A Colorable Showing of a Hybrid Rights Claim Under Strict Scrutiny: A Legal Analysis of What Would Happen when Transgender Identity Clashes with Free Exercise of Religion in California Public Schools

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Introduction

CALIFORNIA IS ONE OF THE LEADING STATES in enacting antidiscrimination laws that provide broad protection to Lesbian, Gay, Bisexual, Transgender, and Queer and/or Questioning ("LGBTQ") youths.[1] In 2013, California passed Assembly Bill No. 1266 ("AB 1266"),[2] the first law of its kind in this country.[3] AB 1266 adds a provision to the California Education Code that establishes a right for transgender public school students to access sex-segregated public school facilities and creates programs to recognize their selected gender identity.[4]

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1. Associated Press, *New Calif. law a win for transgender students*, NY DAILY NEWS (July 3, 2013) [hereinafter *New Calif. law*], http://www.nydailynews.com/news/national/new-calif-law-win-transgender-students-article-1.1389901 [https://perma.cc/4DW6-3SRT].

2. A.B. 1266, 2013 (Cal. 2013), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266.

3. *New Calif. law*, *supra* note 1.

4. CAL. EDUC. CODE § 221.5(f). The Education Code

> prohibits discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition

According to the National Transgender Discrimination Survey, students who expressed a transgender identity while in grades K-12 "reported alarming rates of harassment (78%), physical assault (35%), and sexual violence (12%)."[5] Compared to their non-transgender peers, a disproportionate share of transgender students—nearly one-sixth—drop out of school at some point in their lives.[6] To alleviate such harm, California exercised its police power by enforcing legislative initiatives that prescribed equal treatment of LGBTQ students.[7] However, some argue AB 1266 infringes on the liberty interests of other students—namely their free exercise of religion.[8] AB 1266 brings to light one of the biggest tensions within our Constitution: liberty versus equality. What happens when a transgender youth, exercising his right to access facilities of the gender he identifies with, clashes with another student's religious beliefs?[9] This paper details previous assertions of the Free Exercise clause and how courts have reconciled conflicts between the free exercise of religion and other constitutional interests.

Compelling Interest Standard

The Constitution's Free Exercise clause states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Since 1963, interpretation of that clause has largely been controlled by the Supreme Court's decision in *Sherbert v. Verner*.[10] In

> of hate crimes in the Penal Code, in any program or activity conducted by an education institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.

Gender is defined to include both gender identity and gender expression. *Id.*

5. Rachel E. Moffitt, *Keeping The John Open To Jane: How California's Bathroom Bill Brings Transgender Rights out of the Water Closet*, 16 GEO. J. GENDER & L 475, 486 (2015).

6. *Id.*

7. CAL. BUS. & PROF. CODE § 865.1 (2013) (prohibits licensed mental health providers from subjecting patients under 18 years of age to sexual orientation change efforts); CAL. HEALTH & SAFETY CODE § 1522.41 (2013) (requires foster care service providers, including licensed foster parents, and administrators of group home facilities, to receive training in cultural competency and sensitivity to provide adequate care to LGBT youth).

8. Tyler Brown, *The Dangers of Overbroad Gender Legislation, Case Law, and Policy in Education: California's AB 1266 Dismisses Concerns about Student Safety and Privacy*, B.Y.U. L. REV. 287 (2014).

9. For simplification purposes, forms of "he" shall represent all genders throughout this comment.

10. Sherbert v. Verner, 374 U.S. 398 (1963).

Sherbert, the Court held that South Carolina could not deny unemployment benefits to a Seventh-Day Adventist who was fired for being unavailable to work on Saturdays, her Sabbath.[11] The Court required that a state have a compelling interest to legally infringe on an individual's religious right.[12] A compelling interest is an especially high burden to meet because courts are prevented from delving into religious matters[13]

In 1972, the Supreme Court reaffirmed the 'compelling interest' standard in *Wisconsin v. Yoder*, where a group of Amish parents appealed a decision finding them guilty of violating the compulsory education law.[14] Wisconsin's school-attendance laws required children to attend school until the age of sixteen.[15] The Amish parents argued that Wisconsin's compulsory education law contradicted their fundamental belief in a devoted church community separate and apart from secular influences.[16] The Court recognized there was "no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."[17] However, the Court held that the State's interest is "by no means absolute to the exclusion or subordination of all other interests."[18] The Court, in its syllabus, wrote that "application of the compulsory school-attendance law violated the[] rights [of the Amish] under the Free Exercise Clause of the First Amendment . . . ."[19]

There, the Court recognized that the Amish lifestyle was increasingly under threat with modern influences as society became more industrialized and complex.[20] They held compulsory education laws were permissible if confined to basic elementary education, since the Amish community had little basis to fear that school attendance would expose their children to the modern influences they rejected.[21] In contrast, the court recognized that compulsory secondary-school attendance carries "a very real threat of

11. *Id.* at 410.
12. *Id.* at 403.
13. *Id.* at 406.
14. Wisconsin v. Yonder, 406 U.S. 205, 215 (1972).
15. *Id.* at 207.
16. *Id.* at 209.
17. *Id.* at 213.
18. *Id.* at 215.
19. *Id.* at 205.
20. *Id.* at 217.
21. *Id.*

undermining the Amish community and religious practice."[22] Therefore, the Court found that although the regulation was neutral on its face, its application offended the constitutional requirement for governmental neutrality because it unduly burdened the Amish.[23]

Regarding the Amish parents' Fourteenth Amendment claim, the Court recognized the history and culture of Western civilization "reflects a strong tradition of parental concern for the nurtur[ing] and upbringing of their child."[24] However, the Court stated the "power of the parent" is not without bounds[25] and that state interference is warranted if a parent's power threatens health, safety, or a significant social burden.[26]

Hybrid Claims

In 1990, the Supreme Court revisited themes of liberty and the free exercise of religion when considering the constitutionality of Oregon's controlled substance law in *The Employment Division v. Smith.*[27] Two members of the Native American Church were fired from their jobs for ingesting peyote and subsequently denied unemployment benefits due to the "misconduct."[28] The plaintiffs claimed that prohibitions against the sacramental use of peyote was an unconstitutional infringement of their rights under the Free Exercise Clause and, therefore, the state could not deny them unemployment benefits.[29] The Supreme Court denied the claim

22. *Id.* at 218.

23. *Id.* at 220.

24. *Id.* at 232.

25. *Id.* at 233.

26. *Id.* at 233–34.

27. Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990). After the *Smith* decision, that ultimately held that a state does not need a compelling reason to justify non-discriminatory laws of general applicability, Congress responded to this holding by passing the Religious Freedom Restoration Act ("RFRA") that restored the standard to the "compelling interest" test established by the *Sherbert* Court. The Supreme Court in City of Boerne v. Flores, 521 U.S. 507 (1997), declared the RFRA unconstitutional since it was not within Congress' §5 of the 14th power to establish such a law. Congress responded to this by using their power under the commerce clause and passing the Religious Land Use and Institutionalized Persons Act ("RLUIPA") which would allow them to regulate land use and religious activity of prisoners, and prevent states from establishing laws that would infringe on religious beliefs absent a compelling interest. The Supreme Court in Holt v. Hobb, 135 S. Ct. 853 (2015), upheld RLUIPA as a valid exercise of congressional power as applied to prisoners and land use.

28. *Smith*, 494 U.S. at 883.

29. *Id.* at 876.

and held that the First Amendment does not require the government to have a compelling reason to deny an individual an exemption from an otherwise "valid and neutral law of general applicability" which incidentally infringes on an individual's exercise of religion.[30]

In *Smith*, the Court used the *Sherbert* test ("governmental action that substantially burdens a religious practice must be justified by a compelling governmental interest")[31] to invalidate unemployment compensation rules which conditioned the availability of benefits "upon an applicant's willingness to work under conditions forbidden by his religion."[32]

Although *Smith* and *Yoder* both rely on the Free Exercise Clause, the Supreme Court distinguished the two by labeling *Yoder* as a "hybrid [rights] situation."[33] The Court went on to state, "The only decisions in which we have held the First Amendment bars application of a neutral 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."[34] *Smith* is not "such a hybrid situation," but instead "is a free exercise claim unconnected with any communicative activity or parental rights."[35] By not imbibing other constitutional protections, the Supreme Court did not believe *Smith* warranted heightened scrutiny as requested by the petitioners.

The Ninth and Tenth Circuit Courts have yet to articulate the threshold standard for what a showing of a "colorable" claim to a hybrid rights case would require. They have only held certitude is not required and the inquiry is extremely fact specific.

Hypothetical Analyses Based on AB 1266

For the purposes of this legal analysis, consider the following hypothetical situation to see if it could meet this "colorable" showing, and therefore warrant a strict scrutiny standard.

A California School District has, in accordance with AB 1266, implemented a regulation allowing all transgender students access to the

30. *Id.* at 879.
31. *Id.* at 883.
32. *Id.*
33. *Id.* at 896.
34. *Id.* at 872.
35. *Id.* at 882.

restroom facilities according to the gender they identify with. In response, another student's parents brought an action against the school district seeking declaratory and injunctive relief. The second student's parents allege the school's rules violate their right to familial privacy, right to parental liberty, and right to free exercise of religion.

In order to successfully establish a hybrid rights claim, and therefore warrant strict scrutiny, the companion claim here needs to have a colorable showing of success—that is a fair probability or likelihood of success. Consider *Curtis v. School Committee of Falmouth*[36] to understand how courts have analyzed similar facts.

Analysis Using *Curtis* as Precedent

In *Curtis v. School Committee of Falmouth*, parents brought a similar cause of action (although based on different circumstances) due to a school's program of condom availability established in the junior and senior high schools.[37] The parents claimed the condom availability program violated their right to familial privacy, right to parental liberty, and right to free exercise of religion.[38] Ultimately, the court rejected the parents' claim finding the condom availability program was in all respects voluntary and in no way intruded into the realm of constitutionally protected rights.[39] In addressing the parents' fundamental rights claim to direct and control the education and upbringing of their child, the *Curtis* court began by discussing the role of the courts with respect to the administration of public education.[40] The court found that public education is "unquestionably entrusted to the control, management, and discretion of State and local school committees."[41] The *Curtis* court, quoting *Epperson v. Arkansas*,[42] a case in which a school teacher sued to prevent public funds from being used to teach evolution in Arkansas, successfully arguing that such funding violated the First Amendments' mandate of freedom of religion, echoed the rule that courts are not allowed to intervene in "'resolution of conflicts

36. Curtis v. School Committee of Falmouth, 420 Mass. 749 (1995).
37. *Id.* at 751.
38. *Id.*
39. *Id.* at 753.
40. *Id.*
41. *Id.* at 754.
42. Epperson v. Arkansas, 393 U.S. 97 (1968).

which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.'"[43]

The parents in *Curtis* claimed that by having a program which would allow their minor child unrestricted access to contraceptives, without parental input, and by not having an opt-out provision in the program, it amounted to an unnecessary infringement of their rights.[44] Ultimately the court rejected the plaintiffs' parental liberties claim finding that the constitutional threshold requirement of coercion or compulsion was not met.[45]

Though "coercion" has not been adopted as the judicial standard, no decision has proceeded further in the constitutional analysis than the governmental action having a coercive effect on the claimants' parental liberties.[46] Coercion has been found to only exist where the governmental action is mandatory and provides no outlet for the parents, "such as where refusal to participate in a program results in a sanction or in expulsion."[47] Because no classroom participation is required of students in the condom availability program and condoms are only available to students who request them, the *Curtis* court found no coercive element.[48] Although the exposure to condom vending machines and to the program itself may "offend the moral and religious sensibilities of the plaintiffs, mere exposure to programs" do not amount to unconstitutional interference with parental liberties.[49]

The *Curtis* court next considered the parents free exercise claim.[50] The preliminary inquiry for such a claim is whether the challenged "governmental action creates a burden on the exercise of a plaintiff's religion."[51] Only if a burden is established must the analysis move to "the nature of the burden, the significance of the governmental interest at stake,

43. *Curtis*, 420 Mass. at 754.

44. *Id.*

45. *Id.* at 757.

46. *Id.* at 757. *See also* Wisconsin v. Yonder, 406 U.S. at 215 (finding that compulsory school attendance law violated Amish parents' right to direct religious upbringing of children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (requiring public school attendance and prohibiting attendance at private parochial schools violated parental liberties); Meyer v. Nebraska, 262 U.S. 390 (1923) (prohibiting teaching of foreign languages to school children violated parental liberties).

47. *Id.*

48. *Curtis*, 420 Mass. at 757.

49. *Id.* at 757.

50. *Id.* at 760.

51. *Id.*

and the degree to which that interest would be impaired by an accommodation of the religious practice."[52]

The parents argue that the condom-availability program burdens their right to freely exercise their religion by rejecting their religious teachings on the issue of premarital sex.[53] Furthermore, the program is coercive in nature because it exists in a public school, to which the parents are compelled to send their children.[54] Additionally, the program lacks an opt-out provision by which parents can choose to prohibit their children from obtaining condoms at school.[55]

Ultimately the *Curtis* court held that the parents failed to demonstrate sufficient facts to support their argument that the condom-availability program substantially burdens their rights to freely exercise their religion "to any degree approaching constitutional dimensions."[56] Although all citizens have a right to freely exercise their religion, it cannot be understood to "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[57] The *Curtis* court, quoting a line of cases beginning with *Sherbert v. Verner* in 1963, wrote "[t]he Free Exercise clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[58] Since there is no requirement that any student participate in the condom program and no one is penalized for lack of participation, it simply does not rise to the level of constitutional infringement.[59]

Thus, *Curtis* instructs that an examination of whether AB 1266 infringes on religious freedom begins with determining whether the governmental action is coercive or compulsory in nature, thereby placing a substantial burden on the exercise of a plaintiff's religion. Returning to our hypothetical, public schools and the state have a significant interest in protecting and fostering the ability of transgender students to express their gender identity in use of school facilities. The Equal Protection Clause of the Fourteenth Amendment commands, "no state shall deny to any person

52. *Id.* at 761.
53. *Id.* at 761–62.
54. *Id.* at 762.
55. *Id.*
56. *Id.* at 761.
57. *Id.* at 762.
58. *Id.* (quoting *Sherbert*, 374 U.S. at 398, 412 (1963)).
59. *Id.* at 763.

within its jurisdiction the equal protection of the laws.[60]" The Supreme Court has interpreted that language as "essentially a direction that all persons similarly situated should be treated alike."[61] Although, this is not to say the Supreme Court has never recognized that the Fourteenth Amendment, in certain limited circumstances, would allow states the power to treat different classes of persons in different ways.[62] This power is not without bounds since the Equal Protection Clause denies to states the power to base their differential treatment of the classes on a criteria wholly unrelated to the objective of the statute.[63]

In the presented hypothetical, the state and the public schools would be placed in a difficult situation since failure to recognize AB 1266 would constitute an equal protection violation. It would treat students differently who identify with a gender other than the gender assigned by society. Because transgender people are a recognized quasi-suspect class, it would require a measure to be substantially related to an important government interest.[64]

Sex and gender are both quasi-suspect classes subject to intermediate scrutiny.[65] Thus, a failure to recognize an individual's identifying gender by the state or a public school is discriminatory and in direct violation of his equal protection rights.

The Supreme Court observes inherent differences between men and women which may call for differential treatment but not "for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[66] Such classifications based on sex must be closely scrutinized to prevent the creation or perpetuation of the legal, social, and economic inferiority of women.[67] Legislative classifications based on sex, unlike differentiations based on such statuses as intelligence or physical disability, frequently bear no relation to ability to perform or contribute to society.[68] Rather, such classifications which distribute benefits and burdens between sexes very likely are a reflection of outmoded notions of the

60. U.S. CONST. AMEND. XIV, §1.
61. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).
62. Reed v. Reed, 404 U.S. 71, 75 (1971).
63. *Id.*
64. Adkins v. City of N.Y., 143 F. Supp. 3d 140 (S.D.N.Y. 2015).
65. Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).
66. U.S. v. Virginia, 518 U.S. 515, 533 (1996).
67. *Id.* at 534.
68. *City of Cleburne*, 473 U.S. at 440–441 (1985).

relevant capabilities of men and women.[69] In order to remain within the constitutional parameters of the Fourteenth Amendment, a State must show that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.[70]

Analysis Using *Price Waterhouse v. Hopkins* as Precedent

This "heightened" standard of review has been extended by the Supreme Court to gender classifications as well.[71] In a landmark decision by the Supreme Court in *Price Waterhouse v. Hopkins*[72], a female senior manager brought a Title VII claim since she was denied partnership because she was considered "macho" and "overcompensated for being a woman."[73] Six members of the Supreme Court held that such comments were indicative of gender discrimination and that Title VII not only bars discrimination because of biological sex, but also gender stereotyping—the failure to act and appear according to expectations defined by society's expectations of gender.[74]

This same line of reasoning has recently been utilized by circuit courts to provide protection for transgender identity. In *Schwenk v. Hartford*,[75] a prisoner who was a pre-operative male-to-female transsexual sued a state prison guard under the Gender Motivated Violence Act ("GMVA") alleging that the guard attempted to rape her. The prison guard claimed the GMVA statute was inapplicable to *Schwenk* because transsexuality is not an element of gender but rather constitutes gender dysphoria, a psychiatric illness.[76] The Ninth Circuit court rejected the prison guards' argument construing the Supreme Court's decision in *Price Waterhouse* to indicate discrimination based on gender non-conformity is still discrimination.[77]

This conclusion, that discrimination based on gender non-conformity

69. *Id.* at 441.
70. *Virginia*, 518 U.S. at 533 (quoting *Hogan*, 458 U.S. 718, 724).
71. *City of Cleburne*, 473 U.S. at 440–41.
72. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
73. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).
74. *Id.* at 250–51.
75. Schwenk v. Hartford, 204 F.3d 1187, 1192 (9th Cir. 2000).
76. *Id.* at 1200.
77. *Id.* at 1200–01.

constituted sex discrimination, was further discussed by the 11th Circuit Court in *Glenn v. Brumby*.[78] In *Glenn*, a transgender employee brought an action against her former employer alleging a sex-discrimination claim when she was fired once her boss discovered that she wished to go through a male-to-female sex change operation.[79] The court held transgender individuals are protected from discrimination on the basis of gender stereotypes.[80] A person is defined as transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes."[81] The court found "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms,"[82] explaining that "The nature of the discrimination, is the same; it may differ in degree but not in kind, and discrimination on this basis [gender non-conformity] is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause."[83]

Conclusion

The presented hypothetical illustrates how truly complicated the relationship between liberty and equality can be. On one side of the scale, we have the liberty interests of parents with a recognized fundamental right to inculcate and direct the moral standards and religious beliefs of their children, coupled with the First Amendment right to freely exercise their religious beliefs without undue burden. On the other side of the scale stands gender identity, protected by the Fourteenth Amendment, one of the most revered constitutional rights that demands equal protection of all citizens. Both of these constitutional rights and interests are compelling and have been interpreted by the Ninth Circuit Court of Appeals as requiring a strict scrutiny standard. Until the Supreme Court clarifies what is needed in order to establish a "hybrid-rights" claim relied on in *Smith,* and whether the *Price Waterhouse* decision that discrimination based on gender stereotypes is equivalent to discrimination based on gender non-conformity, this tug-of-war will remain at a standstill.

78. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).
79. *Id.* at 1313–14.
80. *Id.* at 1318.
81. *Id.* at 1316.
82. *Id.*
83. *Id.* at 1319.