

2011

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Repository Citation

Dwyer, James G., "The Good, the Bad, and the Ugly of Employment Division v. Smith for Family Law" (2011). *Faculty Publications*. 1180.

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THE GOOD, THE BAD, AND THE UGLY OF
EMPLOYMENT DIVISION V. SMITH FOR
FAMILY LAW

*James G. Dwyer**

Though I have not seen or taken a poll, I would speculate that the central holding of *Employment Division v. Smith*¹—namely, “that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)’”²—was much better received among family law scholars than among First Amendment scholars. If that is so, I believe the explanation would be that First Amendment scholars are predominantly concerned about men, whereas family law scholars are predominantly concerned about women and children. This is a perhaps too glib a way of stating an observation that First Amendment scholars mostly worry about the liberty of the autonomous individual vis-à-vis the state in the public sphere, whereas family law scholars mostly worry about the vulnerability of dependent persons to abuse by private actors in the home, and therefore generally support extension of state protective authority into private life. State involvement in private life is especially likely to conflict with religion—specifically, with the freedom of men to subordinate women in the name of religion and the freedom of parents in the name of religion to do things to their children that the state believes to be harmful.

So the central holding of *Smith* is very congenial to the family law academy. However, two aspects of the *Smith* opinion, both of which the Court stated in dictum, threatened to undermine this holding in the family law realm and, to a large degree, have done so. First, the Court endorsed legislative accommodation. The Court held that generally, *courts* should not create religious exemptions to generally applicable laws as a matter of individual entitlement. However, that majority opinion seemed to suggest that if legislatures wish to create such exemptions they may, without running afoul of the Establishment

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¹ 494 U.S. 872 (1990).

² *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J. concurring in judgment)).

Clause.³ This might not be a great concern from a women's-equality perspective, because women have a sufficient political voice to prevent passage of laws creating religious exemptions to, for example, partner violence prohibitions. It is a great concern from a child welfare perspective, however, because legislatures are deferential in the extreme to parents who object on religious grounds to state child welfare laws, with little political pushback. For example, though states heavily regulate public schools, there is virtually no state regulation or supervision of what goes on inside religious schools.⁴ As long as religious schools comply with fire and safety codes, take attendance, and profess to be teaching the 3Rs, science, and history, the state leaves them entirely alone.⁵ In the realm of medical care, nearly every state has a religious exemption to its newborn screening law, its vaccination law, and its medical neglect law.⁶ Unless a child is in imminent danger of severe physical harm or death, the state will not override religiously-motivated parental choices about medical care.⁷ It is not enough that children experience prolonged suffering.

The second aspect of *Smith* that made it less than fully welcome to family law scholars was the apparent reaffirmation of *Wisconsin v. Yoder*⁸ and, more importantly, the concomitant suggestion that the *Smith* decision's central principle simply would not apply to religious parenting cases. In an effort to make the central holding of *Smith* appear consistent with precedent, the *Smith* majority explained away certain prior free exercise cases in which the Court had held that religious objectors were entitled to an exemption from a generally applicable law. The Court did this by asserting that the cases involved a

³ *Id.* at 890 (“[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . .”).

⁴ See JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* ch. 1 (1998).

⁵ See, e.g., 24 PA. CONS. STAT. ANN. § 13-1327(b) (West, Westlaw through 2010 Reg. and 1st Special Sess.) (setting forth the singular requirement for religious schools that they send a letter to the state professing to teach certain subjects, and stating: “It is the policy of the Commonwealth to preserve the primary right and the obligation of the parent . . . to choose the education and training for such child. Nothing contained in this act shall empower the Commonwealth, any of its officers, agencies or subdivisions to approve the course content, faculty, staff or disciplinary requirements of any religious school . . . without the consent of said school.”). States generally impose more requirements on homeschools, but there is a broad range of expectations, from standardized testing and home visits by education officials to merely requiring that the instructor have a high school diploma. See Paul A. Alarcón, *Recognizing and Regulating Home Schooling in California: Balancing Parental and State Interests in Education*, 13 CHAP. L. REV. 391, 410-11 (2010). And some states excuse homeschooling parents from all state oversight if they have a religious objection to such oversight. See, e.g., VA. CODE ANN. §§ 22.1-254(B)(1), 22.1-254.1(D) (West, Westlaw through 2011 Reg. Sess. cc. 1 to 3).

⁶ See *Religious Exemptions From Healthcare for Children*, CHILD, INC., http://childrenshealthcare.org/?page_id=24 (last visited Feb. 19, 2011).

⁷ See generally James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147 (2000).

⁸ 406 U.S. 205 (1971).

second constitutional claim in addition to a free exercise claim.⁹ The Court identified only two types of cases fitting this description: those involving other First Amendment freedoms—speech or press—and those involving parents’ rights with respect to child rearing. Representing the latter category of “hybrid rights cases” was *Yoder*, in which the Court held that Amish parents are entitled to an exemption from compulsory education laws.

What precisely the majority in *Smith* was thinking about religious parenting cases is quite unclear. What the majority opinion says about *Yoder* is just that it presented a “hybrid situation” and the state lost.¹⁰ One might infer that the Court was reaffirming the outcome in *Yoder*, but the Court did not say that. Consistent with what it did say, the *Smith* majority opinion could have gone on to state that the Court had, on rare occasions, made mistakes, and that *Yoder* was one of those occasions. One might also infer that the Court in *Smith* was thinking that its holding would not apply to *any* parenting cases, and that strict scrutiny would apply in all parenting cases, but the Court also did not say either of those things. The Court might instead have been thinking that the *Yoder* approach would continue to apply solely in education cases and not in other parenting contexts. Support for that more limited reading comes from the Court’s explanation of *Yoder* as involving “the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children,”¹¹ and from a list the Court offers later in its opinion of child welfare laws as to which parents are generally not constitutionally entitled to a religious exemption. The Court stated: “The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind”¹² The Court included in the list of such civic obligations child neglect laws, compulsory vaccination laws, and child labor laws.¹³ Then the Court finished its thought by stating: “The First Amendment’s protection of religious liberty does not require this.”¹⁴ In fact, some lower courts, before and after *Smith*, have read the *Yoder* holding as severely limited in scope, not simply confined to conflicts over education but actually confined to just the Amish and groups very much like the Amish.¹⁵ On the other hand, the *Smith* majority also

⁹ *Emp’t Div. v. Smith*, 494 U.S. 872, 881-82 (1990).

¹⁰ *Id.* (“The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children” (citations omitted)).

¹¹ *Id.* (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)).

¹² *Id.* at 888-89.

¹³ *Id.*

¹⁴ *Id.* at 889.

¹⁵ *See, e.g., Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 250-52 (3d Cir. 2008).

pointed out that Mr. Smith did not allege “any communicative activity or parental right,”¹⁶ suggesting that *any* parenting activity might be covered by the exception.

In sum, the Court sent mixed signals about parenting cases, probably reflecting very muddled thinking, or a lack of thought, with respect to such cases, leaving family law professors, lower courts, legislatures, school districts, and parents in great confusion about what the constitutional rule is for parental religious objections to state-imposed school regulations.

In addition to this lack of clarity, the Court’s implicit explanation of *Yoder* is nonsensical. The majority suggested that the *Yoder* Court viewed the substantive due process claim of the parents as sufficient on its own to block prosecution of the Amish parents for violating the school attendance laws. After asserting that the Court had previously invalidated laws in free exercise cases only when a second constitutional right was infringed, the majority stated:

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.¹⁷

The majority here suggested that parents withholding children from schooling is not “otherwise prohibitable,” because of parents’ Fourteenth Amendment substantive due process right. But the *Yoder* Court dismissed out of hand the notion that parents’ substantive due process rights, as established in the Court’s prior decisions, *Pierce*¹⁸ and *Meyer v. Nebraska*,¹⁹ could do *any* work in that case:

A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. . . . *Giving no weight to such secular considerations*, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction . . .²⁰

And later: “It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some ‘progressive’ or more enlightened process for

¹⁶ *Smith*, 494 U.S. at 882.

¹⁷ *See id.*

¹⁸ *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

¹⁹ 262 U.S. 390 (1923).

²⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (emphasis added).

rearing children for modern life.”²¹ Rather, the *Yoder* Court treated the Free Exercise claim as alone giving parents a leg to stand on. When it announced that strict scrutiny would apply, it spoke simply and broadly of religious freedom: “The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”²² And the *Yoder* Court cited in support of applying heightened scrutiny to non-parenting cases such as *Sherbert v. Verner*²³ and *Walz v. Tax Commission*, even to laws that are generally applicable and neutral as to religion.²⁴

Parenting cases prior to *Yoder* also reflect the view that a free exercise claim enhances a substantive due process objection to state regulation of child rearing, raising the level of judicial scrutiny. *Pierce* and *Meyer* were prior to the Court’s development of the levels-of-scrutiny concept, but their holdings rested on an assumption that the state had shown no rational relation between the laws at issue and any legitimate state interest, and so failed what the Court would later term a rational basis test.²⁵ Then, in the Court’s other religious parenting case, *Prince v. Massachusetts*, the Court emphasized that more than “mere” general right of parents with respect to child rearing was at issue; the free exercise element raised the bar for the state.²⁶ The Court said in *Prince*: “Against these sacred private interests [in adhering to religious convictions], basic in a democracy, stand the interests of society to protect the welfare of children, and the state’s assertion of authority to that end, made here in a manner conceded valid if only secular things were involved.”²⁷

So the *Smith* majority misread *Yoder* rather than either conceding that it contradicts their account of the doctrine and the principle that *Smith* enshrines or saying that *Yoder* is simply no longer good law (which would surely have caused the Amish great consternation). Suggesting that due process was doing all or even most of the work in *Yoder* is completely implausible.

A somewhat more plausible, but still inaccurate, way to interpret *Yoder* to make it support the hybrid rights idea would be to view it as resting on an assumption that neither substantive due process nor free exercise alone triggers heightened scrutiny, but the combination of the two does so. In other words, both parents’ rights and free exercise

²¹ *Id.* at 235.

²² *Id.* at 215.

²³ *Id.* at 215, 220 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

²⁴ *Id.* at 220 (citing *Walz v. Tax Comm’n*, 397 U.S. 664 (1970)).

²⁵ See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400, 403 (1923).

²⁶ See *supra* notes 20-24.

²⁷ *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

rights might be “weak rights,” as against laws of general applicability, but when combined collectively constitute a “strong right.” Commentators considering this understanding of *Smith*’s hybrid rights language were predominantly derisive of this idea for two primary reasons: (1) it is quite difficult to make sense of and justify an additive notion of rights; and (2) it is about as clear an instance as one could imagine of an exception swallowing a rule.²⁸

The additive view of rights is difficult to justify conceptually because it appears to presuppose a quantification of a right’s strength. One would need, in at least a rough sort of way, to assign some value to each single right, establish some threshold value for a right’s triggering heightened review, and assume that the value of each single right is below this threshold, but then find that adding the values of two such rights together creates a sum that is above the threshold. It is difficult to know even where to begin with such quantification and calculation.

The hybrid rights idea would create an exception that swallows the rule because in almost every free exercise case, it is an easy matter to assert not only the Free Exercise Clause, but also the Free Speech Clause and/or the Due Process Clause. Any speech is presumptively protected by the Free Speech Clause, any conduct is presumptively protected to some degree by substantive due process doctrine, and any religious exercise must involve speech or conduct or both.²⁹ The point here is not that all speech is absolutely protected under the Free Speech Clause, nor that any conduct that is part of religious exercise would always be independently fully safeguarded under the Fourteenth Amendment: neither of those things is true. The point is rather that a person who has engaged in religious exercise can almost always state a *prima facie* case under either the Free Speech Clause or the Due Process Clause. The only exception might be speech the Court has determined to be categorically excluded from Free Speech Clause protection, such as obscenity, and speech in those categories is rarely, if ever, religiously motivated.

In any event, the *Smith* Court effectively invited parents who want an exemption from any child welfare legislation to assert a “hybrid

²⁸ For a summary of the commentary, see Ariana S. Cooper, *Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post-Smith?*, 108 COLUM. L. REV. 716, 721 (2008). Some of the Court’s members have also leveled such criticism. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

²⁹ The *Smith* Court did suggest at one point that only “communicative activity or parental right” can give rise to a colorable free exercise demand for exemption from a generally applicable law, emphasizing that the private individual seeking strict scrutiny in *Smith* had not alleged either of those things. *Emp’t Div. v. Smith*, 494 U.S. 872, 882 (1990) (“The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.”). But the Court offers no basis for the peculiar proposition that parents’ rights precedents are the only strain of substantive due process doctrine that religious objectors can invoke to bolster their claim.

rights claim.” It sent very mixed signals, but some of the signals suggested that nothing was to change in the realm of child rearing in terms of constitutional litigation. Lawyers for parents now just had to make sure they mentioned due process and/or free speech, as well as free exercise. And so, almost without fail in the two decades since *Smith*, parents’ attorneys in litigated parent-state conflicts over child rearing have advanced a hybrid rights claim. Arguably it would be malpractice not to do so. Undoubtedly, in the past twenty years, there has been much more litigation, much more disruption of families’ lives, and much more expense to school districts and other state agencies than there would have been if the *Smith* Court had stated simply that the central principle of its holding would henceforth apply in all contexts, including parental objections to school regulation and other child welfare laws.

Because of the vagueness and illogic of *Smith*’s hybrid rights idea, lower courts have reached divergent conclusions about the viability of a hybrid rights claim.³⁰ Very few courts have accepted the claim and then handed victory to parents after applying strict scrutiny. When that has happened, the state interest at stake was fairly weak—for example, in student dress code cases.³¹ Parents have almost always lost when objecting to a medical care legal requirement on religious grounds.³² Many more courts have either accepted the argument that alleging substantive due process as well as free exercise raises the level of scrutiny, or have assumed for the sake of analysis that the argument was persuasive, but have then found either that the parent failed to establish a proper hybrid rights claim or that the state action satisfied strict scrutiny.³³ And a substantial number of courts have rejected the hybrid rights argument and applied rational basis review. Those who have rejected the argument, or who have analyzed the parents’ claims in the alternative under both levels of scrutiny, have offered various explanations for their reluctance to conclude that strict scrutiny is required. Some have pointed to the objections above—that is, that the

³⁰ For a series of articles discussing lower court treatment of hybrid rights claims in a variety of contexts, see Cooper, *supra* note 28, at 723 n.55.

³¹ See, e.g., *Hicks v. Halifax Cnty. Bd. of Educ.*, 93 F. Supp. 2d 649, 653-54 (E.D.N.C. 1999) (involving challenge to mandatory uniform policy at an elementary school that was not a response to any particular problem with student dress); *Betenbaugh v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 881 (S.D. Tex. 2009) (finding hair style regulations at an elementary school unnecessary to meet the school’s stated goals of maintaining order, discipline, and hygiene).

³² See, e.g., *Douglas Cnty. v. Anaya*, 694 N.W.2d 601, 605-08 (Neb. 2005) (rejecting parental religious objection to a newborn-metabolic-screening mandate).

³³ Some courts that find no proper hybrid rights claim presented do so because the other claim was not “independently viable” and some because the other claim was not “colorable.” See, e.g., *Swanson v. Guthrie Indep. Sch. Dist.* 135 F.3d 694 (10th Cir. 1998) (stating that plaintiff must show at least a colorable claim under parents’ rights doctrine); *Brown v. Hot, Sexy, & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (finding parental substantive due process claim not independently viable).

very idea of additive rights is incoherent or that such an exception would swallow the rule.³⁴ Others have relied on the fact that the idea of additive rights comes from mere dictum in *Smith*, while also reading *Smith* to create a new rule for free exercise cases generally.³⁵ Or they have pointed to the dictum in *Smith* that is specifically about vaccination and medical neglect. Some have implored the Supreme Court to clear things up. Others ignore the issue and just cite precedent on the specific issue before them.³⁶

Now I will explain why the parenting context is less—rather than more—appropriate for religious exemptions, contrary to the tenor of *Smith*'s handling of *Yoder*. First, the right-holder claim in parenting cases is, properly viewed, quite weak, and arguably incoherent and illicit. It is at least weak, because the right holder—the parent—is not complaining about the state interfering with his or her self-determination the way Mr. Smith was and the way most people are when alleging a violation of their rights. Rather, the supposed right holder is complaining about the state interfering with his or her control of another person's life. Simply as a conceptual matter, a demand for control of another person's life must be weaker than a demand for control of one's own life, regardless of the relationship one has with the other person. In fact, in any context other than parenting, including other contexts involving care of non-autonomous persons who are close family members, we would be quite perplexed by someone insisting that they have a constitutional right to control some aspect of another person's life, such as their medical care or education.³⁷ Even the most extreme pro-lifers, for example, do not claim that they themselves have a constitutional right to control pregnant women.

Second, although any religious exemptions create an equality problem, they are likely to create a clearer and more troubling equality problem in the child-rearing context. If Mr. Smith was given an exemption, others who want to consume peyote or some other illegal substance might understandably complain about this unequal treatment as a favoring of religion over non-religion. However, there would be a somewhat plausible defense of the inequality, on the grounds that Mr. Smith arguably has a stronger interest at stake than recreational users

³⁴ See, e.g., *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993).

³⁵ See, e.g., *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 246-47 (3d Cir. 2008); *Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Stratton*, 240 F.3d 553, 561 (6th Cir. 2001).

³⁶ See, e.g., *Workman v. Mingo Cnty. Schs.*, 667 F. Supp. 2d 679, 688-89 (S.D. W. Va. 2009).

³⁷ Cf. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 266-67, 285-87 (1990) (rejecting a suggestion by parents of an adult in a persistent vegetative state that they had a constitutional right to make the decision to terminate their daughter's life support, and stating that, regardless of how strongly the parents felt about the matter, only the incompetent adult herself had any constitutional rights in the matter that could properly be considered).

do; correspondingly, the person denied permission to take a drug will not suffer as much. This would be true in many other cases as well—for example, if someone in the military just likes wearing baseball caps, rather than being under a religious command to wear a particular form of head dress, or if some people will simply have their view spoiled by construction of a highway rather than having their sacred land violated. In contrast, in the case of parenting, exemptions do create a danger of real harm not to those *denied* an exemption, but to the children of those who *receive* the exemption. Exemptions from school regulations and from medical care requirements create danger of significant harm to the cognitive development and health of the free exercise claimants' children. They incur a danger from which other children receive legal protection. And there is generally no plausible defense of the discriminatory treatment that can be given to *the children*, the people who are truly harmed by it.³⁸ Imagine that you are a state legislator speaking to a one-year-old child who is dying because of a genetic condition that could have been corrected at birth, but now cannot be treated, and that it was not detected because the parents claimed a religious exemption from the state's metabolic screening law. How would that speech go? "Well, we had to let your parents refuse the screening, even though your interest in receiving it was just as great as that of any other child, because" Or imagine speaking to an eighteen-year-old who wishes she could become a doctor, but who has never had any real science or math instruction because her parents' religious community operated its own school and did not believe girls should be prepared for college. How would you justify having supported laws that exempted religious schools from all meaningful academic requirements? "Really, it was for your own good, because" Or "well, you did not have as much of an interest in receiving a secular education as other children had, because"

In sum, then, although the central principle of *Smith* is one very congenial to those of us worried about free exercise of religion being asserted as a barrier to state efforts to protect vulnerable persons in private life, the family law baggage *Smith* carried with it has created a mess. The Court might never be forced to clear up the mess, because legislatures are so accommodating of religiously-motivated parents that few such parents have reason to initiate litigation, and because there is no constituency for challenging the accommodations as violations of children's equal protection right. Such accommodation is sometimes challenged by parents who want to avoid a state welfare law, but whose

³⁸ For an extended presentation of this equal protection analysis, see DWYER, *supra* note 4, and James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1414-20 (1996).

objection to the law is secular. They assert their own equal protection right and the Establishment Clause as bases for objecting to accommodation of only religious objectors, and they usually lose.³⁹ An irony of the free exercise parenting doctrine is that parents are in a worse position if they agree with the state on the ends for children, but have empirical evidence contradicting the means the state has chosen than they would be if they simply rejected the state's aims for children and asserted that their religion tells them to do so. For example, if you do not want your child to receive the polio vaccine because you know polio is virtually non-existent in the United States and you have read that the vaccine can have harmful side effects, the state need not pay you any heed, but if you object that vaccines are the work of the devil, a court might order your child's school district to waive the vaccination requirement to accommodate your belief. Those of us who find this troubling from the perspective of children's welfare and rights (and perhaps also from the perspective of religious neutrality) can only hope that someday soon a medical care or private school regulation case will make its way to the Supreme Court and the Court will inject some clarity, logic, and respect for children into the doctrine governing religious parenting cases.

³⁹ See, e.g., *People v. Bennett*, 501 N.W.2d 106, 117 (Mich. 1993); *People v. DeJonge*, 501 N.W.2d 127, 129, 131 (Mich. 1993). *Bennett* and *DeJonge* were companion cases in which the Supreme Court of Michigan held that a state law requiring homeschool instructors to be state certified teachers violated the free exercise right of parents who objected to the requirement on religious grounds and did not wish to comply with any state requirements for schooling. However, the Court held the law did not violate the due process right of parents who objected to the certification requirement for non-religious reasons, such as the fact that they could show in other ways their competence to provide a good secular education to their children.