

WHY DON'T MORE PUBLIC SCHOOLS TEACH SEX EDUCATION?
A CONSTITUTIONAL EXPLANATION AND CRITIQUE

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In the culture war between the religious right and the secular left, much of the fighting has been over how to teach sex education. Appearing ubiquitously in various media outlets and academic commentary,¹ the arguments have become quite familiar to many Americans. The religious right contends that, in order to protect teenagers from pregnancy and STDs, public high schools must encourage students to abstain from sexual activity.² And the secular left claims that because young people will have sex anyway, whether or not they are taught sexual abstinence, public high schools must teach teenagers how to engage in safe sex.³ What many Americans might not know is that in some places the dispute about *how* to teach sex education is not yet relevant because the

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¹ For a general (and enlightening) discussion of the history of the sex education conflict between the religious right and secular left, see KRISTIN LUKER, *WARRING VIEWS ON SEX—AND SEX EDUCATION—SINCE THE SIXTIES: WHEN SEX GOES TO SCHOOL* (W.W. Norton & Company 2006). For commentary on the culture war, see JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (Basic Books 1991), which led to the wide-use of the war analogy. Also, see NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (Farrar, Straus and Giroux 2005) for a treatment of the culture war's religious elements.

² The legislative enactment best expressing the Republican approach to sex education is the Adolescent Family Life Act ("AFLA"), Pub. L. 97-35, 95 Stat. 578 (1981), codified at 42 U.S.C. 300z et seq. 103, an Act sponsored by Republican Senators Orrin Hatch and Jeremiah Denton and designed to deprive the comprehensive sex education movement of federal funding. According to UC Berkeley sociologist Professor Kristin Luker, "AFLA is where the idea of 'abstinence education' made its debut on the national scene." LUKER, *WARRING VIEWS ON SEX*, *supra* note __, at 222. Abstinence sex education was formalized as a Republican stance in 1988 when the Republican National Platform stated: "We oppose any programs in public schools which provide birth control or abortion services or referrals. Our first line of defense . . . must be abstinence education." *Id.* at 18 n.5.

³ The Democrats expressed where they stand on the sex education issue in 1978 when Senator Edward Kennedy led the expansion of comprehensive sex education. *Id.* at 221-22. Recently, in response to the growing Republican attack on comprehensive sex education, the Democrats strengthened their attack on abstinence education. In December of 2004, Representative Henry A. Waxman, a Democrat from California, released a report providing examples of inaccurate information (e.g., "that HIV can be contracted through exposure to sweat and tears") included in federally funded abstinence-only sex education programs. This report has bolstered the secular left's argument against abstinence sex education. See ACLU, *Responsible Spending: Real Sex Ed for Real Lives*, Feb. 18. 2005, at <http://www.aclu.org/reproductiverights/sexed/12622res20050218.html> (last visited August 9, 2006).

public schools have not answered the threshold question of *whether* to teach sex education. This threshold question is the topic of this Article.

Most state legislatures do not require any of their public schools to teach sex education,⁴ opting instead to leave the decision entirely to the local school boards. Exercising this discretion granted from their state legislatures, many public schools choose not to teach sex education. According to the Centers for Disease Control, 15.2% of public high schools and 30.9% of public junior high schools do not require any STD prevention education, including abstinence sex education.⁵ Although there is some confusion as to precisely how many teenagers do not receive any formal sex education, there is strong evidence that because a large percentage of public schools are not teaching any sex education, many teenagers receive no formal sex education at all.⁶ Whatever the actual numbers, the problem is that there is, undoubtedly, an n greater than zero. In other words, there are *some* teenagers who become adults without formally learning *anything* about STDs and pregnancy. These are the forgotten soldiers in the culture war over sex education.

⁴ A 2004 study found that only twenty-two states require their public schools to teach sex education. See Debra Sorgan, *Sexuality, Gender and Curricula*, 5 GEO. J. GENDER & L. 343 (2004).

⁵ CENTERS FOR DISEASE AND PREVENTION, FACT SHEET SEXUALLY TRANSMITTED DISEASE PREVENTION FROM CDC'S HEALTH POLICIES AND PROGRAMS STUDY 2000, *available at* <http://www.cdc.gov/HealthyYouth/shpps/factsheets/pdf/stdprev.pdf>.

⁶ As indicated above, the CDC reports that 15.2% of public high schools and 30.9% of public junior high schools do not require any STD prevention education. However, between 95 and 97 percent of teenagers report having some sex education. LUKER, WARRING VIEWS ON SEX, *supra* note __, at 251. Since almost all sex education includes information about STD prevention (indeed, any discussion of abstinence or condoms is included in the CDC numbers), these discrepant data seem irreconcilable. This discrepancy might be due to a liberal interpretation of what constitutes sex education. There is support for this explanation; according to a 1999 Kaiser Family Foundation survey, "three out of four of those actually charged with teaching sex said that in their schools, the subject was covered in only a few class periods, sometimes as few as one." *Id.* If students consider one class dedicated to sex education as sufficient to count as sex education, a short and superficial sexual or anatomical lesson probably counts too. Thus, while 95-97 percent of teenagers might learn the bare basics about sex in a classroom setting, the CDC is probably right that as many as almost one out of every six public high school students and almost one out of every three public junior high school students do not take a sex education class.

That some people go through public education without receiving any sex education is both troubling and surprising. It is troubling because widespread sex education—either encouraging abstinence or safe sex—is probably necessary to solve the problems resulting from uninformed teen sex.⁷ And it is surprising because an overwhelming majority of citizens support some form of sex education.⁸ This makes for a highly important and interesting question: Why don't more public schools teach sex education?

My answer to this question is that the U.S. Constitution is a factor in the unwillingness of public schools to teach sex education.⁹ This claim is based on the following two premises: (1) the U.S. Constitution *certainly* does not require public schools to teach sex education; and (2) the U.S. Constitution *arguably* requires public schools that teach sex education to exempt those students whose religious beliefs are substantially burdened by sex education. To illustrate how these two premises might weigh in a school district's decision not to teach sex education, this Article is framed as an analysis of a question to a school district attorney as to how the district should respond to threatened constitutional litigation regarding sex education.

⁷ To determine sex education's efficacy, the CDC assembled a panel of experts to synthesize 17 studies on the subject. The research synthesis found that sex education has no negative effects (e.g., sex education does not accelerate or increase sexual activity), and some sex education programs have positive effects (e.g., some programs delay sexual activity and increase condom use). See NATIONAL EDUCATION ASSOCIATION HEALTH INFORMATION NETWORK, SCHOOL-BASED HIV, STD, AND PREGNANCY PREVENTION EDUCATION: WHAT WORKS?, at <http://neahin.org/programs/reproductive/works/>.

⁸ According to Professor Luker, though there has always been opposition to sex education, the opposition has never been popular. Only the most conservative groups, like the John Birch Society, have opposed all forms of sex education. In fact, Professor Luker writes, opinion leaders of almost every stripe believed that sex education was the best response to the twin problems of teenage pregnancy and HIV/AIDS." LUKER, WARRING VIEWS ON SEX, *supra* note ___, at 220.

⁹ Lest I leave the reader with the impression that this Article is yet another example of a constitutional commentator reducing highly complex social, economic, and political issues to a matter of constitutional law, I want to highlight here that my argument is that the Constitution is a factor—not *the* factor.

Part I describes the hypothetical problem, which, I should note at the outset, is based on real situations school districts face.¹⁰ According to this hypothetical, some students and parents—the liberals in the culture war—favor sex education, but they live in a district where the public schools do not teach sex education and in a state that does not currently require its public schools to do so. So, in order to pressure the schools to teach the subject, these students and parents claim that they have a constitutional right to have their public schools teach sex education. Opposing these liberals are the conservatives who claim that they have a constitutional right not to be taught sex education.

Part II analyzes the constitutional dimensions of the problem.¹¹ This analysis branches into the two premises upon which my thesis is based: Part II.A analyzes the constitutional arguments that parents and students might make for sex education; and Part II.B considers the constitutional arguments that parents and students might make for exemptions from sex education.

Based on the relative strengths of these constitutional arguments, Part III offers a solution to the problem: not to teach sex education. After noting that this is not a solution at all—in that it will not solve the social, health, and economic problems that result when young citizens are uninformed or misinformed about sex—Part III parts from

¹⁰ In her excellent book on the sex education war, *see* LUKER, *WARRING VIEWS ON SEX*, *supra* note ___, Professor Luker draws upon twenty years of sociological research in four American communities. Identifying some of the people in these communities will be helpful in concretizing the problem addressed in Part I. When this is the case, I will direct the reader to Luker’s findings.

¹¹ The reader should be warned here that Part II’s analysis is relentlessly descriptive—that is, it does not weigh whether a particular outcome is right as a matter of policy, but rather limits the analysis to the available arguments under the case law. Part II is framed this way for an important reason. A principal idea explored in this Article is that not only is the Constitution not a solution to all our problems, as many conservatives like Justice Scalia have noted, but the Constitution can also be a source of our problems. In order to engage in meaningful dialogue about how to deal with this issue, we must be as descriptive as we can in analyzing the problem, so that normative judgments do not conceal the problem’s existence.

Part II's descriptive format and briefly explores, as a normative matter, whether we should break the constitutional constraints that lead public schools to make this problematic decision. Given that applying act-utilitarianism¹² to judicial decisionmaking rarely makes for good jurisprudence, and, more importantly, that various American political institutions have already acted to solidify these constraints, Part III concludes that any practical solution to the problem must work from within, rather than against, the constraints, and accordingly, the Part offers a sort of constitutional compromise consisting of three proposals as to how, within these constraints, the government may educate children and teenagers about sex. The Article ends with consideration as to how the preceding discussion contributes to our understanding of the Constitution and those charged with interpreting it.

I. A SCHOOL DISTRICT'S PROBLEM OF WHETHER TO TEACH SEX EDUCATION

Imagine you are a school district attorney in a state that does not require its public schools to teach sex education. Students and parents in the district who want the public high school to teach sex education have pressured your school district to institute compulsory sex education. Based on sex education polls and research, many school board members think that compulsory sex education is a good idea. However, after hearing that the district might force their children to attend sex education classes, some religious parents have threatened that they will challenge the constitutionality of any compulsory sex education program.

¹² Act-utilitarianism is the term philosophers use to describe an application of utilitarianism that permits a departure from utilitarian rules when such a departure maximizes happiness. Rule-utilitarianism, by contrast, adopts rules that maximize happiness and does not permit exceptions to such rules—even in the instances when allowing for an exception would maximize happiness.

To avoid this litigation, some board members have proposed allowing all students who can show that sex education violates their religious beliefs to opt-out of sex education class. This exemption clause, however, worries many board members and parents. The district has not taught sex education precisely because there are so many public school students whose parents vigorously oppose sex education. Given their opposition, these parents will probably invoke the exemption clause, and given their strongly held religious beliefs, they will do so successfully. Thus, a large percentage of the students could be exempt from sex education class while the other students are compelled to attend sex education class. Some board members worry that by giving students different schedules on the basis of their religious backgrounds, the exemptions could highlight the differences among different religious groups, thereby increasing the likelihood of school violence. In addition, many conservative parents have expressed concern that their opted-out children will feel alienated from their classmates,¹³ and many liberal parents question the efficacy of a sex education program that exempts those students who need the education most.¹⁴

Weighing the costs of the disorder and tension that exemptions might create against the limited benefits of a sex education program where a large percentage of the most information-starved students are exempt from class, the majority of the board

¹³ This is a common concern among sex education opponents. For example, Professor Luker explains in her book how, in response to Jenny Letterman's opposition to sex education, other families wonder why Jenny doesn't just have her child opt-out and go to the library while the other children attend sex education class. Professor Luker writes that this opt-out suggestion angers Jenny just as much as Jenny's refusal to opt-out angers others. One reason why it angers Jenny so much is that "she thinks her son will feel weird and different going to the library when everyone else stays behind." LUKER, WARRING VIEWS ON SEX, *supra* note __, at 27.

¹⁴ Many sex education supporters worry that parents who opt their children out of sex education will not teach sex education adequately at home, and that as a result there will be some sexually uneducated children in the community, who in turn will spread the risks of uninformed sex to others. According to Melanie Stevens, a sex education supporter in Professor Luker's field study, opt-outs are dangerous because one ignorant child in the community puts "all of our precious, beautiful children . . . at risk of death." *Id.* at 30.

believe that compulsory sex education with exemptions is a bad idea. For these board members, the solution is either to institute compulsory sex education without an exemption or to do nothing at all.

In response to the board's failure to institute compulsory sex education, some students and parents who support sex education have threatened to file lawsuits, claiming that all public high schools are compelled by the U.S. Constitution to teach sex education.

Confused by the fact that both the supporters and the opponents of sex education seem to think that the U.S. Constitution is on their side, the school board has come to you, its attorney, with two questions that are critical to how it will respond to the litigation threatened by these groups. One question is whether there is any merit to the claim that the U.S. Constitution requires public high schools to teach sex education. The other question is whether there is any merit to the claim that the U.S. Constitution requires public high schools that teach sex education to exempt from class those students whose religious beliefs are burdened by sex education.

II AN ANALYSIS OF THIS PROBLEM UNDER THE U.S. CONSTITUTION

A. Does the U.S. Constitution Require Public High Schools to Teach Sex Education?

The three constitutional provisions that most strongly support the claim that public high schools are required by the U.S. Constitution to teach sex education are: the Free Speech Clause,¹⁵ the Due Process Clause in the 14th Amendment,¹⁶ and the

¹⁵ "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

¹⁶ "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

Establishment Clause.¹⁷ The arguments that students and parents can make under these three constitutional provisions are analyzed below.

1. The Free Speech Clause

The Free Speech Clause expressly guarantees a right to speak. Because a corollary of the right to speak is the right to know,¹⁸ the U.S. Supreme Court has ruled that the Free Speech Clause guarantees citizens a right to acquire information.¹⁹ Thus, students might have a right to acquire sex information in public schools. Based on the Supreme Court's free speech jurisprudence, there are two ways the right to acquire sex information might apply in public schools.

The stronger free speech right to acquire sex information in public school means that when public schools make curricular decisions, they must consider the interests that students have in acquiring sex information. This right probably translates into a public high school student's constitutional right to take sex education classes.

A weaker free speech right limits the power that public schools may exercise when they deprive students of access to sex information. This right does not require public high schools to teach sex education, but instead prohibits public high schools from withdrawing sex information that they already have in their possession.

Following is an evaluation of the legal arguments for each right and an analysis of the implications for public high school students.

a. The right to acquire sex information in the classroom

¹⁷ "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

¹⁸ *Miller v. California*, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting) (stating that "the right to know is the corollary of the right to speak").

¹⁹ *See, e.g., Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

The strongest free speech right to acquire sex information means that public high school students have a right to take sex education classes. Supporters of this right can draw inspiration from *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.²⁰ The dispute in *Pico* arose after the local school board decided to remove controversial fiction books from the public junior high school and high school libraries.²¹ Some students and parents challenged this decision, arguing that because the Free Speech Clause guarantees a right to acquire information,²² the school board violated the students' free speech rights.²³

Writing for a plurality of the Court, Justice Brennan found that the school board violated the Free Speech Clause.²⁴ Justice Brennan reasoned that although public schools may remove books from their libraries for many reasons, public schools may not remove a book on the basis that it is controversial.²⁵ While Justice Brennan addressed only the removal of books from libraries, a court could extend Justice Brennan's reasoning to other media besides books and to locations outside of the library. To persuade a court to extend this reasoning, our hypothetical sex education supporters could make the following argument:

The right to acquire information in public schools should not be based on the location in which students receive the information or the medium through which the

²⁰ 457 U.S. 853 (1982).

²¹ *Id.* at 858.

²² *Id.* at 859.

²³ *Id.*

²⁴ It should be noted that this proposition is dictum since the actual holding in the case was to remand for development of the facts—that is, to determine why the library removed the books. *Id.* at 883-84.

²⁵ Lower courts have interpreted *Pico* to mean that public schools may not deprive students of information on the basis of the information's controversial content. *See, e.g., Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) (interpreting *Pico* to mean that "students' First Amendment right of access to information is violated when schools remove books from library in a content-based manner").

information is passed because the right to acquire information under the Free Speech Clause is based on the recipient's *interest* in the information.²⁶ By connecting one's interest in information with how much one values the information, sex education supporters can argue that the strength of a student's right to acquire certain information should be based on how much the student values it. With informational value as the primary criterion, sex education supporters can argue that it does not make sense to limit the right to acquire information in public schools to a particular location or to a particular medium.

Moreover, if the strength of this right is based on the informational value, then sex information should receive more constitutional protection than the literary works at issue in *Pico*. Because sex education is not only important to the intellectual development of students, as the controversial books in *Pico* were, but sex information is also important to the health of students, unlike the literary works in *Pico*, a public school should have less discretion in depriving students of access to sex information than it has under *Pico* in removing controversial works of fiction. Thus, not only are public schools *prohibited* from depriving students of sex information in the library, but public schools are also *required* to provide sex information in the classroom, and accordingly, public high schools must teach sex education.

This argument, however, would prevail only if a court were to interpret Justice Brennan's plurality opinion in *Pico* so broadly that it applied to information transmitted to students outside of the library. If, as is more likely, a court were to read Justice Brennan's opinion narrowly, so that it would apply only to the removal of library books, a court could easily find that the Free Speech Clause does not guarantee a right to sex

²⁶ See, e.g., *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

education classes. Under a narrow reading of *Pico*, the Court's other cases considering the question of how much discretion public schools may exercise in regulating the curriculum are more relevant than is *Pico*. Two important decisions in this respect are *Hazelwood School District v. Kuhlmeier*²⁷ and *Epperson v. Arkansas*.²⁸

In *Hazelwood*, the Court held that a public school's regulation of curriculum-related speech does not raise free speech concerns if the regulation is "reasonably related to legitimate pedagogical concerns."²⁹ Because *Hazelwood* means that students do not have a right to express in the classroom anything that they want to express, *Hazelwood* strongly suggests that students do not have a free speech right to take sex education classes. Indeed, if public schools have the power to regulate what kind of information is *expressed* in the classroom, as the Court held in *Hazelwood*, then it follows that public schools have the power to regulate what type of information students *acquire* in the classroom. So even if Justice Brennan's plurality opinion in *Pico* were treated as binding precedent, a court could read *Pico* in harmony with the Court's holding *Hazelwood* to rule that students do not have a free speech right to sex education.

Furthermore, Justice Black's concurrence in *Epperson* provides ample support for the proposition that there is no free speech right to sex education. In *Epperson*, the Court held that Arkansas violated the Establishment Clause by endorsing a creationist interpretation of human development.³⁰ Justice Black's concurrence pointed out that Arkansas did not violate the Constitution simply by condemning natural science. Justice Black reasoned that because "students do not have a constitutional right to learn a certain

²⁷ 484 U.S. 260 (1988)

²⁸ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

²⁹ *Hazelwood*, 484 U.S. at 268-69.

³⁰ *Id.* at 109.

subject in public school,”³¹ a public school therefore may decide not to teach a subject either because the subject is not a priority for the school, or because the school considers the subject too controversial for public consumption.³² Thus, even if Arkansas wanted to remove biology from the curriculum because it found the subject too controversial, Arkansas could still do so without violating the U.S. Constitution.³³

Notably, there is considerable tension between Justice Brennan’s plurality opinion in *Pico* and Justice Black’s concurring opinion in *Epperson*. Whereas Justice Brennan’s analysis in *Pico* focuses on the school’s motive for depriving students of access to information, Justice Black’s opinion in *Epperson* disregards the school’s motive for withdrawing information from the curriculum so long as that motive is not clearly religious. The tension between these opinions is noteworthy because a court might look to both Justice Brennan’s plurality opinion and Justice Black’s concurrence for guidance when dealing with the question of whether the Free Speech Clause requires public schools to teach sex education.

Even though Justice Black’s concurrence is the older of the two opinions, it is probably more persuasive where a curricular decision is at issue, since, after all, *Epperson* certainly speaks more directly than does *Pico* as to the power that the state may exercise when making curricular decisions. Given that neither *Epperson* nor *Pico* provide mandatory authority for a lower court,³⁴ and that *Epperson* probably has more persuasive authority with regard to curricular questions, a court would probably look to

³¹ *Id.* at 113.

³² *Id.*

³³ *Id.*

³⁴ Of course, a court could simply ignore both opinions, since neither Justice Black’s concurrence nor Justice Brennan’s plurality is controlling precedent.

Epperson more closely in determining whether students have a free speech right to sex education.

Therefore, if a court were to read *Pico* narrowly so as to apply only to library books, a court probably would hold that students do not have a free speech right to acquire sex information in the classroom under *Hazelwood* and *Epperson*—no matter how important that information might be to some students.

b. The right to acquire sex information in the school library

As discussed above, *Pico* can be stretched to apply to curricular decisions. However, since Justice Brennan gave little indication that his opinion applied to curricular decisions, a more faithful reading of his plurality opinion is that the *Pico* applies only to a school’s decisions regarding school library books. If this reading were to apply to school library books containing sex information (“sex information books”), students might have a free speech right to acquire sex information in the school library.

This free speech right to acquire sex information in the school library could have two meanings. One meaning is that public school libraries are not only prohibited from getting rid of sex information books on the basis of their content, but are also obligated to provide such books. Another meaning is that while public school libraries are prohibited from removing sex information books on the basis of their content, public school libraries do not have an obligation to provide *any* sex information books. Based on the facts at issue in *Pico*, the latter interpretation is probably right.

In determining whether *Pico* means that public school libraries have an obligation to provide any sex information books, a critical fact in the case is that the Island Trees School District *removed* the books from the school’s library. Thus, the facts of the case

did not involve the acquisition of books. In fact, Justice Brennan’s plurality opinion suggests that there is a constitutional distinction between a public school’s decision not to acquire books and a public school’s decision to remove books.³⁵ Accordingly, a court can hold that *Pico* creates an obligation on the part of public schools to provide controversial books to students only *after* the school has acquired the controversial books. This is indeed how many lower courts have interpreted *Pico*.³⁶

Under this interpretation, public schools may not remove sex information books already in the library’s possession on the basis of their controversial content, but public schools may decide that they will never provide such books to students. Read in this light, then, *Pico* is a powerful case for students in schools with libraries full of sex information books; but *Pico* is of little value to students demanding sex information books from public schools that have never provided them. In order to receive sex information, these students in public schools that have never provided sex information books need to point to an affirmative state educational obligation.

An important case in this respect is *San Antonio Independent School District v. Rodriguez*.³⁷ In *Rodriguez*, parents claimed that unequal funding of public education³⁸ violates the Equal Protection Clause “because [education] is essential to the effective

³⁵ *Pico*, 457 U.S. at 862 (noting that “[r]espondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read” but “[r]ather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by the school authorities, or without objection from them”) (emphasis in original).

³⁶ Lower courts have interpreted *Pico* to mean only that public schools may not remove certain books from the library. See, e.g., *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) (interpreting *Pico* to mean that “students’ First Amendment right of access to information is violated when schools remove books from library”).

³⁷ 411 U.S. 1 (1973).

³⁸ The dispute in *Rodriguez* arose after Texas’ policy of basing local school expenditures on property taxes resulted in schools in wealthy districts having much more money than schools in poor districts. *Id.* at 11-16.

exercise of First Amendment freedoms and to intelligent utilization of the right to vote.”³⁹ To support this claim, the parents noted that if a person is not given the training to speak and think intelligently, the rights to speak and vote are meaningless.⁴⁰ Without education, the marketplace of ideas is an empty market and the ballot is just a blank piece of paper.

Writing for the majority, Justice Powell began his analysis by searching the text of the U.S. Constitution for a right to public education.⁴¹ Justice Powell determined that since there is no provision in the U.S. Constitution even suggesting such a right,⁴² the only way the parents could prevail is if they could show that public education is necessary to fulfill a textual right.⁴³ Justice Powell rejected the argument as applied to the plaintiffs because, even if public education is a nexus for free speech, Texas had not destroyed that nexus by providing universal but unequal education.

At first glance, *Rodriguez* seems to invalidate the proposition that the government is obligated to provide sex information under the Free Speech Clause. Surely, if the government does not have the obligation under the Free Speech Clause to provide education, then it must not have the greater obligation to provide information about a specific subject.

³⁹ *Id.* at 35.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² It should be noted that there is an explicit right to education under some state constitutions. *See*, e.g., CONN CONST., art. VIII § 1; MD. CONST., art. VIII § 1; N.J. CONST., art. VIII § 4; *and* N.D. CONST., art. VIII §§ 1 and 2.

⁴³ Notably, Justice Powell did not say that the parents would prevail *if* they made this showing. Rather, he claimed that they would prevail *only if* they made this showing—that is, without a textual right, they could not prevail any way other than making a nexus argument. And whether they would prevail by making that argument was a question to be dealt with another day—i.e., when an education system was so unequal that poor parents could not meaningfully exercise textual rights. *See Rodriguez*, 411 U.S. at 35-37.

Upon further examination, though, *Rodriguez* might mean that states have affirmative educational obligations under the Free Speech Clause. Because *Rodriguez* involved a dispute over a decision to provide universal but unequal education, there is still an open question as to whether there is an obligation to provide universal education. Moreover, the language of Justice Powell’s majority opinion indicates a limited requirement to educate under the Free Speech Clause. Justice Powell stressed the fact that although Texas did not educate all of its citizens to become active or astute political participants, Texas did provide the information necessary for Texans to communicate and vote.⁴⁴ This education, Justice Powell found, was sufficient to meet the government’s educational requirements mandated by the Free Speech Clause.⁴⁵

Thus, the Court might have held differently had Texas completely denied all of its citizens an entire category of information. So, while *Rodriguez* might have shut the door for some educational obligations, *Rodriguez* might have left the door open for others. Because *Rodriguez* indicates that the government might be required to teach citizens only “the basic minimal skills necessary for the enjoyment of the rights of speech,”⁴⁶ one can still say after *Rodriguez* that the government may not deny its citizens information that is fundamental to communication. In other words, the door remains open for an obligation to provide information that is necessary to a citizen’s ability to speak to others.

⁴⁴ *Id.* at 36-37 (stating that “[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short”).

⁴⁵ *Id.* at 37.

⁴⁶ *Id.* (declaring that “[w]hatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the *basic minimal skills necessary for the enjoyment of the rights of speech* and of full participation in the political process.) (emphasis added).

This door might still be open for sex education because sex education, arguably, is more fundamental to communication than many general subjects that are considered central to the high school curriculum. For example, sex education seems more fundamental to communication than math. This might not be intuitively apparent. After all, a basic understanding of math is probably necessary for a person to participate in the marketplace. Nonetheless, it might be argued that sex education is more fundamental to communication for the majority of American citizens because it is through sex education that a person learns how to express to others how she feels about such fundamental matters as her desire to procreate or her interest in remaining healthy. Moreover, by bringing people a comfort with their identities, sex education facilitates a person's ability to speak to others.⁴⁷ For this reason, some rank the importance of sex education with the three R's.⁴⁸ Viewed in this light, the idea that sex education is more fundamental to communication than a general subject like math might be quite sensible. For many people, lessons about health and family planning apply to daily communication, unlike the forgotten lectures on sine curves.

This application of *Rodriguez* to sex education might strike many as specious. Some might say that even if *Rodriguez* leaves the door open for some educational obligations that are necessary to communication, *Rodriguez* must not require schools to provide sex education because an understanding of sex is not *necessary* to communication. Admittedly, there is much to be said for this critique, since people have communicated for years without an understanding of sex. However, even if one rejects

⁴⁷ JAMES HITCHCOCK, *WHAT IS SECULAR HUMANISM* 99 (Servant Books 1982) (declaring that “[t]he aim of sex education is now “to help students ‘get over their hangups’”).

⁴⁸ RICHARD GREEN, *SEXUAL SCIENCE AND THE LAW* 176 (Harvard University Press 1992) (noting that “[a]dvocates of sex education rank its importance with the ‘three R’s’; thus failure to receive education in this area significantly handicaps a person in later life”).

the argument that sex education is necessary to communication, it must be accepted that sex education is of great importance to a person's physical and psychological health,⁴⁹ and it therefore follows that sex education is at least important to communication.

Because sex education might be important to rather than necessary to communication, a court could find that while there is no affirmative obligation under *Rodriguez* to teach sex education, the government has the lesser obligation to provide access to sex information. If there is such an obligation, local libraries or public school libraries might have an obligation to provide sex information. This might mean that if the local library does not permit young people to gain access to sex information, then the young people can argue that the government must give them access to sex information elsewhere—perhaps in the public school library.

This shifting obligation from the local library to the public school library is particularly relevant after *U. S. v. American Library Association*,⁵⁰ in which the Court upheld a congressional act forbidding public libraries receiving federal funding from granting uninhibited Internet access to minors. After this decision, many minors might not be able to acquire sex information on the Internet in their local public libraries. If minors cannot acquire sex information from their local public libraries, *Rodriguez* might require the government to provide some sex information in the public school library. And, under *Pico*, if this sex information is provided in the form of books, the state may not remove the books from the public school library on the basis of their controversial content.

⁴⁹ See *supra* note __, discussing CDC research synthesis finding that sex education has only positive effects.

⁵⁰ 539 U.S. 194 (2003),

2. The Due Process Clause

The Court has read the Due Process Clause to mean that the government may not unreasonably burden the exercise of certain unenumerated privacy rights. Under this reading of the Due Process Clause, students can argue that they have a constitutional right to acquire sex information, and parents can argue that they have a constitutional right to have their tax dollars used to inform their children about sex. The students' due process argument is explored in Part II.A.2.a, and the parents' due process argument is discussed in Part II.A.2.b.

a. A student's constitutional right to make private decisions

Students can argue that they have a right to acquire sex information because they have a due process right to make private decisions. If there is such a right to sex information, this might mean that public schools are obligated to teach sex education, or it might mean that public schools are required only to provide access to sex information. Whatever the extent of the right, however, a due process right to sex information would require public schools to provide a service.

That this right would require a governmental service is important because, to date, the Court has not found a positive obligation in the Due Process Clause. Instead, the Court has found only negative liberties—that is, the right to be free from unreasonable governmental intervention when making decisions that implicate liberty interests. Because the Court has found that citizens have a liberty interest in making private decisions, the Court has ruled that citizens have a right to be free from unreasonable governmental intervention when they make decisions regarding contraception,⁵¹

⁵¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

abortion,⁵² and their sexuality.⁵³ Thus, the strongest argument for a due process right to acquire sex information connects the power to make these constitutionally protected decisions with the acquisition of sex information.

Many have noted the tight analytical relationship between these decisions and sex information. Professor Catherine J. Ross writes, “The right of minors to information about sexuality and contraception flows analytically from the privacy right to obtain an abortion without parental consent.”⁵⁴ The freedom to choose is predicated on decisional power, which requires information.⁵⁵

This is significant in terms of a constitutional right to sex education because there is strong evidence that students do not have access to accurate sex information outside of school. Studies suggest that for two related reasons many students in the United States do not have access to accurate sex education outside of school. One reason is that many parents do not provide sex education at home.⁵⁶ The other reason is that many adolescents learn about sex from other adolescents. According to research, many generations of American children have learned about sex from other children. A 1926

⁵² *Roe v. Wade*, 410 U.S. 113 (1973).

⁵³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁴ Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 259 (1999).

⁵⁵ A simple analogy illustrates the relationship between decisionmaking and information. Let’s say a person is given two buzzers. The person is told that she will receive goods by pressing each of the buzzers, but that she may press only one of these buzzers. She is then told what she will receive if she presses one of the buzzers, but she is not told what she will receive if she presses the other buzzer. In this situation, her freedom to choose between these two goods is not meaningful in any practical sense because she does not know what she is giving up by selecting one of the buzzers. Similarly, in order for a young person to make constitutionally protected decisions about her sexual conduct, she must first know the relevant risks and benefits involved in making these decisions. And in order to know these risks and benefits, she must have a basic understanding of human sexuality.

⁵⁶ Studies suggest that only 15% of mothers and less than 8% of fathers talk to their pre-adolescent children about premarital intercourse. A smaller percentage of parents discuss venereal disease. And an even smaller percentage discuss birth control. GREEN, *SEXUAL SCIENCE AND THE LAW*, *supra* note ____, at 184.

study found that 80% of children received their sex information from other children.⁵⁷

Amazingly, almost 60 years later, researchers found in a similar study that other children are still the most common source of sex information for children.⁵⁸ As these studies suggest, the majority of students do not acquire sex information at home or school.⁵⁹ Instead, most students acquire sex information from other students.

The problem with students acquiring sex information from other students is that the information is often false. For example, it is a common myth among teenagers that a girl cannot become pregnant the first time she has intercourse.⁶⁰ Since some teenagers acquire sex information only from other students, it is difficult for these teenagers to verify sex information. Indeed, without a rudimentary understanding of human sexuality, false sex information is virtually indistinguishable from true sex information.

Clearly, the constitutionally protected right to make private decisions about sex does not mean very much if one needs sex information in order to make these decisions, and if one's only access to sex information is unverifiable and often false. Unfortunately, this can be said for many American public school students—their constitutional right to make private decisions about sex is not very meaningful because they cannot fully exercise it.

Notwithstanding this unfortunate situation, students probably do not have a constitutional right to acquire sex information under the Due Process Clause because the Supreme Court has found that, so long as people can exercise the right to make private decisions free from governmental intervention, the government does not impinge on the

⁵⁷ *Id.*

⁵⁸ *Id.* at 185.

⁵⁹ *Id.*

⁶⁰ Women's Issues, *Teen Sex Myths Exposed*, (2005) at <http://womensissues.about.com/od/womenssexuality/a/teensexmyths.htm>.

right by refusing to assist citizens in exercising the right. Under the Court's interpretation of the Due Process Clause, the mere existence of the right to make private decisions, even without full exercise of that right, is sufficient. To understand why the Court has interpreted the Due Process Clause this way, and to demonstrate how this interpretation probably means that the government does not violate the Due Process Clause if minors have a private means of acquiring sex information, it might be helpful to examine how the Court has treated the government's refusal to assist citizens in exercising the constitutionally protected right to choose whether or not to have an abortion.

*Maher v. Roe*⁶¹ was the first case in which the Court considered the relationship between government benefits and the due process right to an abortion. The dispute in that case arose after Connecticut denied its citizens Medicaid benefits for medically unnecessary abortions. The Court found that because the government does not have an obligation to assist women in exercising their right to have an abortion, Connecticut did not violate the Due Process Clause by denying the use of government benefits for the purpose of obtaining medically unnecessary abortions.

In *Harris v. McCrae*,⁶² the Court followed *Maher's* reasoning by holding that the federal government could refuse to fund abortions altogether. In *McCrae*, Justice Stewart explained why, even though citizens have a constitutional right to choose whether or not to have an abortion, the government does not have an obligation to fund abortions. Justice Stewart pointed out that the Due Process Clause guarantees liberty, and that this

⁶¹ 432 U.S. 464 (1977)

⁶² 448 U.S. 297 (1980).

guarantee of liberty does not require any governmental action.⁶³ Instead, it protects people from governmental action.⁶⁴ Thus, even though the Due Process Clause guarantees the right to have an abortion, “it simply does not follow [from *Roe*] that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”⁶⁵ Justice Stewart then applied his understanding of the Due Process Clause to other privacy rights: “It cannot be that because government may not prohibit the use of contraceptives [*Griswold*] or prevent parents from sending their child to a private school [*Pierce*], government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.”⁶⁶

The Court extended Justice Stewart’s reasoning in *Rust v. Sullivan*.⁶⁷ In *Rust*, a restriction on abortion counseling for people receiving federal family planning funds was challenged as an unconstitutional interference with a woman’s right to an abortion.⁶⁸ The Court found that since the government is not obligated under the Due Process Clause to assist citizens in exercising the right to have an abortion,⁶⁹ the government may prohibit government employees from providing abortion counseling.⁷⁰

Notably, there were dissents in these abortion cases, claiming that if the government does not assist people in exercising the right to have an abortion, the right to have an abortion is meaningless for many women. In *Rust*, for example, Justice Blackmun wrote that, “[b]y suppressing medically pertinent information and injecting a

⁶³ *Id.* at 317-318.

⁶⁴ *Id.*

⁶⁵ *Id.* at 316.

⁶⁶ *Id.* at 318.

⁶⁷ 500 U.S. 173 (1991).

⁶⁸ *Id.* at 203.

⁶⁹ *Id.* at 201-202.

⁷⁰ *Id.*

restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of . . . freedom of choice.”⁷¹ Justice Blackmun concluded that in effect “the Government will have obliterated the freedom to choose as surely as if it had banned abortions outright.”⁷²

Justice Blackmun’s dissent is similar to the point made above about the freedom to choose being predicated on decisional power.⁷³ Since this decisional power requires information, the mere existence of the freedom to choose, without the information necessary to choose, is meaningless in any practical sense. Applying this reasoning to abortion, Justice Blackmun found that women who are unaware of the benefits and risks of abortion cannot fully exercise their power to make the decision of whether or not to have an abortion. Because these women might not know what will happen if they choose to have an abortion, these women are unable to choose in any meaningful way whether or not to have an abortion.

But, as the Court has pointed out in various contexts, the language of the Due Process Clause does not support Justice Blackmun’s reasoning. While the text clearly prohibits the government from depriving citizens of liberty, the text does not indicate that the government is obligated in any way to protect citizens from other private actors seeking to take away their liberty.⁷⁴ In other words, the Clause does not guarantee liberty; rather, the *Clause guarantees that the government will not take away liberty*. Thus, the text does not suggest that the government has an obligation to inform women of

⁷¹ *Id.* at 215.

⁷² *Id.*

⁷³ See *supra* note ____.

⁷⁴ See, e.g., *Deshaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189 (1989) (holding that the government does not have the constitutional obligation to protect a child from his physically abusive father).

the risks and benefits of obtaining an abortion. Indeed, just as the government does not have an obligation to protect citizens from private actors, the government does not have an obligation to protect uninformed women from their ignorance. So, although Justice Blackmun's dissent in *Rust* is logically sound in terms of what it means to exercise true choice, Justice Blackmun's analysis is not in tune with the tenor of the Due Process Clause. Consistent with the text of the Due Process Clause, the Court has held repeatedly that states do not have an affirmative duty to provide the services necessary for women to choose whether or not to have an abortion.

Based on the Court's textual interpretation of the Due Process Clause, minors do not have a right to acquire sex information under the Due Process Clause. Just as women are not protected from their ignorance, children are not protected from the misinformation disseminated on the playground. And just as women are not entitled to cost-free abortions, minors do not have a right to cost-free sex information. Thus, even if the government burdens a minor's private access to sex information, courts will invalidate the impediment only if it effectively makes the information inaccessible. This might be limited to situations when the government imposes a civil or criminal penalty on the acquisition of the information. But when the government imposes a minimal burden on the acquisition, such as when the government merely decides not to facilitate the acquisition of the information, courts will not find a due process violation. Thus, the government's obligations under the Due Process Clause are probably satisfied when it refuses to provide sex education even if this means that the only way teenagers can acquire sex information is by private means, such as by buying books or renting videos. This is true even if the costs of acquiring the information—i.e., paying money, enduring

humiliation—place the information out of reach for some teenagers. So long as teenagers can obtain sex information without fear of suffering a civil or criminal penalty, there is no due process obligation on the government to inform students about sex so that they can make constitutionally protected private decisions.

b. The right to raise one’s own child how one sees fit

Until this point, the discussion of the Due Process Clause has been limited to the liberty interests of *students* in sex education. However, a public school also violates the Due Process Clause if it violates the liberty interests of *parents*. Since parents are rarely in a position to educate their children by themselves, the government acts as a surrogate for parents in educational matters. In this role, the government may exercise discretion to give effect to parental interests. However, the government’s interests and a parent’s interests sometimes conflict. The Court ruled in *Meyer v. Nebraska*⁷⁵ and *Pierce v. Society of Sisters*⁷⁶ that when there is such a conflict between the government and the parent, the Due Process Clause limits the power that the government may exercise over a child.

The analysis applied in *Meyer* and *Pierce* is pretty straightforward. A balancing test is triggered when parental and governmental educational interests conflict. If the government’s interests are not strong, the balance will swing in favor of the parent, as

⁷⁵ 262 U.S. 390 (1923). In *Meyer*, the Court struck down a Nebraska law forbidding instruction in any modern language other than English. The purpose of the law was to create linguistic uniformity in a region with a large foreign population. The dispute in *Meyer* arose after Nebraska used this statute to convict a teacher who was instructing a class in German. The Court found that, although the government may “improve the quality of its citizens,” *id.* at 401, the government may not unreasonably interfere with a parent’s duty to educate his children. Because the Nebraska law ignored the interests parents had in their children learning foreign languages, and because Nebraska’s interest in linguistic uniformity was not sufficiently weighty so as to overcome these parental interests, the Court invalidated the law.

⁷⁶ 268 U.S. 510 (1925). In *Pierce*, the Court invalidated an Oregon statute requiring parents and legal guardians to send all children between the ages of eight and sixteen to public schools. Oregon passed this law to prevent Catholic and foreign parents from sending their children to parochial schools. As it had in *Meyer*, the *Pierce* Court struck down the statute because it “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.” *Id.* at 534-35.

indicated in the Court's decisions in *Meyer* and *Pierce*. As in all balancing tests, however, the difficult part is in weighing the interests. In this respect, the facts of the cases are helpful. From *Meyer*, for instance, we know that the government's interest in linguistic uniformity is too weak to trump a parent's interest in having her child learn a foreign language. And from *Pierce*, we know that the government's interest in patriotism is too weak to trump a parent's interest in private education.

Thus, by comparing the interests that parents have in their children learning about sex to the interests that parents have in their children learning foreign languages and attending private schools, parents can argue that the Due Process Clause requires public schools to teach sex education to their children.

In making this argument, parents can also emphasize how the government's refusal to teach sex education interferes with the private relationship between parents and their children because the government's refusal to teach sex education places the educational responsibility on parents. This responsibility is especially burdensome in a culture, such as ours, in which open sexual dialogue between parents and children is rare and even taboo.⁷⁷ Moreover, this burden is enhanced by the fact that many parents feel that if public schools do not teach sex education, then they *must* instruct their children about sex in order to protect their children from STDs and pregnancy. Accordingly, a school's failure to teach sex education makes some parents feel compelled to initiate uncomfortable conversations with their children while their children are still young. To avoid this discomfort, parents need public schools to educate their children in sexual matters. And, so the argument goes, because the government's interest in not teaching

⁷⁷ RICHARD POSNER, *SEX AND REASON* 270 n.10 (Harvard University Press 1992).

sex education is not very strong, the parental interests in having the government teach sex education should prevail under *Meyer* and *Pierce*.

The problem with this argument is that it ignores the fact that there are also parents who strongly believe that public schools should *not* provide sex education. Since *Meyer* and *Pierce* protect the interests that *all* parents have in their children's education, *Meyer* and *Pierce* are limited to situations when the government can accommodate one group of parental interests without impinging on another group of parental interests. That *Meyer* and *Pierce* must be limited in this way is demonstrated by a brief examination of what it would mean if conflicting parental interests did not limit *Meyer* and *Pierce*.

Let's say one group of parents wants the government to do x and a second group of parents wants the government to do y, and the goals achieved in doing x and y are contradictory. And let's also say that the government decides to do x, even though doing x conflicts with the interests of the second group of parents. If conflicting parental interests did not limit *Meyer* and *Pierce*, the second group of parents could argue that the Due Process Clause requires the government to do y. But if the Due Process Clause required the government to satisfy the interests of the second group of parents, and if in doing so the government ignored the conflicting interests of the first group of parents, the Due Process Clause would require the government to ignore the interests that the first group of parents had in their children being educated a certain way.

If the Due Process Clause required this, the Constitution would require the government to do precisely what the Constitution forbade the government from doing. Unless we subscribe to a Godelian view of constitutional interpretation,⁷⁸ the Constitution

⁷⁸ By a Godelian view of constitutional interpretation, I am referring to an approach to constitutional interpretation that adopts the incompleteness theorem proposed by the mathematician Kurt Godel in his

cannot require contradictory actions. Accordingly, *Meyer* and *Pierce* must be limited when the government makes a decision in which parental interests conflict. In such situations, the government must be free to make reasonable decisions, even if in making those decisions the government ends up siding with one group of parents over another.

In light of the competing parental interests in the sex education debate, the government's decision to ignore the interests of parents who want sex education should be permissible under *Meyer* and *Pierce* so long as the decision is either an effort to please parents who oppose sex education or the reasonable judgment of the local school board. Indeed, some lower courts have suggested that for this reason neither parents who support sex education nor parents who oppose sex education may prevail in their claims under *Meyer* and *Pierce* to challenge the government's decision either to institute or not to institute sex education.⁷⁹ Thus, there is no due process claim under *Meyer* and *Pierce* that parents can make for sex education.

3. The Establishment Clause

A final argument for sex education is that public schools violate the Establishment Clause by deciding not to teach sex education. This is by good measure the weakest of the constitutional arguments for sex education. Even assuming that the Establishment Clause could be invoked to invalidate a decision that was not made, which is a generous

famous 1931 paper "On Formally Undecidable Propositions in *Principia Mathematica* and Related Systems." See KURT GODEL, COLLECTED WORKS, VOL. I: PUBLICATIONS 1929-1936 (Solomon Feferman ed., Oxford University Press 1986). According to this theorem, axioms in a consistent system sufficiently powerful to produce propositions will always produce propositions that cannot be proven to be consistent by the system itself. Only under such a reflexive system can the Fourteenth Amendment require the government to accommodate parental child-rearing interests when doing so violates other parental child-rearing interests. For another example of how Godel's incompleteness theorem might relate to constitutional interpretation, see Jesse R. Merriam, *Finding a Ceiling in a Circular Room: Locke v. Davey, Federalism, and Religious Neutrality*, 14 TEMP. POL. & CIV. RTS. L. REV. __ (forthcoming 2006).

⁷⁹ Lower courts have found that *Meyer* and *Pierce* do not grant parents the constitutional right to control the public school curriculum. See, e.g., *Brown v. Hot, Sexy & Safer Prods, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995); *Swanson v. Guthrie Indep. Sch. Dist.* No. I-L, 135 F.3d 694 (10th Cir. 1998).

assumption, it is extremely doubtful that under the Court's existing Establishment Clause doctrine, the *Lemon* test, a court would find that a public school violates the Establishment Clause by making the decision not to teach sex education. This likelihood goes from scant to zero when one considers how the Court's unhappiness with the *Lemon* test has led the Court to apply the test with a strong emphasis on the government's obligation to act neutrally towards religion.

However, despite the unlikelihood of finding that a public school that does not teach sex education violates the Establishment Clause, it might be helpful here to describe how a public school's decision not to teach sex education could be analyzed under the *Lemon* test and to explain how the issue could be analyzed under the Court's recent Establishment Clause jurisprudence.

In 1971, the Court announced an Establishment Clause test in *Lemon v. Kurtzman*.⁸⁰ Under this test, a governmental act violates the Establishment Clause if: (1) the government's purpose in the act is religious; or (2) the act's primary effect advances or inhibits religion; or (3) the act excessively entangles government and religion.⁸¹ Twenty-six years later, in *Agostini v. Felton*,⁸² the Court collapsed the "entanglement prong" of the *Lemon* test into the "effects prong" by explaining that the factors used to determine whether a government program excessively entangled the government with the religion were the same as the factors used to examine the effect of the program.⁸³ The extent of that collapse is not important here, though, since there is no conceivable

⁸⁰ 403 U.S. 602 (1971).

⁸¹ *Id.* at 612-13.

⁸² 521 U.S. 203 (1997).

⁸³ *See id.* at 206.

argument that a governmental institution is entangled with religion by not teaching sex education. Thus, only the first two prongs merit discussion below.

Under the first prong of the *Lemon* test, sex education supporters could argue that when a public school decides not to teach sex education, the public school's purpose is to promote religion. In the unlikely case that state decisionmakers were to reveal their religious motives for deciding not to provide sex education, this would be an easy argument. In such a case, sex education supporters could make a prima facie Establishment Clause case by simply pointing to their religious motives.⁸⁴

However, as we all know, many state decisionmakers disguise their religious motives in secular rhetoric when they have religious motives for making decisions that have religious overtones.⁸⁵ Decoding the religious nature of the secular rhetoric poses some difficulties. To do this, one would have to argue that despite the government's professed secular reasons for making the decision, there are religious forces at play. Since this is very difficult to prove, courts rarely invalidate laws based on the first prong of the *Lemon* test.

Making this argument in the sex education context particularly difficult is that there are many secular reasons for not teaching sex education. For example, the government might frame the issue in terms of health—an interest that the Court has found to be secular even when the government uses religious organizations as the primary

⁸⁴ See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985).

⁸⁵ For example, in *Edwards v. Aguillard*, 482 U.S. 578 (1987) the Court considered whether the Louisiana legislature's professed secular motive for passing the "Balanced Treatment for Creation-Science and Evolution-Science Act" immunized from invalidation under the Establishment Clause. Although the legislators tried to disguise their obviously religious motives by citing an interest in the open pursuit of scientific truths, the Court struck down the law.

vehicle for its promotion.⁸⁶ This connection between a public school's decision not to teach sex education and the school's interest in health is supported by research indicating that sex discussion in the classroom makes it more likely that adolescents will have sex,⁸⁷ and that adolescent sexual activity is psychologically and physically dangerous.⁸⁸

Therefore, to prove that the government has a religious purpose for not having public schools teach sex education, sex education supporters would have to argue that although there are legitimate secular reasons for adopting this policy, *these state decisionmakers* made the decision for religious reasons. This is impossible to prove without clear evidence of the decisionmakers' religious motives. Accordingly, sex education supporters can make a strong case under the first prong of the *Lemon* test only in the unlikely case that state decisionmakers were to reveal their religious motives for deciding not to teach sex education. But in the likely case (the case in which the state decisionmakers did not have any religious motives, did not reveal any motives, or disguised their religious motives), the argument under the first prong is very weak.

Under the second prong of the *Lemon* test, sex education supporters can argue that the promotion of religion is the primary effect of the government's decision not to teach sex education. This argument connects the values expressed in not teaching sex

⁸⁶ See *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988). (O'Connor, J., concurring) ("Government has a strong and legitimate secular interest in encouraging sexual restraint among young people.").

⁸⁷ A BBC poll of teenagers found that one in ten teenagers believe that sex education "made them more likely to have sex." BBC News, *Young Take Risks with Sex*, (Feb. 13, 2000), at <http://news.bbc.co.uk/1/hi/health/639566.stm>. A poll conducted by NPR, the Kaiser Family Foundation, and Harvard's Kennedy School of Government found that only 39% of Americans believe that "giving teens information about how to obtain and use condoms will not encourage them to have sexual intercourse earlier than they would have otherwise." NPR, *Sex Education in America: An NPR/Kaiser/Kennedy School Poll*, Jan. 2004, at <http://www.npr.org/templates/story/story.php?storyId=1622610>.

⁸⁸ One study found that sexually active adolescents are less likely to be happy and more likely to commit suicide than non-sexually active adolescents. Karen S. Peterson, *Study Links Depression, Suicide Rates to Teen Sex*, USA TODAY, June 2003, at http://www.usatoday.com/news/health/2003-06-03-teen-usat_x.htm. Also, sexual activity always involves some risk to a person's physical health, even when condoms are used.

education with religious objectives. This is related to the argument that the Establishment Clause prohibits public schools from teaching abstinence sex education—an argument advanced by Gary Simson and Erika Sussman.⁸⁹ In making this claim, Simson and Sussman draw on the close relationship between the Christian Coalition’s objectives, and the effects that flow from a public school’s decision to teach abstinence sex education.⁹⁰

A similar argument can be made when a public school refuses to teach any form of sex education. This argument would draw on the fact that many in the religious right reject public sex discussion,⁹¹ and that a rejection of public sex discussion is precisely what is achieved when a public school decides not to teach sex education.

This argument would not prevail because the *Lemon* test forbids only those religious effects that the court finds to be *primary*—not those that are merely incidental. Thus, the effect prong in the *Lemon* test cannot and does not mean that a state act is unconstitutional simply because it coincides with a religious objective. Instead, the effect prong means that a government act is valid when the effect of a government act is both religious and secular. Since not teaching sex education has both a religious and secular effect, there is no obligation on public schools to teach sex education under the effect prong.

⁸⁹ Gary Simson & Erika Sussman, *Keeping the Sex in Sex Education: The First Amendment’s Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN’S STUD. 265 (2000).

⁹⁰ Simson and Sussman point to the fact that "Sex Respect," the most widely used abstinence-only curriculum in the United States, is modeled after religious manuals, encourages participation from the religious community, and often incorporates religious beliefs. Indeed, many of the basic lessons of Sex Respect—e.g., the sanctity of marriage, the immorality of abortion, the abnormality of homosexuality—are based heavily on literal scriptural interpretation. *Id.* at 287.

⁹¹ For example, one religious right organization—Concerned Women for America—opposes “gay rights, sex education, drug and alcohol education.” Concerned Women for America, Profile, at <http://rightweb.irc-online.org/org/cwa.php>.

As described above, in order to prevail under the *Lemon* test, supporters of sex education would either have to decipher government motives or connect the absence of a sex education program to primarily religious objectives. Because accomplishing either of these tasks would be quite difficult, prevailing under the *Lemon* test would be almost impossible.

Making matters more difficult, the Court has modified the scope of the Establishment Clause by emphasizing in many cases that the Establishment Clause does not require complete separation between religion and government, but rather that the Clause requires the government to act neutrally towards religion.⁹² Applying this neutrality requirement to government funding, the Court has found that the government may fund religious organizations so long as the government does not discriminate on the basis of religion and the effect of the act is not inherently religious.⁹³

If a court were to apply this neutrality requirement to the government's decision not to teach sex education, it would be virtually impossible to find an Establishment Clause violation. One, the government does not discriminate on the basis of religion when it decides not to teach sex education. Two, the decision not to teach sex education is not an inherently religious decision; indeed, because there is research connecting adolescent sex to real secular harms, the basis for making the decision is not inherently religious. Therefore, even in the unlikely case that it could be proven either that the

⁹² Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771 (2001).

⁹³ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding voucher program that resulted in government indirectly aiding sectarian schools because the program was neutral with respect to religion); *Mitchell v. Helms*, 530 US 793 (2000) (plurality opinion) (upholding government's direct aid of sectarian schools because the aid program was neutral between sectarian schools and others, and the government did not engage in religious indoctrination by providing the aid); *Agostini v. Felton*, 521 U.S. 203 (1997) (allowing Title I services in private, religiously-affiliated schools); and *Bowen v. Kendrick*, 487 U.S. 589 (1988) (holding a congressional statute authorizing funding for religious organizations to provide adolescent sexual counseling facially valid under the Establishment Clause).

government had a religious purpose for not teaching sex education or that that the government achieved religious objectives by not teaching sex education, it would be very difficult for sex education supporters to succeed in using the Establishment Clause to compel a public school to teach sex education.

B. Are Some Students Constitutionally Entitled to Exemptions from Sex Education?

Let's say that, even though the Constitution certainly does not require it do so,⁹⁴ our hypothetical school district decides to institute compulsory sex education. The question, then, is whether those students who oppose sex education for religious reasons are entitled under the Free Exercise Clause to exemptions from sex education.⁹⁵

1. The Status of *Wisconsin v. Yoder* after *Employment Division v. Smith*

Before the Court decided *Employment Division v. Smith*,⁹⁶ the government had to carve an exemption from a law that substantially burdened a citizen's exercise of her sincerely held religious belief⁹⁷--that is unless the government could show that denying an exemption was necessary to serve a compelling state interest.⁹⁸ It was under this pre-*Smith* standard that the Court held in *Wisconsin v. Yoder*⁹⁹ that Amish students were entitled to exemptions from a Wisconsin compulsory school attendance law. Since *Yoder*

⁹⁴ As explained *supra*, while the Constitution certainly does not require public schools to teach sex education, the Free Speech Clause probably prohibits public schools from removing sex information from their libraries, and might require states to provide access to sex information. In addition, the Due Process Clause might forbid states from unreasonably burdening adolescent access to sex information.

⁹⁵ Some lower courts have found that students are not entitled to all-out exemptions from sex education under the Free Exercise Clause. Most notably, the First Circuit upheld the one-time compulsory attendance of a 90-minute AIDs awareness program, *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525 (1st Cir. 1995), and the Sixth Circuit upheld a Catholic student's compulsory attendance in health class when he could opt-out of family-life instruction and AIDS education classes, *Leebaert v. Harrington*, 332 F.3d 134 (6th Cir. 2003). Neither of these cases, however, addressed whether religious students are entitled to exemptions from a semester-long sex education class without opt-out provisions. That is the issue addressed in this section of the paper.

⁹⁶ 494 U.S. 872 (1990).

⁹⁷ See, e.g., *Sherber v. Verner*, 374 U.S. 398 (1963).

⁹⁸ *Id.* at 403.

⁹⁹ 406 U.S. 205 (1972).

provides the strongest argument for students and parents seeking exemptions from compulsory sex education, and since *Smith* radically changed free exercise doctrine, determining the status of *Yoder* after *Smith* is critical to an analysis of the strength of their argument for exemptions.

In *Smith*, the Court upheld an Oregon law that prohibited the use of peyote. Although the law substantially burdened the exercise of a Native American religious ritual, the Court held that the law did not violate the Free Exercise Clause because the law applied to the general population and because the government did not target a religious practice or religious group in passing the law.¹⁰⁰ The Court has applied *Smith* to mean that laws that incidentally burden religious exercise, no matter how much, are presumptively valid and therefore do not need to satisfy strict scrutiny.¹⁰¹

Under the post-*Smith* standard, compulsory sex education does not violate the Free Exercise Clause. So long as the program applies to all schoolchildren, and so long as the program does not target any religious group or practice, it is religion-neutral and generally applicable. And as such, the program is presumptively valid under *Smith*. Accordingly, students and parents do not seem to have a constitutional right under the post-*Smith* Free Exercise Clause to an exemption from compulsory sex education. Indeed, some lower courts have held just that.¹⁰²

¹⁰⁰ *Smith*, 494 U.S. at 879.

¹⁰¹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating a Hialeah ordinance that targeted a religious group's practice of animal sacrifice). It should be noted that pre-*Smith* strict scrutiny still applies under the Religious Freedom Restoration Act ("RFRA") when federal laws substantially burden religious exercise. In addition, laws passed in states with their own RFRA are subject to strict scrutiny when they substantially burden religious exercise.

¹⁰² See, e.g., *Brown v. Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (rejecting a Free Exercise Clause challenge to sexually explicit public school assembly because the school's decision to have the assembly was neutral and generally applicable).

However, students and parents seeking exemptions from compulsory sex education might prevail under the stricter standard established in *Yoder*. For the *Yoder* standard to apply to their claim, however, students and parents seeking exemptions must first demonstrate that *Yoder* survives *Smith*. In this respect, an important part of the *Smith* opinion is the section dealing with “hybrid situations.”

Writing for the majority in *Smith*, Justice Scalia tried to explain why the *Smith* Court applied a lower standard than the Court had applied in previous free exercise cases. In explaining one category of the Court’s previous free exercise cases, Justice Scalia claimed that a higher free exercise standard applied to cases that presented hybrid situations. According to Justice Scalia, a hybrid situation arises when a law substantially burdens both a person’s religious exercise and another constitutional interest.¹⁰³ When there is a hybrid situation, a higher standard than the *Smith* standard applies even when the law is religion-neutral and generally applicable.

Justice Scalia claimed in *Smith* that this hybrid exception explains why the Court applied a higher standard to the religion-neutral and generally applicable law at issue in *Yoder*. Since the compulsory school attendance law at issue in *Yoder* both substantially burdened the Amish parents’ sincerely held religious beliefs and impinged upon their constitutional interest in rearing their children how they saw fit, the *Yoder* case was a hybrid situation.¹⁰⁴ Thus, even though the compulsory school attendance law was religion-neutral and generally applicable, the Amish parents were entitled to exemptions for their children.

¹⁰³ *Smith*, 494 U.S. at 881.

¹⁰⁴ *Id.*

Applying this hybrid situations language to compulsory sex education, religious students and parents can make a strong argument for exemptions. Indeed, if the government cannot show that denying exemptions from sex education is necessary to achieving a compelling governmental interest, public schools must provide exemptions to those students who can show that sex education both substantially burdens their or their parents' religious exercise and impinges on another constitutional interest of theirs or their parents.

There is a problem, however, with this argument. Because the Supreme Court has not clarified what types of claims fall under this hybrid exception, the Circuit Courts follow three different approaches to the hybrid exception—each approach pointing the claimant in a different direction.

One approach applies the hybrid exception when a plaintiff articulates, in addition to a free exercise claim, an independent constitutional interest upon which she could prevail. The First Circuit supports this approach.¹⁰⁵ This approach has been sharply criticized on the basis that it does not change the substantive or procedural rights of claimants.¹⁰⁶

A second approach applies the hybrid exception when a plaintiff brings a colorable claim in addition to the free exercise claim. The Tenth Circuit has applied this

¹⁰⁵ See, e.g., *Brown v. Hot, Sexy & Safer Prod., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995).

¹⁰⁶ This approach does not seem to change the substantive rights of plaintiffs because, under this approach, a plaintiff who can win on another constitutional claim does not need to make the free exercise claim at all; she can prevail with or without the free exercise claim. As Justice Souter declared in *Lukumi*, “If a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring). This approach does not seem to change the procedural rights of plaintiffs either since, before *Smith*, the Federal Rules of Civil Procedure already allowed plaintiffs to join federal constitutional claims. See FRCP 18 (a) (“A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.”).

approach to mean that the non-free exercise claim must be serious, even though it need not be sufficiently strong to win the case.¹⁰⁷ The problem with this approach, however, is that many free exercise claims could be colored to meet this requirement.¹⁰⁸ Thus, litigants in courts following this approach could use the hybrid exception that *Smith* created to swallow the *Smith* rule.

A third approach does not treat the hybrid exception as an exception at all. The Second and Sixth Circuits ignore *Smith*'s hybrid situations language under the premise that it does not make sense for free exercise standards to change because of the existence of another constitutional interest.¹⁰⁹ Some Justices and commentators have made this point, suggesting that Justice Scalia discussed hybrid situations in the *Smith* opinion not to create a new doctrine, but rather for the sole purpose of reconciling the discrepant outcomes in *Yoder* and *Smith*.¹¹⁰

¹⁰⁷ See, e.g., *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (holding that claiming a hybrid exception "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").

¹⁰⁸ For instance, any burden on a child's religious exercise could be articulated under case law as a violation of the parents' constitutionally protected child-rearing interests. Surely, if sex education substantially burdens a child's religious exercise, the parents of the child could make a persuasive argument under *Meyer*, *Pierce*, and *Yoder* that sex education impermissibly interferes with their right to rear their children how they see fit.

¹⁰⁹ See, e.g., *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (stating that that *Smith*'s "language relating to hybrid claims is dicta and not binding on this court"); *Kissinger v. Bd. of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) (stating that the proposition that the legal standard of the Free Exercise Clause changes when a Free Exercise claim is brought with another constitutional interest is 'completely illogical'); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (holding that a father's right to direct the education of his child does not require his son's school to exempt him from a compulsory health class because there is "no good reason for the standard of review [in free exercise cases] to vary simply with the number of constitutional rights that that plaintiff asserts have been violated").

¹¹⁰ See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) (stating that "[o]ne suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case"). Justice O'Connor raised this point in her dissenting opinion in *Smith*: "The Court endeavors to escape from [these] decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence." *Smith*, 494 U.S. at 896.

Due to this sharp split among the Circuits, the status of *Yoder* is unclear. If a claim is litigated in a Circuit that applies either the first or the second approach, the hybrid exception exists, but depending on the Circuit, the exception might mean that the parents in *Yoder* prevailed on the basis of either: (a) their child-rearing interest alone; (b) their free exercise claim alone; or (c) the special relationship between the two claims. Thus, whether the Circuit follows the first or second approach might be quite significant to a parent seeking an exemption from sex education for her child; it might mean that the parent should claim that sex education impinges upon her child-rearing interests, or that the parent should claim that sex education violates her or her child's religious beliefs, or perhaps that the parent should argue some sort of synergy of the claims.

Alternatively, if a claim is litigated in a Circuit that does not recognize the hybrid exception, then there is the question of whether *Yoder* survived *Smith*. Because the *Yoder* Court analyzed the Amish parents' claim exclusively in terms of the Free Exercise Clause,¹¹¹ the case is probably best understood, as Justice O'Connor contended in *Smith*,¹¹² as a free exercise case. And under the *Smith* free exercise standard, the law at issue in *Yoder* is valid.¹¹³ Therefore, if the hybrid exception does not exist, as the third approach opines, this would mean that *Yoder* is no longer good law.

Where does that leave an analysis of a claim for an exemption from compulsory sex education? If the hybrid exception exists, the analysis varies depending on the Circuit. And if the hybrid exception does not exist, then compulsory sex education must

¹¹¹ The *Yoder* Court explicitly stated that it struck down the law because it violated the tenets of the Amish religion. *Yoder*, 406 U.S. at 218.

¹¹² Justice O'Connor claimed that "there is no denying that [*Yoder*] expressly relied on the Free Exercise Clause." *Smith*, 494 U.S. at 896.

¹¹³ *Yoder* involved a Wisconsin compulsory school-attendance law that applied to the general population. *Yoder*, 406 U.S. at 207.

be analyzed under *Smith*, meaning that students are almost certainly not constitutionally entitled to exemptions from compulsory sex education.¹¹⁴ Clearly, with so much doctrinal uncertainty in this area of constitutional law, it is impossible to analyze a student's constitutional claim for an exemption with any certainty.

However, despite this uncertainty, it must be emphasized that the Court has never overruled *Yoder*. To the contrary, the *Smith* Court confirmed that *Yoder* was decided correctly.¹¹⁵ Indeed, while the *Smith* Court might have reconfigured *Yoder* by explaining *Yoder* as a hybrid situation, the *Smith* Court never suggested that it would have decided *Yoder* differently. Thus, the narrow holding of *Yoder*—that a state may not compel children to participate in an activity that threatens the existence of their parents' religious community—survived *Smith*. Accordingly, whether or not there is a hybrid exception, the best argument for those seeking religious exemptions from sex education is to show how similar their situation is to that of the Amish children and parents in *Yoder*.

2. Applying *Yoder* to Compulsory Sex Education

A closer examination of the facts in *Yoder* reveals the parallel between compulsory sex education for some religious groups and compulsory school attendance for the Amish. In *Yoder*, Amish parents claimed that Wisconsin's compulsory school attendance law threatened the harmony of the Amish community.¹¹⁶ The Amish parents explained how, because the Amish loathe pride and value humility,¹¹⁷ Amish children must avoid the competition and materialism that pervade high school life.¹¹⁸ For this

¹¹⁴ Under *Smith*, as stated above, a school's decision to provide compulsory sex education is probably valid.

¹¹⁵ *Smith*, 494 U.S. at 881.

¹¹⁶ *Yoder*, 406 U.S. at 208.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 212.

reason, Wisconsin substantially burdened the Amish tradition by requiring Amish children to attend high school.¹¹⁹ Writing for the Court, Chief Justice Burger agreed with the Amish parents that the Wisconsin law violated the Free Exercise Clause,¹²⁰ basing his opinion on the premise that high school “places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group.”¹²¹

Different religious groups can pose strong arguments under *Yoder* for exemptions from compulsory sex education because compulsory sex education could burden some religious beliefs in a way that is similar to how the *Yoder* Court found that high school burdens Amish religious beliefs. While a discussion of all the possible ways that sex education could offend every religious belief is beyond the pale of this paper, it might be helpful to examine some religious objections to common themes in sex education.

A central aim of sex education is to make young people feel comfortable with their sexual desires.¹²² With this aim in mind, many sex educators teach students that homosexuality is natural and morally acceptable.¹²³ Many religions, however, teach that homosexuality is unnatural and therefore sinful. The Vatican, for example, teaches that

¹¹⁹ *Id.*

¹²⁰ *Id.* at 234.

¹²¹ *Id.* at 211. It should be noted that many commentators have criticized the Court’s opinion for romanticizing the Amish way. See, e.g., MARCIA A. HAMILTON, *GOD VS. THE GAVEL* 131 (Cambridge 2005) (explaining that the *Yoder* decision is her “vote for the worst Religion Clause case in the United States” and that she would “deep-six it for its romantic, rose-colored depiction of Amish life . . .”).

¹²² A good illustration of this aim is found in the University of Michigan’s Healthy System’s suggested sex education books. Most of the titles refer to the body and its responses to sexual stimuli. University of Michigan Health System, *Sex Education: Resource List*, at http://www.med.umich.edu/1libr/pa/pa_bsexedu_pep.htm. An example of such a title is Karen Gravelle, *WHAT'S GOING ON DOWN THERE?: ANSWERS TO QUESTIONS BOYS FIND HARD TO ASK* (Walker and Co. 1998).

¹²³ National Education Association, *When Kids Don’t Have a Straight Answer*, at <http://www.nea.org/neatoday/0103/health.html>.

homosexuality is sinful because it violates God's design.¹²⁴ Following the Vatican, many Roman Catholics condemn homosexual conduct. Importantly, a person who condemns homosexual conduct because of the Vatican's teachings condemns homosexual conduct for religious reasons, while a person who condemns homosexual conduct because of social norms or individual fears condemns homosexual conduct for secular reasons. Because a Roman Catholic can argue that her sincerely held religious beliefs are contradicted by any suggestion that homosexuality is moral, a Roman Catholic student can pose a strong argument that a school's decision to discuss homosexuality in amoral terms substantially burdens her religious beliefs. Furthermore, since a Roman Catholic parent almost certainly has a more difficult time inculcating her child with Roman Catholic beliefs when her child's school expressly contradicts Roman Catholic teaching, in many situations compulsory sex education will substantially burden the child-rearing interests of Roman Catholic parents, just as Wisconsin's compulsory school attendance law burdened the child-rearing interests of Amish parents.

Even if a sex education program did not discuss homosexuality, and instead merely taught students how to engage in safe sex, many religious groups could still make a strong case for exemptions from compulsory sex education. Again, the strongest reaction might come from Roman Catholic students because a central tenet of Roman Catholicism is that any intentional interruption of the natural reproductive process is an unjustifiable violation of God's plan,¹²⁵ and a public school therefore violates a Roman

¹²⁴ See Catholic Online, at <http://www.catholic.org/>.

¹²⁵ Professor Christine Gudorf writes: "The basis of this conclusion [that contraception is immoral] is an understanding that God's intention in sex is procreation. For some decades now the hierarchical church has recognized other divine purposes in sexual intercourse as well, but procreation has been understood as a permanent, central divine purpose. Papal arguments insist that while human can make use of the natural infertile time to engage in sexual intercourse for unitive purposes, it is wrong to use God's gift of sexuality

Catholic student's religious beliefs by forcing her to attend instruction on contraception or abortion.

Jewish students and parents also can argue that a compulsory sex education program that teaches family planning violates their religious beliefs. The Jewish argument against family planning is based on the premise that some Jewish people are taught that it is their duty, as members of the sacred covenant between God and Israel, to produce Jewish progeny.¹²⁶ Jewish parents might have a legitimate concern that by teaching students how to have sex with minimal procreative risk public schools effectively encourage Jewish students to have sexual relationships with non-Jewish students, and, consequently, this increased sexual activity with non-Jewish students will reduce the number of Jewish offspring. Thus, Jewish parents can argue that the government's religion-neutral instruction on family planning works against the efforts of Jewish people to follow a Jewish imperative. Since public schools do not encourage Jewish students to procreate with Jewish people only (and indeed public schools may not

while thwarting the divine intentions for the act." SACRED RIGHTS: THE CASE FOR CONTRACEPTION AND ABORTION IN WORLD RELIGIONS 67 (Daniel C. Maguire ed., Oxford University Press 2003).

¹²⁶ Rabbi Dorff, a leading commentator on Judaism, frames the Jewish duty to procreate with other Jewish people in both historical and metaphysical contexts. He explains the duty historically, writing that because of the enormous loss of Jewish life in the Holocaust, Jewish reproduction is "the most important *mitzvah* of our time." He also cites Maimonides' claim that "whoever adds even one Jewish soul is considered as having created an entire world." Professor Laurie Zoloth discusses this duty in terms of the future of Judaism. She writes that "the Jewish tradition is suggestive of a principle for Jewish views on the ethical problem of population and family planning" and that "[s]uch a view forms the duty toward a specific future." Accordingly, she concludes, "Jewish law is a discourse on how to provide and maintain such a world for a Jewish child faced with injustice, exile, and danger." *Id.* at 23-24. Notice how the Jewish argument against family planning instruction is much broader than the Roman Catholic argument against safe-sex instruction; the Jewish argument calls for an exemption from all discussion of family planning that does not encourage intra-faith procreation, while the Roman Catholic argument applies only to safe-sex instruction that contravenes the Roman Catholic Church's teaching that contraception and abortion are immoral. It might be argued, however, that the Jewish argument is much weaker than the Roman Catholic argument because the immorality of contraception is central to Roman Catholic belief, while the concept of procreation in Judaism is merely a religious value or principle—not a religious belief. While this might be true, Jewish parents can bolster their argument against family planning with textual support found in the Mishnah in tractate Yevamot, which some commentators have interpreted to stand for the proposition that abortion violates Jewish law. *Id.* at 33.

encourage this because of the Establishment Clause), a Jewish parent can claim that her child must be exempt from any discussion of family planning.

A sex education class limited to a description of human sexuality still might burden religious beliefs because some religious believers interpret their religions to mean that sex discussion with non-believers must be avoided altogether. Some Muslims, for example, strictly follow the Shari'ah, the code of Islamic law based on clerical interpretation of the Koran.¹²⁷ The Shari'ah has specific rules that apply to sexual conduct, and some Islamic authorities have interpreted these rules to require punishment for premarital sex, homosexual acts, and adultery.¹²⁸ In a school where Muslims are not the majority, sex educators of course do not incorporate these rules into the classroom discussion. Instead, it is most often the case that American sex educators teach and discuss sexual conduct in ways that, while typical in the United States, are foreign to many Muslims.¹²⁹ Thus, even when a public school limits sex education to a description of human sexuality, the public school might highlight for Muslim children that their religious laws, which are believed by Muslims to emanate from Allah, are ignored by other people. By highlighting this, the government might suggest to Muslim students that the government believes that Islamic law is wrong, and hence that that the Islamic God is wrong. Muslim parents, therefore, can claim that the government threatens Islamic beliefs by teaching sex education.

¹²⁷ See ARVIND SHARMA, OUR RELIGIONS 466 (Harper Collins 1993).

¹²⁸ For example, Iran, which follows the Sharia'ah as its ultimate legal authority, executes women convicted of adultery. For a particularly troubling account of an execution of a 16 year old girl under this authority, see BBC News, *Execution of a teenage girl*, (July 27, 2006), at <http://news.bbc.co.uk/1/hi/programmes/5217424.stm>.

¹²⁹ GHULAM SARWAR, SEX EDUCATION: THE MUSLIM PERSPECTIVE 11 (The Muslim Educational Trust 1996) (noting that “[s]ome Muslim parents do place undue pressure on their children, especially their daughters, in the choice partner for marriage; in particular, they may place greater emphasis on ‘family honour’ than on the welfare and happiness of their children”).

These examples of how sex education might burden the religious beliefs of different faiths illustrate how difficult it is for schools to establish a compulsory sex education program that does not offend anyone's religious beliefs. When a public school teaches sex education, religious beliefs and state action invariably intersect. As a result, many religious beliefs and values are drawn into question. This questioning can be quite burdensome for many groups. Indeed, it is burdensome for a Roman Catholic student to question the Pope, or for a Jewish student to question what her Rabbi calls a Jewish imperative, or for a Muslim student to question the righteousness of her God.

That is not to say that sex education prohibits these students from following their religion beliefs. There is nothing about sex education that would prevent a Roman Catholic student from believing that homosexuality and contraception are wrong, a Jewish student from procreating with other Jewish people, or a Muslim student from following the Shari'ah. Nonetheless, the metaphysical questioning raised by sex education can be quite burdensome for a believer, especially for a young believer who has not yet developed the analytical skills to ascertain how and why her family's beliefs differ from those of her classmates. Moreover, sex education can lead to questioning that might go well beyond the recesses of a student's mind; the questioning might lead to challenging confrontations at home, and perhaps to dramatic changes in the religious community.

Significantly, it is precisely these changes to a religious community that concerned the *Yoder* Court. The Court was not concerned about what would happen to a few Amish children if they fraternized with other high school students or learned about popular culture, but rather what would happen to the *Amish community* if all the Amish

children in Wisconsin were exposed to non-Amish practices. That the Court was concerned about the Amish community and not the individual is evident from its extensive discussion of the importance of the Amish religion to the American experience,¹³⁰ the historical significance of the Amish religion,¹³¹ the danger that compulsory education posed to the community,¹³² and the consistency of Amish practices.¹³³

Many other religious groups are similar to the Amish in these ways. Undoubtedly, many students who strongly believe in Roman Catholicism, Judaism, or Islam are members of traditional religious communities that have played a significant role in American society; and, as demonstrated above, the consistently held beliefs practiced by these communities are threatened by sex education.¹³⁴ Therefore, if *Yoder* is still good law, these groups, and probably many more, are constitutionally entitled to exemptions from compulsory sex education.

In conclusion, regardless of how courts treat the hybrid exception, different religious groups can present very strong arguments under *Yoder* for constitutionally required exemptions from sex education. If the claim is litigated in a Circuit that does

¹³⁰ The Court characterized Amish practice as part of a tradition “that continued in America during much of our early national life.” *Id.* at 210.

¹³¹ The Court traced Amish beliefs to the “beginning with the Swiss Anabaptists of the 16th century.” *Id.* at 212.

¹³² The Court found that “compulsory high school attendance could . . . ultimately result in the destruction of the Old Order Amish church community.” *Id.* at 219.

¹³³ The Court found that the Amish consistently practiced their ways for “almost 300 years.” *Id.* at 219.

¹³⁴ It should be noted that the Second Circuit ruled that a Catholic man, Mr. Leebaert, could not exempt his son from health class because Mr. Leebaert’s “belief that ‘drugs and tobacco are [not] proper subjects’” did not prove an “irreconcilable *Yoder*-like clash between the essence of [his] religious culture and the compulsory health curriculum.” *Leebaert v. Harrington*, 332 F.3d 134, 145 (2nd Cir. 2003). The *Leebaert* case demonstrates how claimants like Mr. Leebaert who do not assert a strong connection between the challenged subject matter and the religious community’s beliefs and practices are not entitled to exemptions. However, many claimants can make very strong arguments that they are entitled to exemptions from compulsory sex education because sex education, as opposed to health education, creates a *Yoder*-like clash with many religious cultures.

apply the hybrid exception, then the religious parents can simply articulate their child-rearing interests as an interest in raising their children in their religious background—much the way the *Smith* Court framed the parental interests at stake in *Yoder*. And even if the claim is litigated in a Circuit that does not apply the hybrid exception, religious students and parents can point to *Yoder* as controlling precedent. So long as *Yoder* is good law,¹³⁵ and so long as the claimant is a member of a religious group that resembles the Amish in the ways emphasized by the *Yoder* Court, the claimant is constitutionally entitled to an exemption from compulsory sex education—unless the government can show that denying an exemption is necessary to serve a compelling government interest.

3. The Government’s Interest in and Means of Addressing the Problems Resulting from Uninformed Teenage Sex

If the government can show that compulsory sex education is narrowly tailored to meet a compelling governmental interest, then it can refuse to allow religious exemptions. The government’s strongest interest in compulsory sex education is almost certainly protecting students from STDs, and this is probably a compelling interest. But the government probably cannot show that instituting compulsory sex education is narrowly tailored to achieve the government’s compelling interest in protecting students from STDs.

a. The government’s compelling interest in protecting students from STDs

The Supreme Court has established that the health of its citizens rank as one of a state’s strongest interests. In *Jacobson v. Massachusetts*,¹³⁶ the Court held that Massachusetts’ interest in protecting the general public from smallpox was sufficiently

¹³⁵ As argued above, despite the tension between *Smith* and *Yoder*, there is good reason to believe that *Yoder* is good law since the Court has not overruled it.

¹³⁶ 197 U.S. 11 (1905).

strong to overcome a citizen’s liberty interest in not being vaccinated.¹³⁷ The Court based its ruling on the “fundamental principle that persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State.”¹³⁸

The Court also has established that the government’s interest in protecting the health of all its citizens can trump one citizen’s interest in exercising her religious beliefs. In *Prince v. Massachusetts*,¹³⁹ for instance, a minor’s legal custodian challenged a Massachusetts child labor law prohibiting minors from selling newspapers.¹⁴⁰ The legal custodian and minor were both Jehovah’s Witnesses,¹⁴¹ and as such, they believed it was their religious duty to spread religious material.¹⁴² In fulfilling this duty, the legal custodian and the child distributed religious newspapers.¹⁴³ After being charged under the child labor law, the legal custodian claimed that it violated both her freedom to exercise her religious beliefs and her right to rear the child.¹⁴⁴ In defense of the law, Massachusetts claimed that it was necessary to protect the health and welfare of children.¹⁴⁵ Balancing these interests—the legal custodian’s religious and child-rearing rights on the one hand, and the state’s interest in protecting children from labor

¹³⁷ In *Jacobson*, Mr. Jacobson refused to be vaccinated because he thought the vaccination would make him ill. *Id.*

¹³⁸ *Id.* at 29.

¹³⁹ 321 U.S. 158 (1944).

¹⁴⁰ *Id.* at 160.

¹⁴¹ *Id.*

¹⁴² *Id.* at 163.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 164.

¹⁴⁵ *Id.* at 165.

exploitation on the other¹⁴⁶—the Court ruled that the state’s interest outweighed the legal custodian’s interest in fulfilling a religious duty through a child.¹⁴⁷

Based on *Jacobson* and *Prince*, the government’s interest in protecting young people from STDs is clearly compelling.¹⁴⁸ Some STDs are certainly as dangerous to young people as smallpox,¹⁴⁹ and many STDs are significantly more dangerous to young people than is labor. Thus, the government’s interest in protecting citizens from STDs is probably as strong as the government’s interest in protecting citizens from smallpox, and significantly stronger than its interest in protecting young people from labor exploitation. Accordingly, it follows that the government’s interest in preventing adolescents from acquiring STDs¹⁵⁰ outweighs the interest that some religious groups have in being exempt from sex education classes.

b. Compulsory sex education as a means of protecting children from STDs

The constitutional problem with compulsory sex education, however, is that compulsory sex education is not as narrowly tailored in protecting children from STDs as either smallpox vaccinations are in controlling smallpox or a child labor law is in

¹⁴⁶ *Id.* at 166.

¹⁴⁷ *Id.* (declaring that “[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death”).

¹⁴⁸ It should be noted here that some religious groups, like the Amish, do not need a high school education in order to be productive and self-sufficient. *See Yoder*, 406 U.S. at 228-29. However, no religious group has developed a way of life that has immunized its believers from the risks of uninformed sex. Accordingly, the government’s interest in providing sex education to all children is certainly stronger than its interest in providing a high school education to all children.

¹⁴⁹ HIV, like smallpox, is highly contagious. And HIV, like small pox, is fatal. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *YOUNG PEOPLE AT RISK: HIV/AIDS AMONG AMERICA'S YOUTH*, available at <http://www.cdc.gov/hiv/pubs/facts/youth.htm>.

¹⁵⁰ At least the state’s interest in preventing people from acquiring HIV is as strong as the state’s interest in preventing people from acquiring smallpox.

protecting children from labor exploitation. There are at least three arguments why this is so.¹⁵¹

First, compulsory sex education is less effective. Because sex education works only if a person makes sexual decisions consistent with her education, a person with sex education who ignores her education by practicing unsafe sex is not any safer from STDs than is a person who has not had sex education. Since it seems that people who oppose sex education will be less likely to follow sex education lessons, sex education taught to students who oppose sex education is probably less effective than sex education taught to students who favor sex education.¹⁵² For example, a Roman Catholic student who opposes sex education because she rejects the use of contraception will probably not use contraception simply because she was forced to attend sex education classes. Thus, the marginal benefits of teaching sex education to all students over teaching only those students who want to learn sex education are slight. Vaccinations, by contrast, are effective even if a person who receives the vaccination opposes it or is unaware of having received it. And if the government inoculates a person who opposes the vaccination on religious grounds, the person cannot then dispel the vaccination. Thus, unlike sex education, the marginal benefits of inoculating all citizens over inoculating only those who want vaccinations are great.

Second, many people who do not take sex education classes are protected from STDs while many people who do not receive a vaccination are not protected from the relevant virus. Though it might be argued that basic sex information is necessary in order

¹⁵¹ Since sex education is more like a vaccination than a labor law, this section will focus only on the relationship between sex education and vaccinations.

¹⁵² And many people question the efficacy of sex education for those students who do not oppose it on religious grounds.

to have safe sex, this information may be acquired outside of sex education class for a small fee (by buying books or renting movies) and for no monetary cost at all (by talking to relatives or reading books at the public library). Thus, it does not follow that the government must teach sex education in order to protect people from STDs. By contrast, the government might have to provide vaccinations in order to protect citizens from a virus because some people are not protected from a virus unless they receive a vaccination, and many people without healthcare cannot obtain vaccinations.

Third, the burdens created by a vaccination and sex education are dramatically different. While some might argue that a vaccination is more burdensome because it is an actual invasion of the body, sex education is probably more burdensome because it is an enduring invasion of the conscience. Sex education's invasion does not just last the vaccination's few uncomfortable seconds; the sex education's effects on a religious person or community can be permanent. And even though a vaccination might be burdensome to an individual who opposes vaccinations on religious grounds, there are very few ways in which the government can protect a person from a virus without similarly burdening the individual. However, there are many ways of preventing STD transmission that are less burdensome than compelling students to attend sex education class.¹⁵³

Because the government does not need to teach sex education in order to protect children from STDs, and because the government's interest in protecting children from STDs can be achieved through less burdensome means, compulsory sex education is not

¹⁵³ For example, instead of compelling students to attend sex education class, the government can simply provide sex information in local or public school libraries. These alternatives are discussed *infra* as ways in which the state can accomplish the important objective of instructing young people about sex without substantially burdening the religious beliefs of students and parents.

narrowly tailored. Thus, even though the government probably has a compelling interest in protecting children from STDs, public schools are constitutionally required to exempt from compulsory sex education those students who can show that sex education substantially burdens her or her parent's religious beliefs.

III. THE DESCRIPTIVE AND NORMATIVE SOLUTIONS

As discussed in Part II.A, there is very little in the U.S. Constitution suggesting that public schools have an obligation to teach sex education. The Free Speech Clause, the Due Process Clause, and the Establishment Clause are the only provisions in the U.S. Constitution that arguably guarantee a right to acquire sex information. The strongest argument that sex education supporters can make is that the Free Speech Clause compels the government to provide access to sex information in either local or public school libraries and prohibits the government from removing sex information books from the public school library, and the Due Process Clause prohibits the government from unreasonably burdening the acquisition of sex information. This argument, of course, does not come very close to an obligation to teach sex education.

However, as discussed in Part II.B, the constitutional arguments for exemptions from compulsory sex education are much stronger. Since sex education touches on areas that religion traditionally has controlled, it is virtually impossible for a public school not to offend some religious belief when it teaches sex education. Indeed, whether a public school decides to provide comprehensive or abstinence sex education will often be irrelevant because either form of sex education invariably draws some religious beliefs into question. This questioning can be quite burdensome on some religious communities. Under *Yoder*, the government may create this type of burden on religious communities

only if it can show that the cause of the burden is narrowly tailored to meet a compelling state interest. And sex education is almost certainly not narrowly tailored to achieve the government's interest in protecting children from STDs. Therefore, if *Yoder* is still good law, sex education opponents can make a very strong case for exemptions from sex education.

Given these two premises—that the Constitution does not require public schools to teach sex education and that the Constitution requires public schools that teach sex education to exempt certain religious students from class—a school district pressured to teach sex education has three options.

One option is to teach sex education without exemptions for any students. The problem with this option is the inevitable constitutional litigation. Many school districts have found that when they do not allow students to opt-out of sex education, high-profile and controversial constitutional disputes follow.¹⁵⁴ This type of litigation, won or lost, can be quite costly—both in terms of the legal expenses and the negative publicity.¹⁵⁵

¹⁵⁴ See, e.g., *Hopkins v. Hamden Bd. of Ed.*, 289 A.2d 914 (Conn. 1971) (upholding school board's implementation of sex education curriculum); *Hobolth v. Greenway*, 218 N.W.2d 98 (Mich. Ct. App. 1974) (upholding statute authorizing sex education); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (affirming the district court's grant of summary judgment in favor of the school after the school provided a sexually explicit assembly because parents do not have a "fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children"); *Leebaert v. Harrington*, 332 F.3d 134 (2nd Cir. 2003) (upholding the constitutionality of a sex education class with an opt-out provision). While the state might have won in these cases, appealing these disputes can be quite costly—both in terms of the legal expenses and the negative publicity. Moreover, the constitutionality of compulsory sex education is far from resolved because the legal standards for religious and child-rearing rights are still developing. Accordingly, although there have been legal disputes over sex education for more than 30 years, students and parents will continue to challenge sex education programs, even in public schools within jurisdictions that have already considered related issues. In other words, the costs to states could add up quickly.

¹⁵⁵ As evidence of how governments evaluate the costs of constitutional litigation, consider the Public Expression of Religion Act of 2005, HR 2679, 109th Cong. (2005), which exempts Establishment Clause claims from the attorney's fee award provision in 42 U.S.C. 1988. Congress's stated reason for proposing this exemption is to eliminate the chilling effect that constitutional litigation imposes on state and local officials. For further discussion of the legal and policy costs that constitutional litigation imposes on government defendants, see Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217 (1994)

Even in jurisdictions where courts have already considered related issues, litigation is likely because the constitutionality of compulsory sex education is far from resolved. And not only will there be continuous challenges, but there could soon be different results as the doctrines for religious liberty and child-rearing rights develop. This development could be particularly great and unpredictable in the area of religious liberty, where state and federal statutes have joined forces with state constitutions to wage war against *Smith*.¹⁵⁶ So, even though school districts have won most of the litigation so far, the landscape is changing quickly, and the political and financial costs could add up quickly.

A second option is to teach sex education, but to make exemptions available for students that satisfy certain conditions. However, there are also problems with this option. One problem is that students will receive different information according to their or their parents' religious beliefs. As a result, some religious communities might not acquire vital survival information. And not only will this lack of information harm particular religious groups, but there is also the risk that the harmful results of one group's sexual ignorance will spread to others. Another problem with this option is that offering exemptions to students on the basis of religious affiliation is sure to increase

and Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV 1 (1995).

¹⁵⁶ As noted *supra*, in response to *Smith*, Congress passed RFRA, which restored the strict scrutiny framework. Then, after the Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997) that Congress had overreached in using its Section 5 power to apply RFRA to the states, about twelve states enacted their own RFRA's. See EUGENE VOLOKH, *THE FIRST AMENDMENT* 977 (Foundation Press 2001). Also in response to *Smith*, states have interpreted their constitutions to require pre-*Smith* strict scrutiny when the government substantially burdens religious exercise. See, e.g., *State v. Miller*, 549 N.W.2d 235, 240-41 (Wis. 1996). For a general discussion of how and why states have rejected *Smith*, see Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to Employment Division v. Smith*, 68 NOTRE DAME L. REV. 747 (1993).

tension among different religious and ethnic groups—a tension that is already alarming in many communities¹⁵⁷—and to anger both sex education supporters and opponents.¹⁵⁸

A third option is not to teach sex education at all. This of course means that some public school students will never receive sex education, either formally or informally, and that, consequently, the problems resulting from uninformed or misinformed teen sex will continue. Though troubling—in districts where the benefits of teaching sex education do not appear sufficiently strong so as to outweigh option one’s costs of certain political controversy and constitutional litigation or option two’s costs of limited efficacy and likely religious conflict—option three is the politically rational decision.

But, while this might be the solution to the local problem posed in Part I, this is hardly a solution to the national problem we are facing—this “solution” would only ensure that the United States will suffer the enormous social,¹⁵⁹ health,¹⁶⁰ and

¹⁵⁷ See generally Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. (forthcoming 2006); LUKER, WARRING VIEWS ON SEX, *supra* note __.

¹⁵⁸ See *supra* note __, explaining why both sex education supporters and opponents often dislike opt-outs.

¹⁵⁹ Though rates have decreased substantially over the last decade, teen pregnancy rates are higher in the United States than in any other developed country. See The Alan Guttmacher Institute, *Sexual and Reproductive Health in Developed Countries: Can More Progress Be Made?* (Dec. 2001), at http://www.guttmacher.org/pubs/summaries/euroteens_summ.pdf, *1. Between 66% and 95% of these pregnancies are unplanned. AMERICAN COLLEGE OF OSTEOPATHIC FAMILY PHYSICIANS, DEBATE OVER HOW TO REDUCE HIGH RATE OF TEEN PREGNANCY (2003), available at http://www.acofp.org/member_publications/camar_02.htm. Some researchers have explained this high percentage as “both a symptom and consequence of extreme poverty and social disorganization.” *Id.* Research suggests that “adolescents are more likely than adults to suffer negative consequences from their sexual behavior.” Elizabeth Kelts, M.D., et al. *Where Are We on Teen Sex?: Delivery of Reproductive Health Services to Adolescents by Family Physicians*, 33 FAMILY MEDICINE 376 (2001).

¹⁶⁰ In 2000, the Centers for Disease Control and Prevention (“CDC”) found that approximately half of all new HIV infections in the United States occurred among young people under age 25, and that most of these infections were transmitted sexually. CENTERS FOR DISEASE CONTROL AND PREVENTION, YOUNG PEOPLE AT RISK: HIV/AIDS AMONG AMERICA’S YOUTH, available at <http://www.cdc.gov/hiv/pubs/facts/youth.htm> .. Recent research suggests that the health problems resulting from uninformed teen sex are getting worse. According to a 2004 Kaiser report, approximately 65% of all sexually transmitted infections contracted by Americans occur in people under 24, and 25% of new HIV

economic¹⁶¹ problems resulting from uninformed teenage sex. For this reason, any analysis of the constitutional problem must not be left at the descriptive level, but it also must probe the problem normatively. We must determine whether we are willing to accept the costs of a constitutional system committed to individual liberty (with a strong emphasis on religious liberty) and circumscribed governmental power (with a strong emphasis on negative rights and a correspondingly limited provision of positive rights), and if so, what efforts we can take to minimize those costs.

That our commitment to religious liberty and limited government is a source of the problem is highlighted when compared to the experiences and applicable constitutional constraints in other countries. While the U.S. Constitution clearly does not require the government to teach sex education, some have interpreted the European Convention on Human Rights (“ECHR”) to require member States to teach sex education. Indeed, one commentator argues that Article 10.1 of the ECHR, which provides the right “to receive and impart information and ideas without the interference by public authority,” creates a right to sex information that might obligate member States to teach sex education.¹⁶²

Even more strikingly, the Committee on the Rights of the Child has interpreted the Convention on the Right of the Child (“CRC”) to require member States to teach sex

infections occur in people under 22. Molly Masland, *Carnal Knowledge: The Sex Ed Debate* (2004), at <http://msnbc.msn.com/id/3071001/> ..

¹⁶¹ A study of teenage mothers found that, within five years of pregnancy, most had dropped out of high school and 60% were on welfare. RICHARD GREEN, *SEXUAL SCIENCE AND THE LAW* 184 (Harvard University Press 1992). Over a five year period, “teenage childbearing costs to public programs totaled \$130.3 billion and it was estimated that \$48.1 billion could have been saved if each birth had been postponed until the mother was at least 20 years of age.” AMERICAN COLLEGE OF OSTEOPATHIC FAMILY PHYSICIANS, *DEBATE OVER HOW TO REDUCE HIGH RATE OF TEEN PREGNANCY* (2003), available at http://www.acofp.org/member_publications/camar_02.htm ..

¹⁶² See *OF INNOCENCE AND AUTONOMY: CHILDREN, SEX, AND HUMAN RIGHTS* 168 (Eric Heinze ed., Ashgate 2000).

education. In fact, the Committee has interpreted three provisions of the CRC to mean that member States have a duty to educate adolescents about sex,¹⁶³ and the Committee has applied this interpretation to its recommendations to member States. For example, in a recommendation to the Government of Uganda, the Committee advised Uganda to “pursue and strengthen its family planning and reproductive health education programmes, including for adolescents.”¹⁶⁴ Pursuant to its recommendations, the Committee has demanded information from member States regarding their compliance with CRC’s sex education mandate. Indeed, the Committee requested information from Ireland regarding “what steps the Government had taken with regard to those school teachers who had refused to teach sex education, whether they were permitted to keep their posts, and, if so, how the sex education curricular were taught.”¹⁶⁵ The United States, of course, is not a party to either the ECHR or the CRC.

Moreover, while the U.S. Constitution probably does not permit either the federal, state, or local governments to compel students to attend sex education class if attendance substantially burdens their or their parents’ religious beliefs, the ECHR probably permits member States to compel attendance so long as there is a rational basis for doing so. Article 9.2 of the ECHR allows member States to impinge on religious freedom if doing so is necessary for the protection of public order or morality.¹⁶⁶ The European Court of

¹⁶³ The three provisions are: (1) Article 13.1, which provides a right “to seek, receive and impart information and ideas of all kinds”; (2) Article 24.1, which provides a right “to the enjoyment of the highest attainable standard of health”; and (3) Article 24.2(f), which requires States to “develop preventive health care, guidance for parents and family planning education and services.” *Id.*

¹⁶⁴ COMMITTEE ON THE RIGHTS OF THE CHILD, 16th Session, CRC/C/69 (1997).

¹⁶⁵ COMMITTEE ON THE RIGHTS OF THE CHILD, 17th Session, CRC/C/SR.438 (1998).

¹⁶⁶ The text states: “Freedom to manifest one’s religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” EUROPEAN CONVENTION ON HUMAN RIGHTS, available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>.

Human Rights has interpreted Article 9.2 under the doctrine of “margin of appreciation.” Professor Drinan writes that, applied to religious liberty, the doctrine of margin of appreciation “assumes at its discretion that the national lawmaking groups in Europe got it right when they decided issues of religious freedom.”¹⁶⁷ This doctrine is similar to rational basis review in U.S. constitutional law.¹⁶⁸ Thus, a sex education law that violates a person’s religious beliefs is presumed valid under the ECHR, whereas such a law might have to satisfy something like strict scrutiny under the U.S. Constitution.

With this flexibility, many European nations require their public schools to teach sex education, and not coincidentally, these nations have experienced the greatest success in reducing teen pregnancy and STD transmission.¹⁶⁹ The experiences of these European nations highlight the relationship between the U.S. Constitution and the teen sex problems in the United States, and how this relationship will constrain the United States as it tries to address its sex education problem.

That brings us to the normative question: Should we accept these constraints? This is, of course, a big question that cannot be resolved here. A few notes, however, should be made about this issue. Because constitutional doctrines guaranteeing robust religious liberty and limited government often work for our benefit, many people approve of, and some favor strengthening, the doctrines creating the particular result addressed in this Article. Lest we want our courts to reduce constitutional provisions to particularized social utility analyses, we should be careful about urging courts to adopt a different

¹⁶⁷ ROBERT F. DRINAN, CAN GOD & CEASAR COEXIST 90 (Yale 2004).

¹⁶⁸ Professor Drinnan writes that the doctrine of margin of appreciation is “roughly equivalent to the presumption of constitutionality that the courts in the United States employ when they review laws. *Id.*

¹⁶⁹ For example, Sweden, France, and Great Britain all require their public schools to teach sex education, usually but not always with a greater emphasis on comprehensive sex education. Sweden, the country with the lowest teen birthrate, has required sex education longer than any other country. See The Alan Guttmacher Institute, *Sexual and Reproductive Health in Developed Countries: Can More Progress Be Made?* (Dec. 2001), at http://www.guttmacher.org/pubs/summaries/euroteens_summ.pdf, *5.

approach with respect to sex education than it has applied to other religious liberty issues. Put more concretely, if we feel that France has it wrong and that religious liberty means that at all public schools a Jewish boy has the right to wear a yarmulke and a Muslim girl has a right to wear religious headdress, we should also accommodate sex education opponents, even though doing so has greater and more deleterious social consequences than accommodating religious headgear. As shown time and time again, courts creating constitutional doctrine according to social exigency are doomed to fail as expositors of the law.¹⁷⁰

Moreover, whatever our particular feelings about these constitutional constraints, it is quite apparent that this is a question that our representatives have answered in the affirmative. Congress, state courts, and state legislatures agree that religious liberty is something that we must cherish, and something that the U.S. Supreme Court has not taken seriously enough. And, given the nation's growing commitment to religion, there is reason to believe that our representatives have responded to how a majority of the nation feels.

So, as a practical matter, if we are to deal with this problem, we are going to have to work within these constraints. Taking the following three actions is a good place to start. First, the government must make sex information available to those young people who want it. This can be accomplished by providing sex information in public libraries. As discussed in Part I.A.2, public schools are forbidden from removing sex information that they have in their libraries on the basis of the information's controversial content.

¹⁷⁰ Some of the Court's worst decisions ignore broad constitutional rules in the name of public necessity. See, e.g., *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (holding that the Fifth Amendment's equal protection requirement that the federal government treat all races equally does not prohibit the U.S. military from restricting access to areas on the basis of race because "[p]ressing public necessity may sometimes justify the existence of such restrictions").

Students and parents will not have any success challenging this requirement on free exercise grounds since the mere availability of sex information in the library does not substantially burden a person's religious beliefs.

Second, the government must make contraception available to young people. Public schools can do this by providing free contraception in health offices, along with information on how to use contraception. If students object to the use of contraception, they could simply decide not to acquire or read about contraception. Because the free contraception and information about contraception are acquired voluntarily, religious students and parents would almost certainly lose in a claim that the government has violated their religious beliefs or familial privacy.¹⁷¹

Finally, the government must promote dialogue about adolescent sex with the aim of forming a workable sex education program for all students. This dialogue can be initiated through school assemblies and panel discussions in which different student groups explain their viewpoints on adolescent sex. As a result of this dialogue, school districts will have a clearer understanding of how sex education could be taught without excessively burdening or alienating members of their respective religious communities.

CONCLUSION

What makes the Constitution so fascinating is its protean quality. While announcing broad legal and moral propositions, the Constitution provides more than a

¹⁷¹ See, e.g., *Curtis v. School Comm*, 652 N.E.2d 580, 587 (Mass. 1995) (holding that “[b]ecause . . . the [condom availability] program lacks any degree of coercion or compulsion in violation of the plaintiffs' parental liberties, or their familial privacy, we conclude also that neither an opt-out provision nor parental notification is required by the Federal Constitution”). It should be noted that only one case—*Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. 1993)—has held that the U.S. Constitution requires opt-out provisions for contraception availability programs. And it is likely that *Alfonso* was decided wrongly; as the *Alfonso* dissent argued, “the mere fact that parents are required to send their children to school does not vest the condom . . . program with the aura of 'compulsion' necessary to make out a viable claim of deprivation of a fundamental constitutional right.” *Id.* at 272.

political philosophy; it is not just abstract or theoretical; it is also relentlessly practical, touching mundane matters that affect all of our lives, even such local decisions as the one covered in this Article—that of whether to teach the community’s children about sex. And, because political actors must always consider its weight, the Constitution, in reaching into our lives, also reaches beyond its borders, inserting itself into political decisionmaking as a factor to be considered, even when its text does not clearly dictate the conclusion. The area outside its circumference can rule our lives just as if it lay within its nucleus.

As some of the Court’s conservative members have admonished their liberal colleagues, the Constitution does not authorize the federal judiciary to cure all of the nation’s problems. Indeed, the Constitution does not speak to every political problem. And, as demonstrated in Parts II and III, not only does the Constitution not solve every social problem, it creates some too. For instance, we have discovered here how, by making the provision of sex education more difficult for public schools, the Constitution can discourage schools from selecting what is probably the most effective policy solution to a problem.

Determining what to do when the Constitution creates social problems raises fundamental questions about what we want from our Constitution and judiciary. Some might be tempted to say that we must interpret the Constitution differently to reach the right conclusion—in this case, to encourage public schools to teach sex education. After all, the Constitution, as stated above, is not merely an abstract piece of political philosophy, but rather a practical document, and as such we must be able to shape it to meet our political needs. Others, of course, inveigh against this idea of politics seducing

the judiciary into interpreting a living Constitution. But, whatever the merits of these warring interpretive approaches, it is clear that we must develop greater care in describing, and less deference in criticizing, a document that can be a source of social problems.

We must learn how to identify what is wrong with this document and those charged with interpreting it, and we must find a way of settling whether we are willing to accept these wrongs. In the sex education context, if we are willing to accept these problems we must develop policies that, like the ones discussed at the end of Part III, work within the constraints. And if not, we must consider whether in addressing these problems we are going to follow the laborious Article V process to amend these constraints, or if we should consider other alternatives, such as creating new legal doctrines concerning familial rights and religious liberty. Only through this dialogue can we determine our needs and limitations, and consequently develop the policies that effectively address our problems.