, 2018), <https://www.nyl.com/nyc/all-boroughs/politics/2018/11/21/ny-outlines-new-regulations-for-what-private-schools-must-teach> [<https://perma.cc/H4W2-8RUT>] (describing the political and administrative controversy surrounding the 2018 guidelines).

81. *Young Advocates for Fair Educ.*, 359 F. Supp. 3d. at 226.

studies, art, and health.⁸² The guidelines required that for grades seven and eight, schools must teach approximately 3.5 hours of secular studies per day.⁸³ The guidelines further provided that all nonpublic schools, including yeshivas, must be inspected by December 2021,⁸⁴ and that if a school is found noncompliant—for example, if a middle school yeshiva is not teaching at least seventy-two minutes of mathematics every day⁸⁵—government-funded services, such as textbooks and transportation, will be withheld and students will be declared truant.⁸⁶

Responding to these new guidelines, ultra-Orthodox Jewish leaders and leadership of Catholic schools and private elite schools in New York sued NYSED in New York state court, challenging the guidelines.⁸⁷ They argued that the guidelines violated established New York law regarding how much regulation NYSED could provide for nonpublic schools in the absence of explicit direction by the legislature.⁸⁸ Plaintiffs argued that the New York State Administrative Procedures Act (SAPA) for new regulations was not followed, as what the state labeled “guidelines” were actually rules or regulations within the meaning of the SAPA.⁸⁹ Plaintiffs contended that NYSED did not follow the procedures required—such as giving the public notice of the proposed rule and an opportunity to comment—for issuing rules or regulation.⁹⁰ As a result, plaintiffs requested an order declaring the new guidelines null and void and staying enforcement of the guidelines.⁹¹

82. N.Y. State Educ. Dep't, Commissioner's Determination of Substantial Equivalence 24 (2018), <https://web.archive.org/web/20181128223937/http://www.nysed.gov/common/nysed/files/programs/nonpublic-schools/cd-elementary-middle-tools.docx> (on file with the *Columbia Law Review*) [hereinafter N.Y. State Educ. Dep't, Commissioner's Determination].

83. Press Release, Teach NYS, Teach NYS Confirms 3.5 Hour Daily Core Subject Requirement (Grades 7 and 8) in NYSED Enforcement Guidance (Dec. 20, 2018), <https://teachcoalition.org/nys/teach-nys-confirms-3-5-hour-daily-core-subject-requirement-grades-7-and-8-in-nysed-enforcement-guidance/> [https://perma.cc/4FSE-QV6E].

84. N.Y. State Educ. Dep't, Substantial Equivalency in Religious and Independent Schools: Responsibilities of Local School Authorities and Religious and Independent School Leaders 7 (2018), <https://web.archive.org/web/20181221150411/http://www.nysed.gov/common/nysed/files/programs/nonpublic-schools/substantial-equivalency-presentation.pdf> (on file with the *Columbia Law Review*).

85. N.Y. State Educ. Dep't, Commissioner's Determination, *supra* note 82, at 24 (calculating the seventy-two-minute minimum based on the stated requirement that students receive two units (180 minutes each) of mathematics per week).

86. *Id.* at 9.

87. See *supra* note 14 and accompanying text.

88. Parents for Educ. & Religious Liberty in Schs. v. Rosa, No. 901354-19, p. 6 (N.Y. Sup. Ct. Apr. 29, 2019).

89. Verified Petition at 31–34, *Rosa*, No. 901354-19 (N.Y. Sup. Ct. Apr. 29, 2019).

90. *Id.* at 42–43.

91. *Id.* at 48.

Although the guidelines have temporarily been struck down on procedural grounds,⁹² given the state's proclamation that it will imminently reinstate the guidelines as regulations,⁹³ advocates for Hasidic education will continue to shift their posture from the defensive in protecting the constitutionality of the amendment to the offensive in challenging the forthcoming regulations on free exercise grounds.⁹⁴

92. *Rosa*, No. 901354-19, p. 7–8.

93. See Press Release, N.Y. State Educ. Dep't, State Education Department Proposes Regulations for Substantially Equivalent Instruction for Nonpublic School Students (May 31, 2019), <http://www.nysed.gov/news/2019/state-education-department-proposes-regulations-substantially-equivalent-instruction> [<https://perma.cc/X4KZ-FE2L>]. The public comment period closed in early September 2019. At the time of this writing, final regulations have not yet been released. *Id.*

94. See, e.g., Chris McKenna, *State Tries Again to Regulate Private Schools*, *Times Herald-Record* (Jul. 3, 2019), <https://www.recordonline.com/news/20190703/state-tries-again-to-regulate-private-schools> [<https://perma.cc/4SUZ-ERFG>] (noting that an advocacy group for Orthodox schools “denounced the new regulations as ‘nothing more than a repackaging’ of the [2018] guidelines” and that “[f]urther litigation is likely”).

The free exercise challenge the ultra-Orthodox community is preparing to bring has been previewed in its challenge to the previous guidelines and in an amicus brief submitted by Parents for Educational and Religious Liberty in Schools in support of the Felder Amendment. See *supra* notes 74–79 and accompanying text. The Amendment was the subject of an Establishment Clause challenge in federal court in the Eastern District of New York. See *supra* notes 77–79 and accompanying text. PEARLS argued that the state not only can, but also must, provide an accommodation to ultra-Orthodox Jewish schools and not hold them to the same standard as other private schools in New York that do not religiously oppose secular education. See Brief of Amici Curiae in Opposition to Plaintiff's Motion for a Preliminary Injunction at 14, *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d. 215 (E.D.N.Y. 2019) (No. 18-CV-4167 (ILG) (JO)), 2018 WL 8805269 (“YAFFED’s constitutional arguments have it entirely backwards. They are not merely wrong when asserting that the Felder Amendment violates the Establishment Clause. They seek to put the State in violation of the Free Exercise Clause . . .”).

Indeed, there is another avenue through which the free exercise claim of proponents of yeshiva education may see the light of day. In the event that the new regulations do not have their intended effect, proponents of secular education in Hasidic schools will be able to resort to litigation. So long as proponents of secular education in Hasidic schools can recruit a parent who currently has a child enrolled in a Hasidic school, the named plaintiff-parent will have standing and will be procedurally well positioned to pursue state statutory and state constitutional claims in state court. It is unlikely that many Hasidic parents would suddenly come forward to bring suit against the very schools to which they voluntarily send their children. But all that is needed is one parent to agree to serve as a plaintiff, and it is certainly possible that one such parent exists. Dovid, discussed above, is an example of one such parent who likely would be willing, if not eager, to bring suit against the state and against Hasidic schools. See *supra* section I.B. Should such a parent come forward, that parent could bring a state statutory claim for mandamus to compel state and local officials who are tasked with the implementation of state education law to take action to force Hasidic schools to comply with statutes mandating minimum standards in private schools. The plaintiff may seek mandamus relief to enforce mandatory duties of administrative agencies under N.Y. C.P.L.R. 7803.1 (McKinney 2003). Such relief in this context would include an injunction. See *Leibowitz v. Dinkins*, 575 N.Y.S.2d. 827, 828 (App. Div. 1991).

III. FREE EXERCISE OF RELIGION

In this Part, I address the viability of a free exercise challenge to state regulations enforcing compulsory education standards in Hasidic schools. Given current free exercise jurisprudence, to be successful such a challenge would require showing that a constitutional right in addition to free exercise has been infringed. I argue that although Hasidic parents may be able to do so, regulation that is narrowly tailored to compelling state interests—like the regulation mandating basic secular education in all schools—would override a challenge by Hasidic parents.

The first two sections outline free exercise, parental control, and “hybrid-rights” jurisprudence. This Part then considers whether and to what extent secular education can be considered a “passive” activity for Hasidic children. Finally, this Part concludes by explaining how ensuring secular education for all children would meet the standard of strict scrutiny.

A. *Hasidic Schools’ “Hybrid Rights”*

Hasidic schools and parents who wish to protect the Hasidic education system from the new guidelines issued by New York have invoked the constitutional right to free exercise as well as the constitutional right to parental control.⁹⁵ Although New York state law unequivocally requires that every private school comply with its education standards,⁹⁶ proponents of Hasidic schooling will argue—as they have recently argued in their amicus brief—that New York must provide an accommodation to Hasidic parents whose religious beliefs forbid them from providing their children with instruction in nonreligious studies.⁹⁷

However, should suit be brought against Hasidic schools and against the Department of Education of New York for not enforcing state educational standards, plaintiffs will face strong communal and political opposition. It is a well-known fact that Hasidic communities wield an extremely powerful voting bloc. See, e.g., John Kifner, *Birth of a Voting Bloc: The Hasidim and Orthodox Organize*, N.Y. Times (May 2, 1989), <http://www.nytimes.com/1989/05/02/nyregion/birth-of-a-voting-bloc-the-hasidim-and-orthodox-organize.html> [<https://perma.cc/T5UB-2MQ4>]. Not well known, however, are the mechanisms by which the Hasidic community publicizes to its constituents which candidates they should support. The irony is that Hasidic leadership uses Hasidic children to deliver these messages to parents during election season. See Josh Nathan-Kazis, *The Mechanics of a Hasidic Bloc Vote*, Forward (Sept. 10, 2013), <https://forward.com/news/breaking-news/183675/the-mechanics-of-a-hasidic-bloc-vote/> [<https://perma.cc/4EZ5-PBLR>]. Additionally, plaintiffs would face legal hurdles in the form of a free exercise argument explored below. See *infra* Part III.

95. See Brief of Amici Curiae in Opposition to Plaintiff’s Motion for a Preliminary Injunction, *supra* note 94, at 14.

96. See N.Y. Educ. Law § 3294(1) (McKinney 2018).

97. See Brief of Amici Curiae in Opposition to Plaintiff’s Motion for a Preliminary Injunction, *supra* note 94, at 14–16, 18–25.

On first glance, existing free exercise doctrine would offer little shelter to Hasidic schools. In *Employment Division v. Smith*, the Court essentially announced the end of this type of free exercise challenge.⁹⁸ In *Smith*, the Court refused to recognize an exemption for the sacramental use of peyote, an illegal drug, by members of the Native American Church.⁹⁹ In doing so, the Court declared that it was reverting largely to the position that it had first announced in *Reynolds v. United States*¹⁰⁰—namely, that the Free Exercise Clause does not require exemptions to generally applicable rules even when they substantially burden religious practice.¹⁰¹ Under *Smith*'s restrictive rule, claims for exemptions from general laws are nearly always rejected and religious claimants are denied relief even from substantial burdens on the exercise of religion,¹⁰² with the exception of when the government has deliberately targeted their religious conduct for discriminatory disadvantage.¹⁰³ After *Smith*, “generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.”¹⁰⁴ In essence, the Court in *Smith* declared that facially neutral laws affecting religious conduct do not require any form of heightened scrutiny.

New York State education law mandating a minimal level of secular education¹⁰⁵ certainly has a neutral purpose and is generally applied. And so, one has good reason to assume that under *Smith*, the Hasidic schools' free exercise claim fails. Some states have enacted religious freedom restoration acts, which statutorily provide what *Smith* constitutionally took away, but New York is not one such state.¹⁰⁶

Free exercise jurisprudence is not entirely straightforward, though. Despite *Smith*'s general neutralization of the Free Exercise Clause,

98. 494 U.S. 872, 878–79, 882 (1990).

99. *Id.* at 874, 878–79, 882.

100. 98 U.S. 145, 161–62, 166–67 (1878) (upholding the polygamy conviction of a practicing Mormon despite his beliefs).

101. *Smith*, 494 U.S. at 878–79, 882.

102. See, e.g., *Hines v. S.C. Dep't of Corr.*, 148 F.3d 353, 357–58 (4th Cir. 1998) (holding that a prison “grooming policy” is “a neutral and generally applicable regulation and, therefore, does not violate the Free Exercise Clause” even though it conflicted with inmates' religious beliefs).

103. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524, 533 (1993) (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” (citations omitted)).

104. *Smith*, 494 U.S. at 886 n.3.

105. N.Y. Educ. Law § 3204(1) (McKinney 2018).

106. See Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 106 (1996); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 844 & n.22; State Religious Freedom Restoration Acts, Nat'l Conf. of State Legislatures (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/MT2Q-VMBE>].

Hasidic schools might nonetheless be in a position to successfully raise a free exercise challenge by asserting, in addition, the right of parental control over education. In *Wisconsin v. Yoder*, members of the Old Order Amish religion and the Conservative Amish Mennonite Church had been convicted under Wisconsin's compulsory education statute for removing their children from public school after eighth grade.¹⁰⁷ The Amish parents maintained that the established practice of their religion called for their children to leave school after eighth grade, at which point they would participate in a "program of informal vocational education" at home, which emphasizes religious, agricultural, and domestic instruction.¹⁰⁸ The Court determined that the conflict between the state and the Amish was to be resolved by balancing the parents' right to free exercise of religion against the state's interest in compulsory school attendance.¹⁰⁹ The Court concluded that Wisconsin's compulsory education statute was unconstitutional as applied to the Amish.¹¹⁰

Justice Scalia argued that *Smith* is distinguishable from *Yoder*—perhaps as a concession to those Justices he needed to convince to sign his opinion and to avoid the hassle of having to overrule *Yoder*—since in *Yoder* the defendants were able to marshal two rights rather than just one right.¹¹¹ The Amish parents in *Yoder* had invoked their right of free exercise, but they also raised their right of parental control¹¹² derived from *Meyer v. Nebraska*¹¹³ and *Pierce v. Society of Sisters*.¹¹⁴ The result of this distinction (between free exercise claims that include the freedom of religion "in conjunction with other constitutional protections" and those that embody only a free exercise claim) is Scalia's "hybrid-rights" doctrine.¹¹⁵ This doctrine establishes that a state regulation overriding free exercise rights *and* other constitutional guarantees must be subjected to

107. 406 U.S. 205, 207–08 (1972).

108. *Id.* at 210–12, 222.

109. See *id.* at 237 (White, J., concurring) ("Cases such as this one inevitably call for a delicate balancing of important but conflicting interests.").

110. *Id.* at 235–36 (majority opinion).

111. *Emp't Div. v. Smith*, 494 U.S. 872, 881–82 (1990). Some scholars argue that *Smith* impacts the viability of *Yoder*. See, e.g., Ralph D. Mawdsley, Has *Wisconsin v. Yoder* Been Reversed? Analysis of *Employment Division v. Smith*, 63 *Educ. L. Rep.* 11, 19–20 (1990) (suggesting that although *Smith* does not reverse *Yoder*, it has severely restricted *Yoder*'s applicability to the Free Exercise Clause). One scholar has gone so far as to say that *Smith* "effectively sounded the death knell for *Yoder*." See Peters, *supra* note 21.

112. *Yoder*, 406 U.S. at 213–14, 232–33.

113. 262 U.S. 390, 400 (1923) ("[The plaintiff's] right to teach [German] and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment.").

114. 268 U.S. 510, 530–31, 534–35 (1925) (holding that an Oregon statute requiring that children attend public schools violates "the liberty of parents and guardians to direct the upbringing and education of [their] children").

115. *Smith*, 494 U.S. at 881–82.

strict scrutiny.¹¹⁶ Therefore, a rule that burdens religious practice, even if nondiscriminatory, can trigger heightened scrutiny if the law also burdens or impairs another constitutional interest, such as freedom of speech or freedom of association.

While the Supreme Court has never squarely addressed the scope and applicability of “hybrid rights,” a number of lower courts have done so.¹¹⁷ Appellate courts usually interpret hybrid claims narrowly, granting their validity only in those specific scenarios enumerated in *Smith*.¹¹⁸ Appellate courts seem to find in favor of the religious party only when such a finding could stand on one of the two constitutional rights asserted when the rights are analyzed independently.¹¹⁹ Some courts have explicitly rejected *Smith*’s hybrid rights as mere dictum or simply as doctrine that is nonjusticiable, if not untenable.¹²⁰ The rare court that

116. Some scholars, noting that *Yoder* has never been overturned, have acknowledged that only a supplemental claim plus a religious claim results in protection. See, e.g., Duncan, *supra* note 21, at 858 (“[I]t is equally true that the sum of a number of fractions—one-half plus one-half, for example—may equal one.”).

117. See Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 NYU. L. Rev. 1045, 1046 (2000) (“In the wake of *Smith*, confusion abounds in the lower courts, which interpret the Court’s new test in significantly divergent ways.”).

118. *Id.* at 1068.

119. See, e.g., Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 214 (1994) (“[The hybrid rights exception has been judicially limited] precisely because it had the potential to swallow the rule.”); see also Kaplan, *supra* note 117, at 1063 (“[The First Circuit] has recognized a hybrid claim only where free exercise rights are implicated in conjunction with fully cognizable parental rights.”). For the Free Exercise Clause to do any work in a hybrid case, of course, the other constitutional claim would have to be inadequate, standing alone, to trigger the same degree of scrutiny. The Supreme Court has done nothing to explain the appropriate constitutional arithmetic, nor has it otherwise elaborated the hybrid claim theory that it advanced in *Smith*. Some lower courts have suggested that the theory might be viable if the companion constitutional claim is “colorable,” but most have either rejected the theory as dictum or else have required that the companion claim be independently viable. Compare *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998) (“Whatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one’s child.”), with *Kissinger v. Bd. of Trs. of the Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (“[W]e did not hold that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights.”), and *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (rejecting a hybrid rights claim when “plaintiffs’ allegations of interference with family relations and parental prerogatives do not state a privacy or substantive due process claim”). See generally William L. Esser IV, Note, *Religious Hybrids in the Lower Courts*, 74 Notre Dame L. Rev. 211, 229–35 (1998).

120. See, e.g., *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231 (3d Cir. 2008). In *Combs*, a case involving a challenge by home-schooling parents to Pennsylvania’s compulsory education law, the Third Circuit undertook a thorough survey of the various approaches taken by other circuits. After discussing a number of cases and noting that “[t]he criterion applicable to a free exercise claim combined with a companion

does take *Smith's* hybrid-rights doctrine seriously seems to do so more in theory than in practice.¹²¹ These courts look for, and typically find, a distinguishing characteristic that differentiates the case at bar from *Yoder*. For example, some courts find that the history of religious belief at the center of the case is not as sincere, or as developed, or even as old, as the religious belief at the center of *Yoder*.¹²² Yet, despite lower courts' apathy (and in some cases antipathy) toward *Smith's* hybrid-rights analysis, a court would have a hard time dismissing a free exercise challenge to New York's compulsory education law. *Yoder* is still good law, and the hybrid rights of free exercise and parental control implicated by Hasidic education are on their face similar to the rights propounded in *Yoder*.¹²³ Both cases involve significantly burdened religious practices grounded in religious convictions that are sincerely held, dealing with religions that have long histories, and coupled with the right to parental control. This last "right," the right to parental control, however, is perhaps in need of further elaboration.

B. *The Right to Parental Control and Hybrid Rights*

Although substantive due process rights from the *Lochner* Era have for a long time been vehemently struck down or weakened out of existence—so much so that they have joined the ranks of the *anticanon*¹²⁴—two early Supreme Court decisions establishing the substantive due process right of parental control have stayed on the books as good law and continue to be cited and relied on. *Meyer v. Nebraska* and *Pierce v. Society of Sisters* enacted and confirmed a fundamental right to the care,

constitutional right was left undefined" in *Smith*, announced: "[U]ntil the Supreme Court provides direction, we believe the hybrid rights theory to be dicta." *Id.* at 246–47.

121. See Kaplan, *supra* note 117.

122. See *id.*

123. In making this comparison, this Piece addresses only the similarity between the implicated rights (to religious freedom in an educational context and to parental control in the same) on their face. It does not address a number of factual dissimilarities, including the amount of secular education provided during elementary school, in particular, and other sociological differences that might meaningfully alter the comparison, nor does it engage in a more preliminary investigation into whether the right provided in *Yoder* is itself constrained by a "limiting principle" that takes into account the degree of education provided to the children, among other considerations. Such a discussion is beyond the scope of this Piece; I will address these questions in a subsequent article.

124. See generally Jamal Greene, *The Anticanon*, 125 *Harv. L. Rev.* 379, 386–87 (2011) ("[A]nticanonical cases [are] those that 'any theory worth its salt must show are wrongly decided' and [are] 'wrongly decided cases that help frame what the proper principles of constitutional interpretation should be.'" (citation omitted) (first quoting J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 1018 (1998); then quoting J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 *Cardozo L. Rev.* 1513, 1553 (1999))).

custody, and management of one's children.¹²⁵ In *Meyer*, the Court struck down a Nebraska statute that prohibited the teaching of certain foreign languages to children. The Court invalidated Nebraska's ordinance on the grounds that "the individual has certain fundamental rights which must be respected"¹²⁶—to wit, parents' right to control the education of their children.¹²⁷

The term "fundamental right" was used only once in *Meyer*, and the Court did not elaborate on its meaning.¹²⁸ However, this did not stop the Court two years later in *Pierce*—when the question of parental control as a defense against state interference was once again raised—from focusing on the *Meyer* Court's passing reference to fundamental rights.¹²⁹ Due to the perceived centrality of parental rights in *Meyer*, the *Pierce* Court invalidated a statute that required parents to send their children to public school. The Court held that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control" which is protected by "rights guaranteed by the Constitution."¹³⁰

Closer examination of *Meyer* and *Pierce*, the two founding pillars of constitutional parental control rights, reveals a gap between the Court's reasoning and its holding. The Court in *Meyer* and *Pierce* used what today would be called "rational basis" scrutiny as its metric for determining whether the state's prohibition—either against teaching certain foreign languages or against refusing to send one's child to public school—was constitutional. The regulations in question in *Meyer* and *Pierce* were found to be unconstitutional because they did not reasonably promote a government interest.¹³¹ As a result of the Court's tethering its conclusion to a mere reasonableness standard, some lower courts have resolved that

125. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

126. *Meyer*, 262 U.S. at 401.

127. Justice McReynolds grounded his fundamental rights analysis in tradition, finding the right to be fundamental because "[t]he American people have always regarded education . . . as [a] matter of supreme importance" and because a parent's right to "bring up children . . . [was a] privilege[] long recognized at common law." *Id.* at 399–400.

128. *Id.* at 401 ("That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically and morally, is clear; but the individual has certain fundamental rights which must be respected.").

129. *Pierce*, 268 U.S. at 534.

130. *Id.* at 534–35 ("Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." (citation omitted)).

131. See, e.g., *id.* at 536 (finding the statute in question to be an "arbitrary, unreasonable, and unlawful interference" with constitutional rights); *Meyer*, 262 U.S. at 403 (finding that because the "inhibition with consequent infringement of rights long freely enjoyed" caused by the statute was "arbitrary and without reasonable relation to any end within the competency of the state," it could not be permitted).

Meyer and *Pierce* prove nothing with respect to the enactment of an affirmative constitutional right to parental control, and as a result, have refused to apply heightened scrutiny to parental rights challenges.¹³² It is important to point out, however, that it is only because *Meyer* and *Pierce* were decided before the Court's development of the current two-tiered substantive due process analysis that they were couched in the language of "rational basis."¹³³ While it may be confusing as to whether we should prioritize an earlier Court's *test* or its *rationale* for providing that test when the two conflict on modern constitutional terms, it makes much sense to conclude that the constitutional *principles* that underlie earlier cases should inform our determination of whether precedent provides for a fundamental right. Although "scrutiny" is the defining feature of constitutional rights today, tiers of scrutiny rest entirely on the existence of the constitutional rights and principles that underlie and trigger them in the first place. Thus, it is the principles and not the tests of *Meyer* and *Pierce* that should matter to us, though we live in a different constitutional milieu than the one that existed when these cases were decided.

Before forging forward, it is worth pointing out that, in addition to the confusion caused by using a modern lens when examining cases decided decades before the Court designed the tests used today to evaluate the constitutionality of state actions, the right of parental control presents yet another complication. Whenever a fundamental constitutional right is discovered (or "invented," depending on one's point of view), its applicability in future cases rests almost entirely on how broadly the courts choose to interpret the right. A right can be understood as confined to the context in which it originally arose, or it can be interpreted as a general principle with a broader application;

132. See, e.g., *People v. Bennett*, 501 N.W.2d 106, 111–12 (1993) ("Defendants argue that . . . as parents, they have a fundamental right to direct their children's education. We do not, however, find that the cited cases should be so interpreted. . . . We conclude that parents do not have such a constitutional right requiring a strict scrutiny standard." (emphasis omitted)).

My point should not be construed to mean that reasonableness in *Meyer* and *Pierce* and rational basis are exactly the same test. Rather, it is that the language used by the Court in these landmark cases sounds in rational basis in such a way that, at the very least, it raises confusion when looked at through modern lenses informed by the "rational basis" test. The test the Court used in the *Meyer* and *Pierce* cases was "arbitrariness." Putting that into contemporary doctrinal parlance, it maps fairly closely onto "rational basis." Something has no rational basis if it's arbitrary.

133. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1286 (2007) (explaining that the Court viewed "reasonableness" as a "definitional requirement of valid exercises of the police power," rather than a standard of review).

there are no governing rules regarding how broadly or narrowly a given fundamental right should be construed.¹³⁴

Finding a right to parental control may therefore prove challenging. Precisely due to the indeterminacy inherent in evaluating and applying fundamental constitutional rights, courts have found it fairly easy to reject parental control claims on the ground that the right established by *Meyer* and *Pierce* is extremely narrow.¹³⁵ In *Combs v. Homer-Center School District*, for instance, a case in which religious parents challenged state-mandated reporting of their children's educational progress, the Third Circuit construed both the right claimed by the parents and the right established by *Meyer* and *Pierce* extremely narrowly.¹³⁶ It is no wonder that the court found "the particular right asserted in this case—the right to be free from all reporting requirements and 'discretionary' state oversight of a child's home-school education—has never been recognized."¹³⁷ According to the Third Circuit's logic, there is no general right to parental control. Rather, there is a right to control one's children in the specific context in which the Supreme Court previously found there to be such a right. The right invoked by the parents, in other words, is not a general one, but a right to do a particular action in a particular context—namely, to educate one's children at home without state oversight.¹³⁸ Since the *Combs* court construed the right asserted by the parents so narrowly, it was only natural for it to conclude that there is no such right to the *specific* action under question, as there is no prior case that established such a right.¹³⁹

While it most likely would have made little difference to the outcome of *Combs* had the court first recognized the right to parental control and then overruled it, the rejection of the right of parental control could have serious ramifications in other contexts—including ours. For a determination of whether Hasidic parents may compel the state to defend its prescription of educational content for all children in New York, or conversely, if the state may dismiss parents' free exercise

134. See Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1099 (1990) ("[J]udges must squarely face the task of deciding how abstractly to define our liberties.").

135. See, e.g., *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 249 (3d Cir. 2008). Indeed, the *Combs* court not only dismissed plaintiffs' claim to parental control because it is not a fundamental right, but also concluded that plaintiffs failed even to muster a "colorable claim" to bolster the free exercise argument and engender a "hybrid right" under *Smith*. *Id.*

136. See *id.* at 247 ("Although Parents assert the fundamental nature of their general right, it is a limited one.").

137. *Id.*

138. *Id.* at 249.

139. The court noted that "[p]arents identify the general right to control the education of one's child. But Parents do not have a constitutional right to avoid reasonable state regulation of their children's education." *Id.*

challenge in light of *Smith*, the question of whether such a right to parental control exists is rather consequential. To this end, importantly, despite the persistent confusion in lower courts about the existence of a right to parental control under the Constitution, and although a number of lower courts have all but ignored it, as recently as the year 2000, the Supreme Court has made clear that the right recognized in *Meyer* and *Pierce* exists, is general, and is broadly applicable.¹⁴⁰

The Court in *Troxel v. Granville* relied on *Meyer* and *Pierce* for the proposition that parental control is a “fundamental right,”¹⁴¹ which, when implicated, triggers “heightened protection.”¹⁴² *Troxel* examined state interference in parental decisions regarding custody and visitation. In *Troxel*, grandparents petitioned for increased visitation with their two granddaughters who had lost their father (plaintiffs’ son) to suicide.¹⁴³ A Washington statute permitted “[a]ny person to petition a superior court for visitation rights at any time,” and had authorized the state court to determine if and when visitation would serve the best interests of the children and to grant or deny visitation rights accordingly.¹⁴⁴ Concluding that it was in the children’s best interests, the Superior Court of Washington held that the grandparents should be granted visitation, despite the objection of the children’s mother.¹⁴⁵ The case then went to the U.S. Supreme Court, which held that the state’s interference with a mother’s choice to not afford her in-laws visitation violated her constitutional right to the parental control of her children.¹⁴⁶ Although the Court did not conclusively explain how control should be allocated between the state and parents, and the Court’s failure to “define the precise boundaries of a parent’s right to control a child’s upbringing and education”¹⁴⁷ has resulted in confusion among lower courts,¹⁴⁸ what is

140. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). The *Troxel* decision, however, did not provide finality as to the scope of right of parental control or as to the applicable level of scrutiny, and the *Meyer* and *Pierce* analyses still remain relevant. See *infra* notes 147–148.

141. *Id.*

142. *Id.* at 65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

143. *Id.* at 60.

144. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Wash. Rev. Code § 26.10.160(3) (1996) (amended 2018)).

145. *Id.* at 60–62. The Washington Court of Appeals reversed this ruling, but the Washington Supreme Court subsequently affirmed it. *Id.*

146. *Id.* at 75.

147. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005).

148. Some lower courts have continued to refuse to recognize the right to parental control due to the Supreme Court’s lack of clarity as to the correct scrutiny test with which to examine parental control challenges. See, e.g., *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003) (recognizing that, even after *Troxel*, the scope of the *Meyer–Pierce* right of parents to “direct the upbringing and education of children under their control” remains “undefined” (internal quotation marks omitted) (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925))).

important for our purposes is that the Court has confirmed parental control as a constitutional right.¹⁴⁹

Thus, considering that hybrid rights—free exercise of religion joined with the right of parental control—will be at issue in a case regarding Hasidic schooling, any court evaluating the constitutionality of a state’s compulsory education laws will have a difficult time outrightly dismissing a constitutional challenge by parents despite the diminishing effects of *Smith* on a substantial segment of free exercise claims.

C. *Is Education Different? Education as Passivity*

While I have discussed the availability of the right to parental control, one might ask whether free exercise itself, the other necessary component to a hybrid-rights claim, is properly implicated when the regulation at issue pertains to *education*. When considering the legality of Hasidic education, it is important to remember that Hasidic parents *do* enroll their children in schools and that the schooling some Hasidic children receive is, in fact, rigorous.¹⁵⁰ The issue in the Hasidic schooling controversy is not whether children are enrolled in school, but what is being taught at their schools: in other words, the *content* of the education. Whether a free exercise challenge to state enforcement of certain content being taught in schools will constitute a valid hybrid-rights claim rests on the extent to which certain educational content can be seen as a burden on religious exercise. In the important Sixth Circuit case, *Mozert v. Hawkins County Board of Education*, the court examined how educational content is to be evaluated vis-à-vis religious free exercise.¹⁵¹ *Mozert* stands for the proposition that because education by its nature is “passive,” it does not warrant constitutional free exercise protection. In 1983, in compliance with a Tennessee state statute mandating its public schools to promote character education, the Hawkins County Board of Education began requiring its schools to use a multicultural reading series—Holt Reading Series—for children in grades one through eight.¹⁵² A group of fundamentalist Christian parents responded by demanding an accommodation for their children on the ground that the content of the Holt reader was incompatible with their religious

149. See *Troxel*, 530 U.S. at 66–68 (“[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

150. See, e.g., Moshe Krakowski, What Yeshiva Kids Are Actually Studying All Day, *Forward* (Dec. 26, 2018), <https://forward.com/life/faith/416616/what-yeshiva-kids-are-actually-studying-all-day/> [<https://perma.cc/5XJY-AJ54>] (“[Y]eshiva students’ ‘religious education’ centers mainly on close textual study of a canon of ancient and medieval texts central to Jewish life: the Torah, the Talmud, and a near infinite body of commentaries on both.”). Even if *Smith* were overturned, see *supra* note 20, it would still be necessary to show that receiving secular education is not a “passive” experience and therefore burdens the free exercise of religion.

151. 827 F.2d 1058 (6th Cir. 1987).

152. *Id.* at 1059–60.

convictions.¹⁵³ When the Board refused to accommodate them, the parents filed suit.¹⁵⁴ The court found for the state and held that the public school's curricular choice was not unconstitutional under the First Amendment.¹⁵⁵

The parents in *Mozert* objected to the Holt reading series because they believed it was designed to instill an appreciation for multiculturalism resting on epistemological foundations at odds with their fundamentalist beliefs.¹⁵⁶ More specifically, one of the parents, Vicki Frost, opposed the series on the grounds that it encouraged students to "use [their] imagination[s] beyond the limits of scriptural authority,"¹⁵⁷ employed rhetoric that equated humans with God, and presented the overall message of tolerance to divergent systems of belief.¹⁵⁸ Therefore, Frost and other parents argued that the mandatory use of the Holt series burdened their First Amendment right to the free exercise of religion, since the state action involved the indoctrination of the school board's own values, namely, of secular humanism.¹⁵⁹

The Hawkins County Board of Education responded by arguing that there was no free exercise issue at play, since the children were not made to engage in any *act* aligned with the ideas taught and that they were not coerced to adopt as true any of the diverse worldviews taught in the Holt series.¹⁶⁰ The state argued, and the court agreed, that since the state did not endorse the worldviews but just taught them, there were no Free Exercise or Establishment Clause concerns.¹⁶¹

The court's reasoning in *Mozert* rested on an assumption that there is a difference between religious practice and affirmation on the one

150. *Id.* at 1060–62.

154. *Id.* at 1060–61.

155. *Id.* at 1070.

156. *Id.* at 1060–62.

157. Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* 330 (2008) (internal quotation marks omitted) (quoting plaintiff Vicki Frost).

158. See Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 *Harv. L. Rev.* 581, 593–97 (1993). The reading material encouraged the *Mozert* children to take their parents' religious traditions less seriously, by implying that religious faith is a matter of opinion, rather than fact. The *Mozert* parents believed that "mere exposure" to alternate beliefs would have profound and damning eternal consequences, even if it did not cause the *Mozert* children to waver in their personal religious beliefs. See *id.* at 612–13.

159. *Mozert*, 827 F.2d at 1061–63.

160. See *id.* at 1066.

161. See *id.* at 1066, 1070 ("Being exposed to other students performing these acts might be offensive to the plaintiffs, but it does not constitute the compulsion described in the Supreme Court cases.").

hand and mere absorption of ideas on the other.¹⁶² It held that exposure is not the same as indoctrination: So long as the children were not required to *accept* particular views, the Board could mandate reading certain texts and could refuse to accommodate students whose religious sensitivities were at odds with these texts and ideas.¹⁶³ Crucially, the court in *Mozert* found that “there was no proof that any plaintiff student was ever called upon to say or do anything that required the student to affirm or deny a religious belief or to engage or refrain from engaging in any act either required or forbidden by the student’s religious convictions.”¹⁶⁴ Rather than mandate particular practices or affirmations of beliefs (or, for that matter, *disbeliefs*), the school district merely required that students be *exposed* to certain ideas. As then-Chief Judge Pierce Lively put it: “It is abundantly clear that the exposure to materials in the Holt series did not compel the plaintiffs to declare a belief, communicate by word and sign [their] acceptance of the ideas presented, or make an affirmation of a belief and an attitude of mind.”¹⁶⁵

To fortify the court’s distinction between passive exposure and active participation, Lively went to great lengths to distinguish the facts in *Mozert* from those in *West Virginia State Board of Education v. Barnette*, the famous 1943 case in which the Court forbade mandatory flag saluting in public schools.¹⁶⁶ One might presume that Justice Jackson’s stirring words in *Barnette*, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion or force citizens to confess by word or act their faith therein,”¹⁶⁷ would support a decision in favor of the parents in *Mozert*. Yet, Lively used *Barnette* as fodder to fortify the court’s position that exposure and active declaration are incomparable. The court concluded that the two cases were different because *Barnette* involved an act—saluting the flag—whereas in *Mozert* what was challenged was merely reading a text.¹⁶⁸ Only if the children had been compelled to profess a belief, thus forcing them to perform a

162. See *id.* at 1070 (noting that the use of the reading series “does not create an unconstitutional burden . . . when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice”).

163. Consequently, while the case was pending in the lower courts, the *Mozert* families withdrew their children from public school and educated them at home. *Id.* at 1060.

164. *Id.* at 1064.

165. *Id.* at 1066 (internal quotation marks omitted) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631, 633 (1943)).

166. 319 U.S. 624 (1943).

167. *Id.* at 642.

168. *Mozert*, 827 F.2d at 1066. Indeed, Lively pointed out that the school exposed students to diverse ideas and allowed, perhaps required, them to remain indifferent to and keep a distance from those ideas precisely so that the students would be able to evaluate them using dispassionate critical reasoning. No particular attitude or point of view was pressed on the students apart from, perhaps, the bid to remain rational, detached, and critical, which was certainly not an undertaking with religious content. *Id.* at 1064.

religious act or to declare a viewpoint in tension with their religious convictions (akin to flag saluting), would the case have required a different legal outcome.¹⁶⁹ Due to the lack of a serious burden on free exercise, the Sixth Circuit determined that strict scrutiny did not apply and that therefore the state's curricular mandate was lawful.¹⁷⁰

Mozert may seem attractive as a persuasive precedent in support of a finding in favor of the state and against Hasidic schooling proponents who challenge New York's compulsory education laws. Yet there is also good reason to believe that *Mozert* would not support the state's regulations in the case of Hasidic schooling, which reminds us that not all religious communities or the reasons they have for opposing secular education are the same. The example of Hasidic schooling puts into sharp relief the fact that the *Mozert* court's dichotomy between ideas and practice, and affirmation and absorption, is not defensible. In Orthodox Judaism, and certainly in the ultra-Orthodoxy of which Hasidism is a subset, study and practice cannot be extricated from one another. The study of Torah, which is valued as the crown jewel of religious experience and is deemed obligatory for every Jewish male, is a "deed" just as much, if not more than, the performance of any ritual.¹⁷¹ Indeed to *not* study Torah is to actively commit a sin.¹⁷² In the case of Hasidism, the difference between passivity and activity is merely semantic.

Passivity is not a neutral option for the Hasidim for several reasons. One of Hasidism's central issues with secular studies is the opportunity cost that comes with it. While one is occupied with secular studies, one is not studying sacred texts, and not studying sacred texts when one is able to study them is nothing short of sinful.¹⁷³ Further, since secular studies originate from the "other side" (a Kabbalistic term attributed to all things devoid of intrinsic holiness) and are therefore themselves ontologically evil according to Hasidic ideology, the sheer absorption of secular ideas in one's mind is in itself sinful.¹⁷⁴ In *Mozert*, plaintiffs had an

169. In Lively's words: "If the Hawkins County schools had required the plaintiff students either to believe or say they believe that 'all religions are merely different roads to God,' this would be a different case." *Id.* at 1069.

170. See *id.* at 1070.

171. See Norman Lamm, *Torah Lishmah: Torah for Torah's Sake in the Works of Rabbi Hayyim of Volozhin and His Contemporaries* 138–39 (1989).

172. See *id.* at 116–17.

173. Shneur Zalman, *Hilchos Talmud Torah* (1794), reprinted in 5 *Shulchan Aruch HaRav* 441, ch. 3, § 7 (Kehot Publ'n Soc'y 2008) (1816) (stating that studying the wisdoms of the world is forbidden); Shneur Zalman, *Likutei Amarim Tanya 33* (Kehot Publ'n Soc'y 1981) (1797) [hereinafter Shneur Zalman, *Tanya*] ("[H]e who occupies himself with the sciences of the nations of the world is included among those who waste their time in profane matters . . .").

174. The term in Kabbalistic parlance is "sitra achra." Shneur Zalman, *Tanya*, *supra* note 173, at 35 (writing that injecting one's mind with secular knowledge contaminates the reified intellectual component of the divine soul with the impurity that is found in these wisdoms); see also Nathaniel Berman, *Divine and Demonic in the Poetic Mythology*

issue with children's exposure to certain foreign worldviews; Hasidism is opposed to the very experience of the mind's engagement with secular ideas. For Hasidism, children doing anything for the purposes of absorbing ideas that are "secular" is inherently negative and harmful.¹⁷⁵ Ill-conceived viewpoints may eventually be corrected, but time spent in sin cannot be recaptured.¹⁷⁶ Thus the "passive" absorption of secular ideas (including those that would appear neutral, like math and science¹⁷⁷), is sacrilegious according to Hasidic philosophy.¹⁷⁸ Thus, although it was clear to the court in *Mozert* that state law mandating certain kinds of instruction in public schools does not trigger constitutional scrutiny, in the case of Hasidic schooling, the religious burden cannot be dismissed on the ground that the objectionable activity represents "mere exposure."

Finding that a constitutionally protected interest has been burdened is not the end of the analysis, however. When the state impedes a constitutional right, a predetermined level of scrutiny of the regulation in question is triggered. Scholars and jurists are often wary of applying strict scrutiny—the most probing of constitutional tests—on the assumption that the test is "'strict' in theory and fatal in fact."¹⁷⁹ But as seen with the example of Hasidic education, in certain contexts it is unjustified to be so cautious of conducting a balancing test and applying the severest of constitutional tests. Ensuring that all children receive a basic secular education would almost certainly meet the standards of strict scrutiny.

D. *Enforcing Secular Education and Strict Scrutiny*

When the government is perceived to be impinging upon a core constitutional right, only the most pressing circumstances can justify government action.¹⁸⁰ If the governmental interests, or, put differently, its ends, are compelling, courts ask whether the law is a narrowly tailored means of furthering those governmental interests. Narrow tailoring requires that the law capture within its reach no more activity than is necessary to advance those compelling ends. This test has also been phrased as

of the Zohar 5 (2018); Rachel Elio, *The Mystical Origins of Hasidim* 29 (2006). For an overview of Shneur Zalman's life and worldview, see generally Immanuel Etkes, *Rabbi Shneur Zalman of Liady: The Origins of Chabad Hasidism* (2014).

175. Shneur Zalman, Tanya, *supra* note 173, at 33–35.

176. See, e.g., Teitelbaum, *supra* note 38, at § 40.

177. This is because they are not from the Torah or its commentary.

178. This is due to Hasidism's belief that the source of such knowledge is "impure." See Shneur Zalman, Tanya, *supra* note 173, at 35.

179. Gerald Gunther, *The Supreme Court, 1971 Term: Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 8 (1972).

180. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (arguing that constitutional rights are not absolutes and that "[p]ressing public necessity" may warrant interference).

determining whether the law is the “least restrictive means” available to pursue those ends.¹⁸¹

A state has an interest in establishing standards for the education of its young in order to prepare them for participation in American political and economic processes as well as to nurture and develop their human potential.¹⁸² These state interests almost certainly qualify as compelling¹⁸³ and should override the interest of parents in teaching their children in a religious school or at home free from governmental interference.¹⁸⁴ Basic education has numerous benefits: It ensures that children grow into adults who can effectively communicate with others in English; it imparts shared civic values, including the virtues and workings of democratic government and a respect for the Constitution; it equips

181. See *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”).

182. See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995) (explaining that New York requires an education to include the “basic literacy, calculating, and verbal skills necessary to enable children to eventually . . . [be] capable of voting and serving on a jury”).

183. See *id.* at 666 (“We think it beyond cavil that the failure to provide the opportunity to obtain such fundamental skills as literacy and the ability to add, subtract and divide numbers would constitute a violation of the Education Article.”).

184. The decision to override a minority religious community's entrenched practice, it should be noted, triggers a liberal tension that is implicated whenever there is a live question whether to grant liberty to a nonliberal community. Something has to give—either the community's autonomy is circumvented or the individual community members' autonomy is jeopardized. It is often difficult, if not impossible, to protect both the autonomy of a community that adheres to illiberal principles and the autonomy of its constituents. Chandran Kukathas, an ardent libertarian, has proposed a solution to this conundrum. He believes that illiberal communities should be permitted nearly unlimited freedom, including the ability to restrict the freedoms and rights of their members, so long as and on the grounds that the community's members have the right to exit. See Chandran Kukathas, *Are There Any Cultural Rights?* in *The Rights of Minority Cultures* 228, 238–39 (Will Kymlicka ed., 1995). As Kukathas sees it, if an individual is oppressed or subordinated within their cultural or religious group, they always have the option of exiting the group. See *id.* at 248, 250. By not exiting, they consent to the illiberalism of the community to which they belong, and the state should respect that choice. *Id.* While Kukathas should be credited for at least attempting to reconcile the paradox triggered when a government chooses to protect the autonomy of an illiberal minority community, his justification for granting maximal liberty to these communities works at most in theory but hardly in practice. Hasidism is the case in point that puts the lie to Kukathas's wishful thinking. As Ayelet Shachar has persuasively argued, exit options are only possible if those being reared in the isolationist community in question are equipped with the skills needed to navigate the world outside the insular community in which they grew up. See Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* 69 (2001). To assume that members of isolationist religious communities have realistic opportunities to exit them is to be grossly insensitive to the realities of these communities. Without basic secular education, many Hasidim speak only Yiddish. See Brief of Amicus Curiae Footsteps, Inc. in Support of Plaintiff's Motion for a Preliminary Injunction, *supra* note 38, at 5. This language barrier alone would make it nearly insurmountable for them to leave their community of birth. See *id.*

children for college and a range of careers so they can earn an income, have a sense of self-worth, and contribute to the tax base and society; and it gives students choices small and large, sparking creativity, engendering tolerance, and encouraging critical thinking about their local communities and the world at large. To these points, New York's *Campaign for Fiscal Equity* education adequacy case, for example, has importantly offered a definition of education as "consist[ing] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."¹⁸⁵

Indeed, the Supreme Court and other federal courts have long recognized that "education is perhaps the most important function of state and local governments."¹⁸⁶ As the Court in *Brown v. Board of Education* stated, education "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."¹⁸⁷ When children lacking the maturity and experience to make an independent judgment concerning the course of their educational future are denied the paramount privilege of an education that meets minimum standards, a compelling state interest is implicated. The state, as well as the affected individual, has an interest in assuring that that individual's education provides them a fair opportunity to become a "self-reliant and self-sufficient" participant in society.¹⁸⁸ State-defined minimum instructional standards enacted to protect the integrity of a state's educational systems are critical to prepare students for the workforce, for participation as citizens, and to inculcate fundamental values necessary to the maintenance of a democratic political system.¹⁸⁹

The compelling state interest standard has been upheld for state oversight of homeschooling. The Eighth Circuit, for example, has held that the state's interests in governmental oversight of religious homeschooling are compelling and that the means of standardized testing in furtherance of those interests are sufficiently tailored. In *Murphy v. Arkansas*, the appellants argued that in requiring home-schooled children to take achievement tests, the Arkansas Home School Act deprived them of their free exercise right.¹⁹⁰ Upholding the Arkansas statute, the court found that Arkansas's statutory testing requirements

185. *Campaign for Fiscal Equity*, 655 N.E.2d at 666.

186. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

187. *Id.* at 493.

188. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

189. See *Ambach v. Norwick*, 441 U.S. 68, 76 (1979); see also *Blackwelder v. Sadneaur*, 689 F. Supp. 106, 106 (N.D.N.Y. 1988) (upholding the constitutionality of N.Y. Education Law § 3204(2), which governs the minimum standards of instruction for school-age children taught outside of public schools).

190. *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988).

embodied in the Home School Act were the least restrictive means of achieving the state's compelling interest.¹⁹¹

As with the Amish in *Yoder*, the parents in *Murphy* came armed with sincere religious objections to a state regulation. The parents contended that “their religious beliefs require[d] [that] they must be *completely* responsible for *every* aspect of their children's education,”¹⁹² a religious tenet that would be infringed if the state were allowed to interfere. Accepting the sincerity of the religious parents' objections, the court determined that the claim triggered strict scrutiny analysis. The court hailed education as “a preeminent goal of American society” reaching back “through the collective memory of the Republic”¹⁹³ and invoked glowing language from *Yoder* and *Brown* regarding its value. Pointing to education's instrumentalization in positioning “citizens to participate effectively and intelligently in our open political system” and enabling them to be “self-reliant and self-sufficient participants in society,” the court concluded that the state had a compelling interest in children's education.¹⁹⁴

Once the state's compelling interest in children's well-being is construed at a high level of generality,¹⁹⁵ as it was in *Murphy*, it is but an easy step for courts to determine that the state's *means* of promoting its interest are narrowly tailored.¹⁹⁶ While it is beyond the scope of this Piece to determine the specific mechanism that is the least restrictive, it is reasonable to assume that there exist mechanisms, whether input or output focused, of furthering the state's interest in education that are sufficiently narrowly tailored.¹⁹⁷ Considering the high value attributed to compulsory education in American history, a court would undoubtedly be hard-pressed to conclude that mandating basic secular education in Hasidic schools does not muster strict scrutiny. As the Supreme Court has

191. *Id.* at 1041.

192. *Id.*

193. *Id.*

194. *Id.* at 1042 (internal quotation marks omitted) (quoting *Yoder*, 406 U.S. at 221) (affirming the reasoning of the lower court that the state has a compelling interest in insuring its citizens have access to an adequate education).

195. See Fallon, *supra* note 133, at 1321–26.

196. See *Murphy*, 852 F.2d at 1042–43; see also Fallon, *supra* note 133, at 1326–32.

197. There are a variety of state interventions that could increase the amount of secular education schoolchildren receive. Broadly, these interventions can be bucketed into input, or *ex ante* (for example, mandating a certain amount of secular education be taught, as New York has) and output, or *ex post* (for example, using standardized tests to measure the secular education received). It should be noted, however, that classes like health and civics might be less important to a basic education—not necessarily meeting the standard of “least restrictive”—than basic math and composition, which should meet that standard. Moreover, while standardized testing may appear the least restrictive measure, this output measure is vulnerable to evasion, undermining its utility. See Reuven Blau, Exclusive: Yeshiva Teacher Seen Pointing Out English Test Answers to Class in Video, *N.Y. Daily News* (Oct. 26, 2015), <https://www.nydailynews.com/new-york/yeshiva-teacher-pointing-test-answers-class-article-1.2410908> [<https://perma.cc/FMX8-MTR3>].

long held, the state has the power to regulate, inspect, and supervise schools to ensure they comply with compulsory education laws.¹⁹⁸

CONCLUSION

The case of Hasidic education is a hard one—it raises tricky questions about what rights, and whose rights, matter. And, because of the factual similarities to *Yoder*, the case provides a unique opportunity for courts to revisit, and test, Justice Scalia's hybrid-rights doctrine. But while many competing interests are implicated in a case like that of Hasidic education, a court would find that securing a basic secular education for all children must ultimately outweigh these competing interests. Having the ability to communicate effectively, to write and read at a relatively sophisticated level, and to have basic mathematical and scientific knowledge are bare minimum requirements for integrating into mainstream society. The principle of liberty upon which the Constitution and this nation are premised demands that all children, including Hasidic children, at minimum be given the preparation they need to make meaningful choices in life, including those skills necessary to support their survival outside the communities into which they were born. Liberty is not just a passive permission to be something; it is the *ability* to be something, to be able to have meaningful options in life. And developing this ability requires a basic secular education.

198. As the Supreme Court declared in *Pierce*:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).