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FAMILY VALUES, COURTS, AND CULTURE WAR: THE CASE OF ABSTINENCE-ONLY SEX EDUCATION

John E. Taylor*

In the context of a symposium on “Families, Fundamentalism, & the First Amendment,” the topic of abstinence-only sex education is a natural. In teaching that sex should be limited to “mutually faithful monogamous relationship[s] in [the] context of [heterosexual] marriage,”¹ abstinence-only sex education promotes a specific normative vision of what families should be. Because this vision is so recognizably part of a religiously conservative worldview, the policy might be described as an expression of “fundamentalism.”² Completing the circle, any government policy born of “fundamentalism” and supported by “fundamentalists” might be thought to implicate, and perhaps to violate, the First Amendment’s Establishment Clause. The

* Visiting Professor, University of North Carolina School of Law; Professor, West Virginia University College of Law. I am grateful to Professor Vivian Hamilton and the students at the Bill of Rights Journal for inviting me to participate in this symposium, and to the Hodges Research Fund of the West Virginia University College of Law for financial support. This paper benefitted from the feedback I received at William & Mary and at a faculty workshop at the UNC School of Law. I would particularly like to thank Naomi Cahn, June Carbone, Maxine Eichner, Andy Koppelman, Holning Lau, and Eric Muller for their comments and suggestions. I also thank Jessie Peed for research assistance and Mika Chance and Kim Vasbinder for secretarial help.

¹ 42 U.S.C. § 710(b)(2)(D) (2006). Teaching the norm of abstinence until marriage has been a requirement for sex education funding under Title V of the Social Security Act since 1996. *See infra* notes 47–55 and accompanying text. I have added the word “heterosexual” in brackets to underline the obvious point that in the vast majority of states, only heterosexuals may participate in the institution of legal marriage.

A few words about terminology and the scope of this Essay are in order. I deal here primarily with facially secular abstinence-only sex education in the context of the public schools. In my usage, any form of sex education that stresses abstinence but does not promote contraception qualifies as “abstinence-only,” whether it promotes abstinence until marriage or simply tells adolescents to wait until they are older (e.g., out of high school) before beginning sexual activity. Where I refer to forms of comprehensive (i.e., contraceptive-promoting) sex education that also stress abstinence, I use the label “abstinence-plus.” To avoid trying the reader’s patience with frequent repetition of phrases like “facially secular abstinence-only sex education” and “supporters of facially secular abstinence-only sex education,” I often refer to “abstinence education,” “abstinence proponents,” and the like. Unless the context clearly indicates a broader meaning, the shorthand phrases should be understood to refer to facially secular abstinence-only programs in the context of the public schools.

² *See, e.g.*, JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS* 16–19 (1998) (using “fundamentalist” as a general term to cover a wide array of conservative strands of Protestantism).

link to the First Amendment raises the hope—or fear—that courts can declare an end to this particular battle in the culture wars.

Under current law, public schools may not use overtly religious approaches to teaching abstinence and the government may not directly fund overtly religious abstinence education by private social service providers.³ The Supreme Court's decision in *Bowen v. Kendrick*,⁴ however, appears to suggest that facially secular abstinence-only programs raise no Establishment Clause problems.⁵ The legal status quo, then, seems to be: "Just say no to sex" is OK; "Jesus wants you to say no to sex" is not. Nevertheless, it takes little imagination to see even facially secular abstinence programs as an expression of the values of the Religious Right. Accordingly, a number of commentators have suggested that *all* abstinence-only sex education violates the Establishment Clause.⁶ If this is so, the logical implication is that courts can and

³ I regard this as an uncontroversial summary of the current state of the law, and can offer only a brief summary of its justification here. The claim that the government may not conduct overtly religious sex education in the public schools follows from the principle that the schools may teach *about* religion, but cannot teach the truth of religion. *See, e.g.*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963). My characterization of the law regarding direct funding is based on my reading of Justice O'Connor's concurring opinion in *Mitchell v. Helms*, 530 U.S. 793, 836–67 (2000). For a detailed analysis of Establishment Clause doctrine regarding the funding of private social service providers, see Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005). The leading case involving the direct funding of overtly religious abstinence education is *ACLU of Louisiana v. Foster*, No. 02-1440 § T(4), 2002 U.S. Dist. LEXIS 13778 (E.D. La. July 24, 2002). For discussion and analysis regarding the settlement of an ACLU lawsuit challenging the funding of a religious sex education program called "The Silver Ring Thing," see IRA C. LUPU & ROBERT W. TUTTLE, *ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, ACLU OF MASSACHUSETTS V. LEAVITT: U.S. DISTRICT COURT, DISTRICT OF MASSACHUSETTS* (2006), http://www.religionandsocialpolicy.org/legal/legal_update_display.dfm?id=44. Both cases underline the basic point that sex education providers who receive direct government funding must conduct their programs in nonreligious terms.

⁴ 487 U.S. 589 (1988).

⁵ *Bowen* rejected a facial challenge to the funding of abstinence-only sex education via the Adolescent Family Life Act (AFLA). *Id.* at 593. I grant that *Bowen* cuts in favor of constitutionality, but I do not think it settles the question. The *Bowen* Court's main concern was that AFLA allowed its menu of social services to be delivered by religious organizations, a move whose permissibility was far less clear in 1988 than it is today. *See id.* at 605–06 (noting the two arguments that AFLA was facially unconstitutional: (1) it recognized that religious organizations had a "role to play" in sex education and (2) it allowed religious organizations to participate as grantees in AFLA programs).

⁶ *See, e.g.*, KENT GREENAWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* 147–48 (2005) [hereinafter GREENAWALT, *DOES GOD BELONG?*]; KENT GREENAWALT, *2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 155–56 (2008) [hereinafter GREENAWALT, *RELIGION AND THE CONSTITUTION*]; Julie Jones, *Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075 (2002); James McGrath, *Abstinence-Only Adolescent*

should bring an end to controversies about sex education by declaring victory for the sexual left.⁷

A complete assessment of the Establishment Clause issues regarding abstinence education is beyond the scope of this Essay.⁸ My limited goal here is to shed light on one common argument that plays an important role in debates about sex education. In a nutshell, the argument is that abstinence education is so ineffective that it can only be explained as an effort to promote a religious vision of sexual morality.⁹ The

Education: Ineffective, Unpopular, and Unconstitutional, 38 U.S.F. L. REV. 665 (2004); Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 46 (2005) (“Abstinence-only sex education is . . . a religious position . . . [and] [t]he preference for sexual abstinence . . . just as clearly a religious position as prayer or creationism.”); Gary J. Simson & Erika A. 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); Naomi Rivkind Shatz, Comment, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495 (2008). It is possible that I slightly overstate the positions of some of these authors in claiming they would regard *all* forms of abstinence education as violations of the Establishment Clause. Many of their discussions are focused on abstinence education meeting federal abstinence-only-until-marriage standards, a narrower class of programs than I include under the abstinence-only label. For an example of an abstinence-only program that some of these authors might regard as constitutional, see *infra* notes 101–05 and accompanying text (discussing a new abstinence education study by John Jemmott and colleagues).

⁷ Kristin Luker develops the idea of a “sexual left” and a “sexual right” in her book, *WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX—AND SEX EDUCATION—SINCE THE SIXTIES* 91–118 (2006). Though the attitudes associated with the sexual left and right are linked to religious and political views, she argues that the overlap is incomplete and that in some cases basic attitudes about sex may be driving politics and religion rather than the other way around. *Id.* at 95–99. The trope of a “culture war” between left and right is a staple in discussions of sex education and its relationship to broader political and cultural polarization. I use it in my title here, and “culture war” aptly describes debates about sex education as reflected in various contemporary media. At the same time, I note the existence of a significant literature suggesting that the polarization of American society is vastly exaggerated. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 350–53 (2009) (suggesting that the appearance of polarization in the electorate is “the result of both parties having been taken over by activists”). Despite my use of the culture war trope, I stand with polarization skeptics in my closing by pointing toward the possibility of sex education that would cater to the “sexual middle.” See *infra* notes 197–206 and accompanying text.

⁸ I deal more thoroughly with these issues in a working manuscript, John Taylor, *The Sound of Silence: Abstinence-Only Sex Education, Contraception, and the Establishment Clause* (March 8, 2010) (unpublished manuscript, on file with author).

⁹ The argument is made, with varying degrees of development and explicitness, in all but two of the sources cited *supra* note 6. See GREENAWALT, *DOES GOD BELONG?*, *supra* note 6, at 147–48; GREENAWALT, *RELIGION AND THE CONSTITUTION*, *supra* note 6, at 155–56; McGrath, *supra* note 6, at 688–89; Simson & Sussman, *supra* note 6, at 288–91; Shatz, *supra* note 6, at 520. The main exception is the treatment in the Jones article. Rather than arguing that the ineffectiveness of abstinence programs shows that their purported purpose of reducing teen

beauty of the argument is that it invites us to view debates about sex education as contests between pragmatic, scientific promoters of public health and ideologues who privilege (religious) values over science (and, perhaps, over common sense as well). This formulation avoids two alternative framings that would be less advantageous to abstinence critics. The sex education debate is not just about policy effectiveness, where we would expect school boards, departments of education, and legislators to have the last word. Nor is the debate simply a clash between religious and secular visions of sexual morality. Courts *might* take sides in that debate under the banner of the Establishment Clause, and (if the Establishment Clause means anything) there *are* instances where courts must say the secular is preferred to the religious as a matter of constitutional principle.¹⁰ But school silence about condoms seems a far cry from teaching students that Jesus died for their sins, and courts are and ought to be nervous about declaring that the Constitution systematically prefers secular, post-religious norms of conduct over traditional, religiously identified ones.¹¹ “Science over values” is a more palatable creed than “Modern, secular conduct norms over traditional, religious ones.”

My goal in this essay is to cast doubt on the “science versus values” framing of the argument. I make four primary claims. The most basic is that sex education is inescapably “about values” for both the sexual right and the sexual left. A full appreciation of this truth leads, I suggest, to three additional points. First, the federal government should not attempt to dictate how state and local governments approach sex education. Second, courts should be reluctant to use the Establishment Clause to settle sex education controversies.¹² Third, we should recognize some limits on the degree to which the public schools can be enlisted as soldiers in the culture wars. I argue that we might best understand what is troubling about abstinence-only sex education by thinking about the proper role of the public schools in navigating deep conflicts about cultural values.

pregnancies and STDs is a sham, she argues that on its face Title V abstinence funding has a purpose of promoting a religiously grounded set of moral norms about sexuality and marriage. Jones, *supra* note 6, at 1089–99. Rubin also fails to make the argument, but this is less noteworthy since he mentions abstinence education only briefly as an illustration of larger themes. See Rubin, *supra* note 6, at 24.

¹⁰ Consider, for example, a contrast between public schoolchildren reciting the pre-1954 (i.e., without “under God”) Pledge of Allegiance and public schoolchildren reciting the Nicene Creed. Who doubts that courts would see these cases quite differently?

¹¹ See generally Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL’Y 1 (2002) (demonstrating that courts rarely accept claims that legal enforcement of religiously-identified moral norms violates the Establishment Clause). See also Taylor, *supra* note 8.

¹² To be clear, I believe that courts *should* continue to enforce the Establishment Clause against overtly religious sex education programs. “The public schools may not teach the truth of religious claims” is a non-negotiable Establishment Clause principle, in my view. “The public schools may not promote religiously identified conduct norms” is not.

I develop the argument as follows. Part I examines the claim that abstinence-only sex education is a form of “fundamentalism.” Part II briefly charts the rise, and recent decline, of federal support for abstinence education. In Part III, I rehearse some of the key policy arguments against abstinence-only sex education and consider the implications of a hypothetical controversy involving abstinence-only dental education. Part IV makes the case that sex education is inevitably value-driven; Part V then considers how this truth bears on the institutional roles of the federal government, the courts, and the public schools in navigating cultural conflicts over sex education. I propose some modest and (hopefully) practical suggestions for teaching sex ed at the end of Part V, and then offer a brief conclusion.

I. ABSTINENCE-ONLY SEX EDUCATION AS “FUNDAMENTALISM”

One common academic custom directs that at this point I should express skepticism about the premises implicit in the symposium’s title, as Professor Koppelman skillfully does in his contribution to this volume.¹³ Here, the problematic term is, of course, “fundamentalism.”¹⁴ I agree that the term can be overused, and that its roots in the history of American Protestantism need to be understood.¹⁵ Yet I want to take a moment to defend the use of the term—in at least one of its many senses—because I believe it provides a useful perspective on why abstinence-only sex education troubles many people.

The sociologist Peter Berger situates fundamentalism as a rear-guard action fought in the context of advancing religious pluralism.¹⁶ Pluralism affects the consciousness of religious individuals by disrupting religion’s “taken-for-granted” status.¹⁷ Berger observes that societies cannot “function without some ideas and behavior patterns being taken for granted,” and that for most of human history religion has

¹³ Andrew Koppelman, *The Nonproblem of Fundamentalism*, 18 WM. & MARY BILL RTS. J. 915 (2010). For another example of symposium title skepticism, see Douglas Laycock, *Voting with Your Feet is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL’Y 29 (2009).

¹⁴ At the conference, Professor Vivian Hamilton ably defended the choice of “Families, Fundamentalism, & the First Amendment” as the symposium’s title by remarking that those who would replace “fundamentalism” with some less-loaded term fail to appreciate the value of alliteration. Vivian Hamilton, Professor, William & Mary School of Law, Comment at the William & Mary Institute of Bill of Rights Law Symposium: Families, Fundamentalism & the First Amendment (Nov. 6, 2009).

¹⁵ Randall Balmer, *Fundamentalism, the First Amendment, and the Rise of the Religious Right*, 18 WM. & MARY BILL RTS. J. 889 (2010). No doubt most supporters of abstinence-only sex education would be evangelicals rather than fundamentalists in Balmer’s classification.

¹⁶ Peter L. Berger, *Pluralism, Protestantization, and the Voluntary Principle*, in DEMOCRACY AND THE NEW RELIGIOUS PLURALISM 19 (Thomas Banchoff ed., 2007).

¹⁷ *Id.* at 27.

been taken for granted in this way.¹⁸ This sense of taken-for-grantedness is maintained through social consensus,¹⁹ but pluralism calls this consensus into question:

Individuals are continually confronted with others who do *not* take for granted what was so taken traditionally in their community. They must now *reflect about* the cognitive and normative assumptions of their tradition, and consequently they must *make choices*. A religion that is chosen, on whatever level of intellectual sophistication, is different from a religion that is taken for granted.²⁰

Berger defines “fundamentalism” as “any project to restore taken-for-grantedness in the individual’s consciousness and therefore, necessarily, in his or her social and/or political environment.”²¹ Fundamentalist projects can be secular or religious, large or small in scale. But all share a common problem. Re-establishing a sense of taken-for-grantedness requires that the individual’s social world reflect consensus, and under conditions of pluralism such consensus can only be achieved through fairly dramatic forms of social control.²² “The slightest relaxation of these controls can breach the protective dam against the pluralistic infection, alternative definitions of reality will then flood in, and the precariously maintained taken-for-grantedness can collapse overnight.”²³

Berger’s account suggests that we look for the fundamentalism of abstinence-only sex education not in its arguably religious origins, but in its attitude toward value pluralism. In this sense, the project of abstinence-only sex education does seem fundamentalist in its aspirations. It seeks to support (where possible) and restore (where necessary) a traditional cultural script that Linda McClain has aptly described using the old rhyme: “First comes love, then comes marriage, then comes the baby in the baby carriage.”²⁴ We might add that “sex”—tactfully omitted from the school-yard rhyme—comes between marriage and the baby carriage or, perhaps, just before

¹⁸ *Id.* at 23; *see also* CHARLES TAYLOR, *A SECULAR AGE* 3 (2007) (explaining that the book’s goal is to “define and trace” the transition that “takes us from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others”).

¹⁹ Berger often refers to the mechanisms that support the taken-for-granted character of ideas and institutions as “plausibility structures.” PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 46–50 (1967).

²⁰ Berger, *supra* note 16, at 23.

²¹ *Id.* at 26.

²² For example, Berger mentions theocratic societies like revolutionary Iran as large scale fundamentalist projects and religious “sects” like the Branch Davidians in Waco, Texas, as small scale projects. *Id.* at 26–27.

²³ *Id.* at 27.

²⁴ Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 *CARDOZO L. REV.* 2133, 2133–35 (2007).

marriage.²⁵ Supporters of abstinence-only sex education long for a time when the plausibility structures channeling sex into marriage were stronger than they are now, a time when teenagers would not have needed to be told that sex in the context of monogamous marriage was the “expected standard” for human sexual behavior. That standard would have enjoyed the “taken-for-grantedness” of which Berger speaks.²⁶ Such a world, if it ever really existed,²⁷ is now gone. Religious pluralism, and sexual pluralism, are realities that cannot be ignored; and this means that a commitment to a traditional sexual ethic of abstinence until marriage requires a choice.²⁸

If fundamentalism is about the denial of choice, though, we might wonder whether abstinence-only sex education is really a fundamentalist project after all. At one level, abstinence education presupposes that young people have choices to make. Because they are subject to many different cultural pressures inclining them toward sex, they need a strong counter-message from schools and community groups in order to choose the right path in the face of temptation. Further—and this is to understate the point to an almost comic degree—schools lack the sort of totalizing control over their students that would be necessary to surround traditional sexual mores with an aura of inevitability.²⁹ And if the counter-messages from peers,³⁰ advertising, and television were not enough, consider the observations made by the sociologist Mark Regnerus on the basis of extensive interviews and analysis of survey data regarding adolescent sexuality:

²⁵ See *id.* at 2148. Even in the no-doubt idealized past of the love-marriage-baby carriage script, pre-marital sex was recognized and sometimes legitimated through the now-declining institution of the shotgun wedding. See George A. Akerlof, Janet L. Yellen, & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States* 111 Q. J. ECON. 277, 278 (1996) (“Until the early 1970s it was the norm in premarital sexual relations that the partners would marry in the event of pregnancy.”). Mark Regnerus points out that the term “premarital sex” once meant sex with the person one intended to marry at a point in time before the marriage. Today, the term has expanded to include what might be better termed “nonmarital sex.” See MARK D. REGNERUS, *FORBIDDEN FRUIT: SEX & RELIGION IN THE LIVES OF AMERICAN TEENAGERS* 84–85 (2007).

²⁶ See *supra* notes 17–23 and accompanying text.

²⁷ For suggestions that it did not, see JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 10 (1988) (stating that one third of brides in the Chesapeake colonies were pregnant on their wedding days); Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954–2003*, 122 PUB. HEALTH REP. 73, 73 (2007) (concluding, based on data going back to 1954, that “[a]lmost all Americans have sex before marrying”).

²⁸ Cf. Berger, *supra* note 16, at 23 (noting that neo-traditional religion is different from taken-for-granted religion because adherents must decide so to believe and behave, which makes their religious commitments “both more personal and more vulnerable”).

²⁹ See, e.g., Emily Buss, *The Adolescent’s Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1241 (2000).

³⁰ See, e.g., *id.* at 1270–76 (discussing the influence peers have on the process of identity formation).

Simply put, whether or not Jane Q. Teacher is allowed to talk about condoms pales in significance and gravity to the democratized availability of the so-called sexual education that is available in the mass media, especially on the Internet. . . . Debates about whether educators will or will not address oral sex or anal sex or condoms or gay or lesbian sex are quickly becoming utterly irrelevant, since a few clicks of a mouse will bring any of us to a demonstration of exactly how each is performed and “experienced.”³¹

Abstinence education is often derided as unrealistic,³² but it strains credulity to think abstinence proponents believe they can make sexual transgression unthinkable.

To clarify the relationship between abstinence education and fundamentalism, we need to distinguish two different ways in which a cultural project might seek to deny choice. Consider that even in a well-ordered society where value norms are largely taken for granted, there will nearly always be awareness of the possibility of transgression: a choice between following the accepted nomos³³ or rejecting it for chaos. Abstinence education need not and does not try to deny the existence of this kind of choice. The relevant denial is that of a choice between competing moral orders: a choice between nomos and nomos. This is the choice posed by value pluralism, and it is the choice that the fundamentalist impulse seeks to deny.

This suppression of choice between competing nomoi, competing orders of value, is central to abstinence education. Abstinence proponents bemoan the idea that students should “decide for themselves” about sexual values rather than being told the correct ones to adopt.³⁴ And, more tellingly, abstinence-only sex education seeks to mask the reality of sexual choice by remaining silent about the benefits of

³¹ REGNERUS, *supra* note 25, at 59. Regnerus relates these observations in the course of a section titled “The Irrelevant Sex Education Debate,” *id.* at 58–59, a title which certainly gives me pause as a writer of an essay about that debate. Suffice it to say that Regnerus’s observations make the project of abstinence-only sex education seem a bit quixotic, and raise concerns about what more comprehensive school-based sex education can do. Regnerus concludes that “*what parents say* about sex has probably never been more important than it is today.” *Id.*

³² See, e.g., Editorial, *End to the Abstinence-Only Fantasy*, N.Y. TIMES, Dec. 19, 2009, at WK6.

³³ The classic legal discussion of nomos (normative order) is Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

³⁴ See, e.g., William A. Donohue, Lecture at his appointment as a Bradley Resident Scholar at the Heritage Foundation, *Why the Schools Fail: Reclaiming the Moral Dimension in Education* (June 23, 1988), available at <http://www.heritage.org/Research/Education/HL172.cfm> (“By instructing students to make up their own minds regarding the moral worth of premarital sex . . . teachers are imposing a value judgment on them, leading students to the conclusion that it is perfectly acceptable to ignore the tenets of established religions, community standards, and social norms.”).

contraception.³⁵ This silence is the most distinctive, and the most constitutionally problematic, feature of abstinence education; and it is fundamentalist in attempting to foreclose awareness of a competing sexual ethic that depends crucially on the responsible use of contraception.³⁶ The real choice faced by teens today is between traditional norms linking sex to marriage and an alternative sexual ethic that divides responsible, protected sex from irresponsible sex.³⁷ These are competing normative worlds: *nomos* vs. *nomos*. Abstinence curricula, however, often contrast the ordered freedom that comes with adherence to traditional norms with the loss of control that can accompany sexual activity: *nomos* vs. *chaos*.³⁸ It is this denial of the existence of any competing sexual *nomos* that makes abstinence education a “fundamentalist project” in Berger’s sense.

Interestingly, one might speculate that this denial is particularly important for federally-funded abstinence education in the public schools because the schools are a tough environment for an abstinence-only-until-marriage message. Public schools may be particularly poor places to try to create (sustain, restore) commitment to a traditional sexual ethic because the schools are forbidden from presenting such an ethic in a thickly (or even thinly) religious form.³⁹ Here, again, Regnerus’s work is instructive. Regnerus studied the impact of religiosity on adolescent sexual choices and found that for a small number of adolescents, religiosity significantly changes their sexual decision-making.⁴⁰ What motivates sexual decision-making, Regnerus found, is neither denominational affiliation nor religious involvement.⁴¹ Instead, the key variable is a “plausibility structure” of “like-minded friends, family, and authorities who[] teach and enable comprehensive religious perspectives about sexuality to compete more effectively against ubiquitous sexually permissive scripts.”⁴² Schools, of course, are forbidden by the Establishment Clause from using “comprehensive religious perspectives” in an effort to shape adolescent sexual mores,⁴³ this leads

³⁵ To be more specific, the federal definition of abstinence-only sex education mandates “exclusive” emphasis on the benefits of abstinence. 42 U.S.C. § 710(b)(2)(A) (2006). In practice, this means that programs meeting the federal definition either remain silent about contraception or they mention only failure rates so as to emphasize abstinence as the more effective strategy for preventing unplanned pregnancies and sexually transmitted diseases.

³⁶ One could stress that abstinence is the better, or even the morally required, choice, without suppressing information about contraception. Such an approach would retain a commitment to a traditional ethic while acknowledging the realities of sexual pluralism.

³⁷ For further discussion, see *infra* notes 120–24 and accompanying text.

³⁸ For example, the covers of the instructor’s guides for the RSVP (Responsible Social Values Program) sex education curriculum announce that “Abstinence is Freedom.” RESPONSIBLE SOCIAL VALUES PROGRAM, INSTRUCTOR’S GUIDE. General information about the RSVP program is available at <http://www.rsvptoledo.org/doc/services>.

³⁹ See *supra* note 3 and accompanying text.

⁴⁰ REGNERUS, *supra* note 25, at 106.

⁴¹ *Id.* at 203.

⁴² *Id.*

⁴³ See *supra* note 3 and accompanying text.

Regnerus to wonder “how effective abstinence-based education can possibly be when stripped of all theological and moral motivation and left to compete in the adolescent marketplace of ideas.”⁴⁴

II. MAKING ABSTINENCE A FEDERAL ISSUE

What I’ve described as the fundamentalist character of abstinence-only sex education would make it controversial on any scale, but the level of controversy has been greatly heightened by the decision to promote abstinence-only sex education through federal legislation. To briefly sketch the trajectory,⁴⁵ Congress began providing modest levels of funding for abstinence education demonstration projects through the Adolescent Family Life Act of 1981.⁴⁶ Serious federal money began flowing to abstinence-only education via the Personal Responsibility and Work Opportunity

⁴⁴ REGNERUS, *supra* note 25, at 95. No doubt some would react to Regnerus’s point by suggesting that schools ought to be allowed to use comprehensive religious perspectives to shape adolescent values about sexuality, and (perhaps) much else besides. If current interpretations of the Establishment Clause stand in the way, so much the worse for those interpretations. In my view, such a response would be both hasty and misguided. This is not the place for a full defense of the basic commitments of Establishment Clause jurisprudence, so I limit myself to a few brief observations. First, it is unsurprising that commitment to a comprehensive religious worldview might be an effective means for personal transformation, and this thought was certainly not foreign to the Founders—or to the Justices who crafted the modern Establishment Clause. As Andrew Koppelman has persuasively argued, a central historical value behind the Establishment Clause was preventing government involvement from corrupting the goods associated with religion. *See generally* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009). Religion flourishes best in a “free market,” and the bet made by the Establishment Clause is that religion’s capacity for personal transformation will benefit society most if the capacity is exercised in the private sphere. Second, comprehensive religious views are, to say the least, not neutral among various religions. History has provided us with much experience of struggles to determine which comprehensive views will be taught and which will not be. The lessons are not happy ones. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. L. ISSUES 313, 317–19 (1996). Third, in recognition of points like these, even the current Supreme Court shows no inclination to permit the government to use religious indoctrination as a tool of social policy in the public schools. It is a closer question whether the current Court might move toward permitting the direct funding of thickly religious social service providers who serve secular ends through promoting religious transformation of their beneficiaries, but for now the law’s answer remains “no.” *See* *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 423–25 (8th Cir. 2007) (holding a directly funded faith-based prison rehabilitation program violated the Establishment Clause despite arguments that the program used religious means in the service of a legitimate secular end).

⁴⁵ A more detailed account of the history of federal abstinence funding can be found in Shatz, *supra* note 6, at 510–13.

⁴⁶ Pub. L. No. 97-35, § 955(a), 95 Stat. 578 (1981) (codified as amended at 42 U.S.C. § 300z (2006)).

Reconciliation Act of 1996, commonly known as the Welfare Reform Act.⁴⁷ Section 912 of Title IX of that Act made \$50 million per year available for block grants to states,⁴⁸ which were then required to match every four dollars in federal aid with three dollars of their own.⁴⁹ In 2000, Congress began funding Community-Based Abstinence Education (CBAE), which made grants directly to community groups.⁵⁰ By 2007, the total federal budget for abstinence education funding had risen to \$177 million,⁵¹ and roughly 1.5 billion federal dollars have gone to abstinence-education over the life of the various programs.⁵²

Nearly all of this money has been tied to compliance with a statutory definition of abstinence-only sex education, commonly known as the A–H definition.⁵³ Under this statutory definition, abstinence education

- (A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
- (B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children;
- (C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
- (D) teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity;
- (E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;

⁴⁷ Pub. L. No. 104-193, § 912, 110 Stat. 2105, 2353–54 (1996) (codified as amended at 42 U.S.C. § 710 (2006)).

⁴⁸ *See id.* at 2345. This grant program is often referred to as “Title V” funding or “Section 510” funding because the 1996 Act created a new section 510 of Title V of the Social Security Act, codified as amended at 42 U.S.C. § 701 (2006).

⁴⁹ *See* U.S. Dep’t of Health and Human Services, Maternal and Child Health Bureau, Learn More Block Grant Program, <https://perfddata.hrsa.gov/mchb/TVISReports/LearnMore/BlockGrantProgram.aspx> (last visited Apr. 17, 2010).

⁵⁰ CARMEN SOLOMON-FEARS, CONGRESSIONAL RESEARCH SERVICE, SCIENTIFIC EVALUATIONS OF APPROACHES TO PREVENT TEEN PREGNANCY 1, 5 (2007) (explaining that CBAE funding was included in annual appropriations for the Department of Health and Human Services (HHS) starting in fiscal year 2001 and listing the appropriations bills containing CBAE funding), *available at* http://policyarchive.org/bitstream/handle/10207/4497/RS22656_20070501.pdf. Prior to 2005, the CBAE program was known as the Special Projects of Regional and National Significance (SPRANS) program. *Id.* at 5.

⁵¹ *Id.* at 4.

⁵² SIECUS, No More Money, A Brief History: Abstinence-Only-Until-Marriage Funding, <http://www.nomoremoney.org/index.cfm?pageid=947> (last visited Apr. 17, 2010).

⁵³ SIECUS, No More Money, Spending for Abstinence-Only-Until-Marriage Programs Funding Chart, <http://nomoremoney.org/index.cfm?fuseaction=page.viewpage&pageid=1004> (last visited Apr. 17, 2010).

- (F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society;
- (G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and
- (H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.⁵⁴

The key aspect of this definition is the claim that qualifying programs must place “exclusive” stress on the benefits of abstinence, and in practical terms this means that contraceptives are not mentioned at all or are mentioned only to stress their failure rates.⁵⁵

Despite some surveys suggesting that most parents favor some form of more comprehensive sex education,⁵⁶ the prospect of federal money had a dramatic influence on the prevalence of abstinence-only approaches to sex education.⁵⁷ Initially every state except California took the federal money, though over time more and more states have refused federal abstinence funding.⁵⁸ As of 2009, only twenty-five states continued to accept Title V money for abstinence-only education.⁵⁹

⁵⁴ 42 U.S.C. § 710(b)(2)(A)–(H) (2006).

⁵⁵ When I presented an earlier version of this paper at William & Mary, Andrew Koppelman pointed out that the A–H definition is not terribly explicit about forbidding positive discussion of contraception and wondered whether the definition might be given a different interpretation at the regulatory level. Andrew Koppelman, John Paul Stevens Professor of Law, Northwestern Law, Comment at the William & Mary Institute of Bill of Rights Law Symposium: Families, Fundamentalism & the First Amendment (Nov. 6, 2009). This possibility would depend on the weight to be given the word “exclusive” in subpart (A) of the definition. The Bush Administration placed great emphasis on this word. See *Domestic Abstinence-Only Programs: Assessing the Evidence, Hearing Before the H. Comm. On Oversight and Gov't Reform*, 110th Cong. (2008) (statement by Charles Keckler, Acting Deputy Assistant Secretary for Policy & External Affairs, U.S. Dep't of Health and Human Services) (explaining that abstinence education does not provide instruction on the use of contraception because of the phrase “exclusive purpose” in the statutory definition).

⁵⁶ A variety of polls are cited in DOUGLAS KIRBY, THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, EMERGING ANSWERS 2007: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY AND SEXUALLY TRANSMITTED DISEASES 104 (2007), available at http://www.thenationalcampaign.org/EA2007/EA2007_Full.pdf.

⁵⁷ See Jones, *supra* note 6, at 1082–84; see also Laura Duberstein Lindberg, John S. Santelli & Susheela Singh, *Changes in Formal Sex Education: 1995–2002*, 38 PERSP. ON SEXUAL & REPROD. HEALTH 182 (2006).

⁵⁸ MARCELA HOWELL & MARILYN KEEFE, ADVOCATES FOR YOUTH, THE HISTORY OF FEDERAL ABSTINENCE-ONLY FUNDING 2 (2007), available at http://www.advocatesforyouth.org/index.php?option=com_content&task=view&id=429&itemid=177.

⁵⁹ Sarah Kliff, *The Future of Abstinence*, NEWSWEEK, Oct. 27, 2009, <http://www.newsweek.com/id/219818/page1>.

As the last figure suggests, support for abstinence education at the state level seems to be weakening. At the federal level, the Obama administration has significantly reduced funding for abstinence-only education while increasing funding for more comprehensive forms of sex education. On December 16, 2009, President Obama signed into law the Consolidated Appropriations Act for 2010,⁶⁰ which includes no federal funding expressly marked for abstinence-only education.⁶¹ Instead, the bill allocates \$110 million to a Teen Pregnancy Prevention initiative to be administered by the Office of Adolescent Health, newly established within the federal Department of Health and Human Services (HHS).⁶² Most of this money will go to competitive grants for sex education: \$75 million for replicating programs with a proven track record for changing teens' sexual behavior, \$25 million to refine and test programs not yet proven successful.⁶³ It remains possible, of course, that some of the latter pot of money will go to abstinence-only programs;⁶⁴ but as of early 2010, it appeared that all three streams of federal abstinence funding (AFLA, Title V, and CBAE) had dried up. The recent passage of the health care reform bill has changed matters slightly, however. During the Senate's consideration of health care reform, Senator Hatch attached an amendment to the bill restoring Title V funding to states for abstinence-only sex education.⁶⁵ Senator Hatch's amendment became law when President Obama signed the Patient Protection and Affordable Care Act on March 23, 2010.⁶⁶ Consequently, \$50 million annually in federal abstinence-only funding will be available to states through 2014.⁶⁷ The health care reform bill also includes \$75 million in annual funding through 2014 for "personal responsibility education,"⁶⁸ defined as "plac[ing]

⁶⁰ Press Release, The White House, Bills Signed by President Today, 12/16/09, *available at* <http://www.whitehouse.gov/the-press-office/bills-signed-president-today-121609>.

⁶¹ News Release, SIECUS, Appropriations for Coming Year Prioritize Sexual Health and Education, Dec. 9, 2009, *available at* <http://siecus.org/index/cfm?fuseaction=feature.showfeature&featureid=1824&pageid=611&parentid=479>.

⁶² Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat. 3034, 3253 (2009).

⁶³ *Id.*

⁶⁴ With the February 2010 publication of a new study by John B. Jemmott and colleagues, there is now at least one abstinence-only program that should be regarded as having a proven track record and thus as eligible for a share of the \$75 million pot of money. John B. Jemmott III et al., *Efficacy of a Theory-Based Abstinence-Only Intervention Over 24 Months: a Randomized Controlled Trial with Young Adolescents*, 164 ARCH. PEDIATR. ADOLESC. MED. 152 (2010). For more on the Jemmott et al. study, see *infra* notes 101–05 and accompanying text.

⁶⁵ Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 2954 (2009) (restoring Title V (Welfare Reform) block grant funding, which lapsed in June of 2009); see also Posting of Sarah Kliff to The Gagggle, <http://blog.newsweek.com/blogs/thegagggle/archive/2009/11/19/senate-bill-restores-abstinence-only-funding.aspx> (Nov. 19, 2009).

⁶⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

⁶⁷ *Id.* § 2954.

⁶⁸ *Id.* § 2953 (adding a new section 513 to Title V of the Social Security Act).

substantial emphasis on both abstinence and contraception.”⁶⁹ All told, then, the current federal regime allocates considerably more money for comprehensive sex education than for abstinence-only education. This represents a sharp departure from Bush administration policies. Nonetheless, Title V funding will continue for another five years thanks to Senator Hatch; and there is no reason to think abstinence-only sex education will wither and die because of decreased federal support.⁷⁰ Questions about the funding of abstinence-only sex education thus seem likely to remain politically “live” for some time to come.

III. CRITIQUES OF ABSTINENCE-ONLY SEX EDUCATION: FROM POLICY TO PRINCIPLE?

The sexual left, of course, rejoices that the pendulum is currently swinging away from abstinence education.⁷¹ Understandably, abstinence critics view recent developments as belatedly recognizing the force of their arguments.⁷² Summarizing at a broad level of generality, these critics maintain that abstinence education misrepresents the facts, teaches the wrong values, and doesn’t work. On the accuracy front, a widely-cited congressional study in 2004 concluded that over two-thirds of federal abstinence funds were supporting curricula containing medical inaccuracies about such matters as STD transmission and condom effectiveness.⁷³ On the values front, critics argue that abstinence-only education surrounds sexuality with an atmosphere of fear,⁷⁴ suggests that the primary burden of sexual responsibility falls on

⁶⁹ *Id.* The quoted language comes from subsection (b)(2)(B)(iv) of the newly created § 513 of the Social Security Act, and will be codified with the rest of the Act at 42 U.S.C. § 701 et seq.

⁷⁰ As one indicator of the political staying power of abstinence-only education, consider the sexual right’s efforts to restore federal abstinence funding prior to the passage of the health care reform bill. *See, e.g.*, Press Release, National Abstinence Education Association, Reps. Dan Boren (D-OK) and Phil Gingrey (R-GA) urge Congress to Renew Abstinence Education Funding in 2011 Budget, *available at* http://www.abstinenceassociation.org/newsroom/020310_reps_urge_congress_to_renew_abstinence_education.html (last visited Apr. 17, 2010) (describing reaction to publication of the Jemmott et al. study cited *supra* note 64).

⁷¹ *See, e.g.*, Posting of Allie Bohm to ACLU Blog of Rights, We Interrupt Your Regularly-Scheduled Health Care Debate for A Victory Message on Sex Ed, <http://www.aclu.org/blog/reproductive-freedom/we-interrupt-your-regularly-scheduled-health-care-debate-victory-message-s> (Dec. 17, 2009, 16:14 EST).

⁷² *See id.*

⁷³ The study is commonly known as the Waxman Report. U.S. HOUSE OF REPRESENTATIVES, COMM. ON GOV’T REFORM, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS, *available at* http://www.apha.org/apha/PDFs/HIV/The_Waxman_Report.pdf (Dec. 2004) [hereinafter Waxman Report].

⁷⁴ The Sexuality Information and Education Council of the United States (SIECUS) develops this criticism at length in the materials on its “Community Action Kit” website,

women,⁷⁵ perpetuates stereotypical gender roles,⁷⁶ and either treats homosexuality as aberrant or ignores it altogether.⁷⁷ These are powerful criticisms. If most or even many abstinence-only curricula are medically inaccurate and convey problematic value messages, this cuts against broad federal abstinence funding as a policy matter. At the same time, however, these sorts of criticisms have limited scope with respect to more local decisionmakers because they target particular curricula. Many abstinence programs may be inaccurate, but not all are; and inaccuracies can be fixed. Many curricula convey questionable value judgments, but not all do,⁷⁸ and not everyone agrees about which value judgments are questionable.

A. *“It Just Doesn’t Work.”*

Consequently, the most rhetorically powerful argument against abstinence-only sex education is that it simply doesn’t work. A composite version of the argument would look something like this:

Studies show that abstinence-only sex education is ineffective as a public health strategy for reducing teen pregnancy and STD rates, and the obvious reason for this ineffectiveness is that abstinence education fails to promote contraception. This strategy is wildly unrealistic in light of the undisputed fact that many teens are going to have sex no matter how strongly schools and families promote abstinence. Further, nearly everyone has sex eventually. Don’t we want schools to prepare each and every student for a responsible sexual future?⁷⁹

<http://www.communityactionkit.org/index.cfm?pageID=923> (providing “fact sheets on fear-based curricula and speakers”).

⁷⁵ See LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY AND RESPONSIBILITY* 278 (2006) (stating that abstinence-only curricula “reinforce the idea that women are gatekeepers because men, by nature, find self-control difficult”); SIECUS, *No More Money, In Their Own Words: What Abstinence-Only-Until-Marriage Programs Say*, <http://www.nomoremoney.org/index.cfm?fuseaction=page.viewPage&pageID=950&nodeID=5> (last visited Apr. 17, 2010).

⁷⁶ See Waxman Report, *supra* note 73, at 16–18.

⁷⁷ See, e.g., McGrath, *supra* note 6, at 681–84.

⁷⁸ See SIECUS, *Abstinence-Only Without Fear, A Step in the Right Direction: Medically Accurate Abstinence-Only Programs Without Fear and Shame*, <http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1169> (last visited Apr. 17, 2010). I gather that these curricula were developed by marketers of more comprehensive sex education curricula who wanted to be able to reach abstinence-only markets without too greatly compromising their visions of sex education. I do not know how widely they are used. The abstinence-only program tested in the Jemmott et al. study, *supra* note 64, would also survive the “medically inaccurate” and “bad values” criticisms.

⁷⁹ Arguments with roughly this structure are made in virtually every critical discussion

This argument has the unusual advantage of starting from premises that seem universally shared. Everyone agrees that there are too many teen pregnancies and STDs, and everyone agrees that decreasing teen sexual activity and increasing teen contraceptive use would *each* contribute to reducing pregnancy and STD rates.⁸⁰ How can it make sense to focus only on abstinence when both abstinence and contraception will help? If we simply take a clear-headed, realistic look at sex education as a public health issue, it seems intuitively obvious that abstinence education is a bad idea.

We are a pragmatic people,⁸¹ and no one wants to support policies that “don’t work.” The argument just sketched gets much of its rhetorical power from being cast in the value-free, instrumental language of social science. It is more comfortable to argue about facts and effectiveness than about the fuzzy world of values.⁸² Further, the scope of this sort of policy argument is universal. Not every abstinence education program meets all the criteria of the A–H definition. Some, for example, do not embrace the controversial (and, to the sexual left, objectionable) claim that the only moral sex is married sex.⁸³ But *every* program worthy of the name “abstinence-only” refrains from promoting contraception. Better still, the argument naturally leads into objections that purport to go deeper than policy.⁸⁴ If abstinence education makes no sense as a public health matter, the fact that we have a “sex education controversy” means that values rather than science are driving one side of the debate. That, perhaps, means that there is something wrong with abstinence education as a matter of (constitutional?) principle. I can illustrate the point by conducting a thought experiment.

B. A Thought Experiment: Abstinence-Only Dental Education

Imagine that today’s public health problems of teenage pregnancy and STDs have been replaced with an epidemic of tooth decay, a.k.a. dental caries. Decades of Ho-Hos and Diet Coke have finally taken their toll, and American cavity rates are more than double those in the rest of the developed world. The resulting burden of

of abstinence education I have ever read. For a recent and forceful presentation, see Shatz, *supra* note 6, at 517–26.

⁸⁰ For comprehensive discussion of teen pregnancy, STDs, and the changes in sexual behavior that would reduce them, see generally chapters one and two of KIRBY, *supra* note 56.

⁸¹ See Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565, 570–72 (stating that “everyday pragmatism” as a mode of decision-making centered on “what works” is a “substantial aspect of contemporary mainstream Americanism”).

⁸² Cf. Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006) (extensively discussing the tendency of courts to try to decide cases about the social status of groups—e.g., current litigation about gay marriage—on the basis of “facts” rather than social norms).

⁸³ See Jones, *supra* note 6, at 1077 (distinguishing between abstinence-only sex education and abstinence-only-until-marriage sex education).

⁸⁴ After all, even the strongest policy argument means little if the votes are not there.

dental expenses and lost productivity causes our health care system to consume ever-increasing portions of GDP and threatens to push the economy over the brink. Let us further assume that the cause of all these bad teeth is that Americans eat too many sweets.⁸⁵ It's true that we brush our teeth, but sometimes we forget. And our technique is often pretty poor. Who among us has not felt the sting of shame when the dental hygienist tells us that we really aren't doing a very good job getting at those back teeth? And do we floss? Really? Every day?

To combat the tooth decay epidemic, we need to start with the young—and we find the young in schools. Enter Mr. Tooth.⁸⁶ His job is to solve the tooth decay crisis by changing the behavior and attitudes of American youth. Once we've passed the initial stage where certain religious leaders call Mr. Tooth's heterosexuality into question,⁸⁷ we encounter a more serious concern. Not everyone agrees on the message that Mr. Tooth should impart. There are, in fact, two schools of thought.

Let's call the first "abstinence-only" dental education. It says: "The only sure way to protect your teeth is not to eat sweets. No other method is one hundred percent effective in avoiding tooth decay; and there are collateral benefits, too, like keeping your weight down." "Abstinence-only" advocates don't want to spend time talking about brushing and flossing except to emphasize that even in the best circumstances their protection against tooth decay is imperfect, and in practice many people will not brush and floss every time they eat sweets. To make matters worse, even those who remember to brush and floss often won't do it very well. Why give people a false sense of security by telling them they can probably eat that Snickers bar safely if they brush and floss right afterward? It's better to avoid mixed messages.

The other approach—let's call it "comprehensive" or "abstinence-plus" dental education—says: "Let's tell kids it's best for them not to eat sweets, or (allowing for occasional weakness of will) to eat them as seldom as possible. But let's also tell

⁸⁵ Admittedly, dentistry is not my field and I draw upon a "folk theory" of tooth decay that I presumably absorbed in childhood. Readers with the disagreeable habit of questioning the realism of authorial hypotheticals may be reassured to find that the folk theory is basically consistent with the elaborate account of the origins of tooth decay on Wikipedia. Wikipedia, *Dental Caries*, http://en.wikipedia.org/wiki/Dental_caries#Causes (last visited Feb. 10, 2010). Who could ask for more reassurance than this?

⁸⁶ The character of Mr. Tooth demands visualization, and here too the Internet provides a ready answer. A downloadable image of Mr. Tooth is available at <http://www.mrcad.com/download/Mr-Tooth.jpg> (last visited Apr. 17, 2010).

⁸⁷ Cf. David D. Kirkpatrick, *Conservatives Taking Aim at Soft Target*, N.Y. TIMES, Jan. 20, 2005, at A6 (reporting criticism of the cartoon character SpongeBob Squarepants by James Dobson, founder of Focus on the Family). The Dobson v. SpongeBob controversy is often remembered as involving a charge that SpongeBob himself was gay. See, e.g., Mike Bianchi, *Imagine Dr. Dobson in Swamp*, ORLANDO SENTINEL, Jan. 23, 2010, at C1 ("James Dobson [is] an ultra conservative zealot who once denounced Spongebob Squarepants for being gay."). In fairness, it appears that Dobson criticized SpongeBob not for being gay or even for being a "pro-gay" character, but for appearing in a video that Dobson regarded as "pro-homosexual." See Corrections: For the Record, N.Y. TIMES, Jan. 29, 2005 at A2.

them that if they give in and eat sweets, it's very important that they brush and floss regularly. And let's make sure that when they brush and floss, they use good technique so that they realize the maximum protection against tooth decay."

In considering the debate about which approach best promotes public health, a few additional points provide important context. First, most people find that sweet foods taste good—*really* good. Second, Americans are surrounded by the temptations of sweet foods at every turn. No checkout aisle in any store is free from candy bars, no TV show is without its soft drink ads.

While I do not purport to be an expert on American public opinion, I take it that there is general agreement that most Americans should probably eat fewer sweets; but, apart from vestigial moral overtones related to the ideas that self-control is a virtue and gluttony a vice, we see people's choices about eating sweets as basically prudential and not moral. This is a public health problem, plain and simple. When assessed in that light, how close does the debate about abstinence-only dental education really seem?

It is possible that people will eat more sweets to the extent they become confident that they can reduce the risks of tooth decay through consistent brushing and flossing. This would be a cost of comprehensive dental education—it might have the inadvertent effect of increasing the consumption of sweets. (And there might be some negative effects like gaining weight that wouldn't be prevented by brushing and flossing.) But those possible negative effects would have to be weighed against the decreases in tooth decay that would result from emphasis upon universal and technically proficient brushing and flossing. Maybe the abstinence-only approach would look attractive if one believed that emphasis on preventive techniques would significantly increase the consumption of sweets *and* one believed kids are so irresponsible that we can't really expect them to do a much better job of brushing and flossing than they do now. But whether these beliefs are actually justified is an empirical question, so let's also take note of a third point: The empirical evidence suggests that teaching people to brush and floss doesn't make them consume more sweets.⁸⁸ It also provides at least some hope that kids' brushing and flossing habits can be improved and the risks of tooth decay when kids do eat sweets can be reduced at least to some degree. Wouldn't everyone support comprehensive dental education on these facts?

At least in the conventional wisdom of the sexual left, my little tale about the tooth decay crisis is a pretty close parallel to the current state of affairs with respect to abstinence-only sex education.⁸⁹ Many sexually conservative parents believe that

⁸⁸ This is "hypothetical empirical evidence," as befits a thought experiment. I have no idea whether the point in the text has been substantiated or even studied in the real world.

⁸⁹ Conventional wisdom about the empirical evidence regarding the effectiveness of abstinence education is, of course, vulnerable to being overturned by further studies. Necessarily, the same is true for arguments that depend on the conventional wisdom. I note below that the Jemmott et al. study, *supra* note 64, may warrant some re-examination of the conventional wisdom (and the arguments). My descriptions in the next several paragraphs present the unqualified, pre-Jemmott conventional wisdom of the sexual left.

talking to kids about contraception will make them more likely to have sex.⁹⁰ And the idea that this effect might occur is not outlandish—social scientists have documented the phenomenon of “risk compensation,” in which people may engage in riskier behavior after adopting precautions that increase their feelings of safety.⁹¹ Nonetheless, there appears to be no rigorous empirical evidence that teaching kids about contraception increases the likelihood that they will have sex.⁹² Further, there is at least *some* evidence that *some* kinds of comprehensive sex education change kids’ sexual behavior by increasing condom use, delaying sexual initiation, and/or reducing the frequency of sex.⁹³

⁹⁰ See REGNERUS, *supra* note 25, at 70.

⁹¹ See Edward C. Green, *The Pope May Be Right*, WASH. POST, Mar. 29, 2009, at A15. Green discusses evidence that condom distribution has been an ineffective means of reducing HIV transmission in Africa, even though similar strategies have worked well in Thailand. Green hypothesizes that one explanation for the ineffectiveness of condoms is “risk compensation”: “when people think they’re made safe by using condoms at least some of the time, they actually engage in riskier sex.” *Id.* Douglas Kirby also briefly notes the possibility that risk compensation may undermine some of the benefits of safe sex education. KIRBY, *supra* note 56, at 44. Regnerus found a “resilient” association between parents talking to their kids about contraception and sexual initiation. REGNERUS, *supra* note 25, at 71. In other words, teens were more likely to have sex after discussing birth control with their parents. Association is not causation, of course, and Regnerus speculates (plausibly, in my view) that parents talk to their teenagers more about birth control when they perceive “sexual intentions” in the teens, and that the conversations themselves may have no causal role in the increased sexual activity. *Id.*

⁹² KIRBY, *supra* note 56, at 16, 115, 119. Though risk compensation is a real phenomenon, intuitively one might suppose there are few significant effects because (a) nearly all young people absorb many messages about the attractiveness of sex from popular culture and peers, and (b) nearly all young people know there is such a thing as contraception that can make sex safer. On those assumptions, it may be that learning about contraception in a systematic way has little effect on willingness to engage in sex but some effect on the frequency and effectiveness of contraceptive use.

⁹³ *Id.* at 102, 115–23 (reviewing studies). Note that evidence of the proven success of comprehensive sex education is pretty modest. According to Kirby, “effective” programs typically reduce at least one sexually risky behavior by about one-third. *Id.* at 7. This is important to note because in reading left-leaning websites, one gets the impression that comprehensive sex education has been proven to be a runaway success. See, e.g., Planned Parenthood Action Center, Real Sex Education, <http://plannedparenthoodaction.org/positions/fighting-real-sex-education-97.htm> (last visited Feb. 5, 2010) (“The best way to help teens prevent sexually transmitted infections and unplanned pregnancies is to provide them with comprehensive . . . education.”). Similarly, reading right-leaning websites creates the impression that abstinence education is a proven success and comprehensive sex education a dismal failure. See, e.g., Focus on the Family, Talking Points (Abstinence Ed.), <http://focusonthefamily.com/socialissues/abstinence/abstinence-education/talking-points.aspx> (last visited Apr. 17, 2010) (“Students participating in abstinence programs are more likely to delay sex. . . .”). It may be closer to the truth to say that no type of sex education has a great track record empirically, but that so far there is modest reason for hope on the comprehensive sex education side and little reason for hope on the abstinence-only side. That it is difficult to change behavior through sex education should not

On the other side of the coin, the conventional wisdom says there is no solid empirical evidence that abstinence-only sex education has any lasting effect in changing youth behavior.⁹⁴ In one of the most rigorous evaluations to date, conducted at Congress's request by the Mathematica Policy Institute, four abstinence-only sex education programs that had been identified as promising were evaluated using an experimental design that compared groups of students receiving abstinence-only sex education with control groups of similar students who received whatever sex education was currently in place at their schools.⁹⁵ Student surveys taken four to six years after study enrollment showed that abstinence-only sex education had no positive behavioral effects.⁹⁶ It appears, then, that from a public health standpoint, comprehensive sex

be surprising when students are subject to so many influences about sexuality from their peers, the media, and the Internet. Kristin Luker notes that "it is surprisingly difficult to show that sex education programs do in fact increase teenagers' willingness to protect themselves from pregnancy and/or disease," but adds that "few social programs show verifiable effects in changing individual behavior, particularly something as socially, politically, and emotionally complex as sex." LUKER, *supra* note 7, at 255.

⁹⁴ Kirby's comprehensive survey of sex education studies in 2007 provided the following takeaway line for comprehensive sex education proponents: "At present, there does not exist any strong evidence that any abstinence program delays the initiation of sex, hastens the return to abstinence, or reduces the number of sexual partners." KIRBY, *supra* note 56, at 15. Though this point is less emphasized, Kirby also observed that relatively few rigorous studies of abstinence education have been done, and that it is too soon to conclude that all abstinence education programs are ineffective. *See id.* Such programs merit further study, but "have not provided sufficient evidence to justify their widespread dissemination." *Id.* The 75/25 approach adopted by the Obama administration seems to have taken a page from Kirby's playbook. *See supra* notes 60–63 and accompanying text. Another recent literature review concluded that abstinence-only programs have not been effective in reducing the risk of HIV infection in high income countries. Kristen Underhill, Paul Montgomery & Don Operario, *Sexual Abstinence Only Programmes to Prevent HIV Infection in High Income Countries: Systematic Review*, BRIT. MED. J., July 26, 2007, at 7. Similarly, a CDC task force recently concluded that there is "insufficient evidence to determine the effectiveness of group-based abstinence education delivered to adolescents to prevent pregnancy, HIV and other sexually transmitted infections (STIs)." THE COMMUNITY GUIDE, CENTER FOR DISEASE CONTROL AND PREVENTION, PREVENTION OF HIV/AIDS, OTHER STIS AND PREGNANCY: ABSTINENCE EDUCATION INTERVENTIONS (2009) http://www.thecommunityguide.org/hiv/RRabstinence_ed.html (internal hyperlink removed). *But see* IRENE ERICKSEN & DANIELLE RUEDT, A MINORITY REPORT: FUNDAMENTAL CONCERNS ABOUT THE CDC META-ANALYSIS OF GROUP-BASED INTERVENTIONS TO PREVENT ADOLESCENT PREGNANCY, HIV, AND OTHER STIS (2009), [http://instituteresearch.com/docs/Minority_Report_CDC_Meta-Analysis_\(11-18-09\).pdf](http://instituteresearch.com/docs/Minority_Report_CDC_Meta-Analysis_(11-18-09).pdf) (criticizing the data analysis in the CDC recommendation).

⁹⁵ CHRISTOPHER TRENHOLM ET AL., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS, FINAL REPORT (2007), *available at* <http://www.mathematica-mpr.com/publications/PDFs/impactabstinence.pdf>.

⁹⁶ *See id.* at xvii–xviii. *But see* Jemmott et al., *supra* note 64 (randomized controlled trial showing that an abstinence-only program was effective); *infra* notes 101–05 and accompanying text (discussing the Jemmott et al. study). A silver lining in the Mathematica Policy Institute

education should not look any more controversial than comprehensive dental education. That it *seems* controversial shows that “values” are driving abstinence proponents. Because those values are the values of the “religious right,” abstinence education can readily be portrayed as an unconstitutional attempt to transmit the sexual ethics of conservative Christianity to captive audiences of public schoolchildren. What began as an empirical policy argument about “what works” quickly segues into an argument of constitutional principle.

IV. THE IMPOSSIBILITY OF VALUE-FREE SEX EDUCATION

The argument based on the dental education analogy is right in one respect, but wrong in another. It is right in highlighting an undeniable truth: sex is not dentistry. If choices about sex education were simply about public health and prudence, the public discussion would be very different. This point makes it tempting to say that sex education is controversial because where the left sees a public health problem, the right sees a values problem.⁹⁷ Thus one commentator remarks that “in abstinence-only classes, abstinence is taught as a moral value, . . . whereas in comprehensive sex-education classes, abstinence is taught as a behavioral method for avoiding unwanted consequences from sex.”⁹⁸ This is a mistake. To treat sex as simply a behavior whose consequences must be managed reflects value judgments as well. The weakness in

study for abstinence-only advocates was that exposure to abstinence-education was also not found to have any negative effects. TRENHOLM, *supra* note 95, at xxiii. For example, researchers found no evidence to support the charge that abstinence-only education is actually counterproductive because it makes teens less likely to use contraception when they do have sex. *Id.* at xvii–xviii. The methodology of the study has been criticized by the sexual right. *See, e.g.*, STAN E. WEED ET AL., THE INSTITUTE FOR RESEARCH AND EVALUATION, “ABSTINENCE” OR “COMPREHENSIVE” SEX EDUCATION? 3–5 (2007), available at [http://instituteresearch.com/docs/Abstinence_vs_Comprehensive_Sex_Education_\(IRE,_6-8-07\).pdf](http://instituteresearch.com/docs/Abstinence_vs_Comprehensive_Sex_Education_(IRE,_6-8-07).pdf) (criticizing the study for using a non-representative study sample, cross-contamination between the study group and control group, and other problems). Nevertheless, one would be hard-pressed to argue with the claim that it is among the most thorough studies conducted to date. Results from another important research trial being conducted by Christine Markham of the University of Texas are scheduled to be released later in 2010. The Markham study compares an abstinence-only curriculum against a comprehensive curriculum and a control group in fifteen inner-city middle schools in Texas. CHRISTINE MARKHAM, CENTER FOR DISEASE CONTROL AND PREVENTION, EVALUATING ABSTINENCE-ONLY AND ABSTINENCE-PLUS PROGRAMS TO PREVENT HIV INFECTION, SEXUALLY TRANSMITTED DISEASE AND PREGNANCY AMONG MIDDLE SCHOOL STUDENTS (forthcoming 2010). More about Markham’s study can be found at ClinicalTrials.gov, a service of the U.S. National Institutes of Health, All About Youth: Evaluation of Sexual Risk Avoidance and Risk Reduction Programs for Middle School Students, <http://clinicaltrials.gov/ct/show/NCT00167505?order=1> (last visited Apr. 17, 2010).

⁹⁷ So tempting, in fact, that I said exactly this when I presented an earlier version of this paper at the conference. John Taylor, Remarks at the William & Mary Institute of Bill of Rights Law Symposium: Families, Fundamentalism & the First Amendment (Nov. 6, 2009).

⁹⁸ Shatz, *supra* note 6, at 516.

the argument based on the dental education analogy is the pretense that educating kids about sex could ever avoid being “about values” as well as about public health. It is probably more accurate to say that values drive the sex education debate from both sides.⁹⁹

The rest of this Essay provides reasons for thinking the sex education debate is inescapably “about values,” and considers the implications of this truth for how three government institutions should approach the issue of sex education. Specifically, I suggest that the federal government should abstain from seeking to influence decisions about sex education, that courts should be reluctant to intervene in cultural contests about sex education, and that public schools have non-judicially enforceable but constitutionally-based obligations not to pursue the ambitious goals of federally defined abstinence-only-until-marriage sex education. On my account, the problem with (at least most forms of) facially secular abstinence education programs is not that they are too religious to satisfy the Establishment Clause, but that they conscript the public schools as strategic tools in culture war. Before proceeding further, though, I want to qualify and contextualize my account in two ways.

A. Two Caveats

First, I am largely accepting for purposes of argument the conventional wisdom that the empirical research on sex education significantly favors more comprehensive forms of sex education over abstinence-only approaches. I think the conventional wisdom may be somewhat overstated, but assessing the evidence and the proper attitudes of legislators, school officials, and judges toward that evidence are tasks too complex to pursue here.¹⁰⁰ I do not rely upon the very recent appearance of a well-designed study by John Jemmott et al. demonstrating that an abstinence-only program was effective in delaying sexual initiation for twenty-four months among a population of African American sixth and seventh graders in an urban school district.¹⁰¹ Notably, Jemmott et al.’s findings suggest that the abstinence-only curriculum was more effective in delaying sexual initiation than either “safe sex” or “abstinence-plus” curricula.¹⁰² As the sexual left has been quick to point out,¹⁰³ however, Jemmott et

⁹⁹ See LUKER, *supra* note 7, at 243 (“[T]he debate about sex education right now is a debate about values, but as is often the case in America, questions about values get obscured in the public arena by questions about practicalities. The most critical one is, does sex education work?”).

¹⁰⁰ I say a bit more about them in Taylor, *supra* note 8.

¹⁰¹ Jemmott et al., *supra* note 64, at 157 (describing the study as “the first randomized controlled trial to demonstrate that an abstinence-only intervention reduced the percentage of adolescents who reported any sexual intercourse for a long period following the intervention”).

¹⁰² *Id.* at 156.

¹⁰³ See, e.g., Evidence Check, Guttmacher Institute, Review of New Study on a Theory-Based Abstinence Program (Feb. 2010), <http://www.guttmacher.org/media/evidencecheck/2010/02/03/EvidenceCheck-Jemmott-Study.pdf> (last visited Apr. 17, 2010).

al.'s abstinence-only program would not have satisfied the federal A–H definition because it did not teach that all sex should be confined to marriage¹⁰⁴ and its effectiveness has been proven only in one study on one population of relatively young subjects in one setting. Deciding exactly how much weight the Jemmott et al. study should have is also beyond the scope of this Essay.¹⁰⁵ Suffice it to say that on any account, the empirical case against abstinence-only sex education is now at least somewhat weaker than it was when I began working on this Essay.

Second, my treatment presupposes an account of the Establishment Clause on which it is at least a close question whether facially secular abstinence education is unconstitutional. A quick illustration shows the point of the qualification. Suppose that the best account of the Establishment Clause included this principle:

Any policy that would not have been adopted but for the support of religiously motivated citizens is unconstitutional.

On such a principle, the unconstitutionality of any abstinence program that satisfied the federal definition might seem clear. And where unconstitutionality is clear, courts arguably have a clear duty to strike down laws and policies whether their actions will be perceived as “taking sides in the culture war” or not.¹⁰⁶ After all, the school prayer decisions¹⁰⁷ were unpopular,¹⁰⁸ yet I think the Court was quite right to act when it did.¹⁰⁹ I am treading here on the edge of an immense thicket, and the reader is correct in surmising that I am not about to offer a complete theory of judicial review and the degree to which its legitimacy depends on coherence with prevailing social norms.¹¹⁰

¹⁰⁴ Jemmott et al., *supra* note 64, at 153 (stating that the program sought to delay sex “until a time later in life when the adolescent is more prepared to handle the consequences of sex”).

¹⁰⁵ See Taylor, *supra* note 8.

¹⁰⁶ Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459, 491 (2007) (quoting *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting)).

¹⁰⁷ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

¹⁰⁸ ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* 165–66 (2009) (describing public response including declarations that *Engel* was a “victory for communism”); FRIEDMAN, *supra* note 7, at 262–67 (describing the “huge protest” that greeted the school prayer decisions but noting that public hostility to the decisions eased partly because the ban on school prayer was difficult to enforce and many communities simply ignored the ban).

¹⁰⁹ See Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 325–26 (2007) (describing *Engel* and *Schempp* as “easy cases”).

¹¹⁰ Some recent, notable contributions to the vast literature on this theme include: FRIEDMAN, *supra* note 7; Goldberg, *supra* note 82; Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431 (2005); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

I offer only the following humble proposition, which I think would be widely if not universally accepted: *Other things being equal*, courts have more discretion to consider the cultural and political implications of their decisions when the purely legal questions are close than when the purely legal questions are clear.¹¹¹ Here, my supposition is that the Establishment Clause issues concerning abstinence education are close enough to make relevant questions about the role of courts in mediating cultural value conflicts. I develop and defend my account of the Establishment Clause issues elsewhere, but I offer the following sketch in order to provide additional context for the argument I present here.¹¹²

The Establishment Clause prevents the government from declaring that religious propositions are true (or false), and it prohibits the government from requiring religious observances. Facially secular abstinence education, however, does neither of these things. Instead, it promotes an ideal of conduct that is thought to be valid for all people, regardless of their reasons for conformity. Facially secular abstinence education cannot be plausibly described as having a religious purpose or religious effects. If it establishes religion, this can only be because it is “based on” or “motivated by” religion in some way. I argue that facially secular abstinence education should be seen as improperly religion-based only if it “implicitly asserts” the truth of religious premises.¹¹³ Implicit affirmation can be shown only by demonstrating the absence of any rational secular basis that could have supported the policy. On this understanding, I suggest that it is quite difficult to show that a policy neither declaring religious truth nor requiring a religious observance violates the Establishment Clause. That should be enough to provide context for my argument here.

B. The Morality of Protection

I now turn to substantiating my claim that there is no value-free approach to sex education. Consider again the steps in the public health argument against abstinence-only sex education.¹¹⁴ The goals of reducing teen pregnancy and STD transmission

¹¹¹ This seems to me a fairly modest claim about the degree to which legal uncertainties leave room for courts to consider social values. *Cf.* Klarman, *supra* note 110, at 433 (suggesting on the basis of Court documents that *Brown* was a “hard case” because the Justices’ personal views and emerging social values cut strongly in favor of invalidating segregation while the “sources of constitutional interpretation to which they ordinarily looked for guidance—text, original understanding, precedent, and custom—indicated that school segregation was permissible”).

¹¹² This sketch should be viewed as no more than a promissory note for the account developed in Taylor, *supra* note 8.

¹¹³ This view is much influenced by the work of Michael Perry and Andrew Koppelman, though of course they are not responsible for the use I make of it in the manuscript, *supra* note 8. *See* MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT 217–28 (2009); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).

¹¹⁴ *See supra* notes 79–84 and accompanying text.

sound neutral enough, and they are shared by both sides. Note, however, that from the standpoint of these goals, adolescents having protected sex is almost as good an outcome as adolescents abstaining from sex altogether. The difference in the quality of these outcomes is the difference between the perfect effectiveness of perfect abstinence and the imperfect but very high effectiveness of consistent and correct contraceptive use. To borrow a distinction from tort law, the difference between using condoms and practicing abstinence is like the difference between reasonable care and extraordinary care.¹¹⁵ One suspects that many parents on the sexual left and center would be uncomfortable with this formulation. For the sexual right, it captures the essence of comprehensive sex education and their objections to it.¹¹⁶ The suspicion is that the public health perspective actually embodies a competing sexual ethic.

To appreciate the point, we need to think a bit more concretely about what sex education programs do.¹¹⁷ To begin with the obvious, nearly all programs convey information about human reproduction and STDs.¹¹⁸ Comprehensive sex education provides information about the benefits of contraception and (usually) tells students how to obtain and correctly use contraceptives.¹¹⁹ It is not realistic, however, to think that information alone will dissuade teens from risky sexual behavior, and educators across the spectrum recognize this. Accordingly, sex education curricula devote considerable attention to inculcating commitment to norms of sexual behavior and building the skills necessary to adhere to those norms.¹²⁰ This is obvious in abstinence education, which seeks to valorize the sex/abstinence boundary and to give teens the skills and confidence to say “no,” but it is equally true in more comprehensive approaches to sex education. Comprehensive approaches seek to valorize the line

¹¹⁵ See JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 154 (2nd ed. 2008).

¹¹⁶ See, e.g., Posting of Pam Heilman to Momlogic, *Sex Education vs. Abstinence Smackdown*, http://www.momlogic.com/2010/02/sex_education_planned_parenthood_abstinence.php (Feb. 16, 2010) (“It is not acceptable or beneficial in any way, shape, or form for 10-year-olds—or 14-year-olds, for that matter—to be having sex.”).

¹¹⁷ See SHANNAN MARTIN ET AL., THE HERITAGE FOUNDATION, *COMPREHENSIVE SEX EDUCATION VS. AUTHENTIC ABSTINENCE: A STUDY OF COMPETING CURRICULA* 13 (2004), available at www.heritage.org/research/welfare/upload/67539_1.pdf (providing table summarizing the content of 9 abstinence-only and 9 comprehensive sex educational curricula).

¹¹⁸ See *id.* (stating that the studied comprehensive curricula devoted 24.6% of their content to HIV/STD awareness and 6.0% to biology and reproduction and that the comparable figures for abstinence curricula were 11.7% and 2.6%).

¹¹⁹ See *id.* at 36–40. Abstinence curricula are silent on these topics. *Id.* at 13 (stating that abstinence curricula devoted 0% of their time to “promoting contraception”).

¹²⁰ See *id.* at 11–23 (providing quantitative analysis of curricular content in which major content categories included “promoting abstinence,” “promoting contraception,” and “general behavioral skills” (i.e., communication, refusal, and risk avoidance skills)); SIECUS, *GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION* 42–49 (3d ed. 2004), available at http://www.siecus.org/_data/global/images/guidelines.pdf (discussing personal and interpersonal skills as a central component of comprehensive sexuality education).

between protected and unprotected sex as a significant, indeed a moral, line,¹²¹ and they, too, devote much attention to giving young people the skills to insist on condoms.¹²² Each approach seeks to transmit a sexual ethic, one focused on the “sex boundary” and the other on the “protection boundary.”¹²³ As I described a moment ago, the seemingly value-neutral public health approach actually treats the protection boundary as far more significant than the sex boundary. In doing so, it effectively sides with an ethic of protected sex. Perhaps in our time this is a better ethic than the traditional one, but that is a choice that should be faced openly rather than smuggled in under the banner of public health.¹²⁴

C. Red and Blue Families and the Morality of Higher Purposes

I am hardly the first to claim that sex education controversies are at least as much about values as about public health and program effectiveness. In the course of over twenty years of field research for her book on sex education controversies, *When Sex Goes to School*, sociologist Kristin Luker came to believe that the key difference between sexual liberals and sexual conservatives is this: Conservatives think sex is sacred; liberals think sex is natural.¹²⁵ Luker further observes that “sex education is now and always has been about sex and its relation to marriage,” which “in turn is always about gender.”¹²⁶ Sounding a similar theme, Naomi Cahn and June Carbone analyze a wide range of demographic information to position sex education as one fault line in a broader conflict between two systems of family values, which they

¹²¹ Consider the following paragraph from a comprehensive sex education curriculum:
 “People who use condoms are responsible, health-conscious people who care about their families, themselves, their partners and their communities. . . . Using condoms correctly during sexual activity is a central part of becoming a responsible teen and acting responsibly to protect yourself and others.”

MARTIN ET AL., *supra* note 117, at 28 (quoting the *Becoming a Responsible Teen* curriculum). Regnerus concludes that for many young people and their families, “[u]nprotected sex has . . . become . . . a moral issue like smoking or driving a car without a seatbelt. It’s not just unwise any more; it’s wrong.” REGNERUS, *supra* note 25, at 147.

¹²² See MARTIN ET AL., *supra* note 117, at 13.

¹²³ Cf. LUKER, *supra* note 7, at 24 (“[T]he idea that sex is defined by *how* you do it (carefully) rather than *where* you do it (in a marriage between a man and a woman)” is “the value at the core of modern sex education.”). It is reasonable to ask why sex education shouldn’t try to valorize both the sex boundary *and* the protection boundary, as “abstinence-plus” sex ed claims to do. See also *infra* notes 197–201 and accompanying text (discussing practical suggestions for seeking overlapping consensus about sex education).

¹²⁴ Cf. REGNERUS, *supra* note 25, at 211 (“Official moral neutrality about sex is a fiction: it merely disguises the moral assumptions upon which actors draw and which institutions purvey. *There is no value-free perspective on sex.*” (citations omitted)).

¹²⁵ LUKER, *supra* note 7, at 99.

¹²⁶ *Id.* at 243.

describe as red families and blue families.¹²⁷ Adherence to these competing values systems is correlated with political and religious affiliation, geography, and class,¹²⁸ such that the conservative red states (i.e., those that voted for Bush in the 2004 presidential election) tend to have different family values than the more liberal blue states.¹²⁹ Cahn and Carbone summarize the contrasts as follows:

Red families, who include the devout, the rural, important segments of the working class, and many recent immigrants, continue to try to channel sexuality into marriage. As a result, they encourage weddings relatively soon after (if not before) the beginning of sexual activity, identify responsible childbearing with family form rather than economic self-sufficiency or emotional maturity, and embrace more authoritarian models of parenting and the state—both parents and the state should be able and willing to intervene to promote the “right” moral values in the next generation.

Blue families, concentrated in urban areas, the coasts, and the middle and upper classes, find these traditional understandings impossible to reconcile with the new pathways to financially secure adulthood. These families emphasize investment in women’s as well as men’s education and careers. Realization of the benefits for both requires postponing entry into family life. Women’s greater financial contributions to family income, in turn, bring greater male socialization into more egalitarian and companionate relationships. And with marriage and childbearing postponed into the late twenties and early thirties, abstinence is unrealistic, contraception is not only permissible, but morally compelled, and abortion is the necessary (and responsible) fallback.¹³⁰

Cahn and Carbone’s analysis portrays a country in a time of transition between traditional and modern understandings of family life and the transition to adulthood. Changing religious understandings are an important part of the picture, but are not portrayed as *the* driving force.¹³¹ The stakes of this transition are high. If the uneven movement

¹²⁷ Their full analysis is presented in a new book, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010), but they have also explored aspects of the red v. blue families theme in articles including: Cahn & Carbone, *supra* note 106; June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC L. REV. 267 (2008) [hereinafter Carbone & Cahn, *Judging Families*].

¹²⁸ See Carbone & Cahn, *Judging Families*, *supra* note 127, at 277.

¹²⁹ *Id.* at 277–78.

¹³⁰ *Id.* (internal citations omitted).

¹³¹ See *id.* at 278.

toward blue family values is a revolution in our understandings of marriage, family, and sexuality, it is worthwhile to remember that revolutions have winners and losers.¹³² According to Cahn and Carbone, blue families are already concentrated in the wealthiest states, and their patterns of educational investment and delayed marriage and child rearing are ideally suited to the new information economy.¹³³ Further, marriages in wealthier blue families tend to be more stable, creating an economic “marriage gap” between rich and poor. Red family values of earlier marriage make the goal of abstinence and the maintenance of traditional sexual morality more realistic, but at the cost of limiting the educational attainment (and therefore the economic prospects) of red families and saddling red families with the higher divorce rates that accompany earlier marriage. Cahn and Carbone suggest that as in previous revolutions related to family life, this may be one where the rich get richer.¹³⁴

It is possible to tell a still broader (if less empirically grounded) story about the explicitly religious roots of the traditional conception of sexual morality favored by advocates for abstinence-only sex education. Painting with a very broad brush, Edward Rubin contrasts two sexual ethics, which he calls the morality of higher purposes and the morality of self-fulfillment.¹³⁵ In the first, explicitly religious view, human beings and their sexual desires are marked by the stain of original sin.¹³⁶ Sexual desire is an unruly force that needs to be controlled and shaped toward some higher purpose that brings it into an appropriate relation to God.¹³⁷ One way to do this is by tying sex to procreation.¹³⁸ Sex open to procreation serves God’s purposes, and in that way

¹³² Luker makes a similar point about the sexual revolution of the 1960s:

What was once taken for granted about sex and pregnancy and marriage came undone. Now that pregnancy is a choice rather than a fate, the traditional understandings between men and women about what sex and marriage mean have undergone radical shifts. For some women, the advent of contraception and abortion was liberating, permitting them to invest in themselves in new ways and to dream of being equal to men. For other women, however—for women who were less interested in higher education and careers and for whom marriage and a family were the main route to happiness and satisfaction—the sexual revolution and all it represented reduced their overall well-being by loosening men’s ties to marriage and family. Now that sex is no longer a scarce resource and men don’t have to promise marriage to get it, premarital pregnancy is no longer a way to chivy a reluctant male to the altar, and single motherhood, and with it female poverty, are on the rise.

LUKER, *supra* note 7, at 33.

¹³³ These points are developed most extensively in Naomi Cahn & June Carbone, *Red Families v. Blue Families* (George Washington University Law School Public Law and Legal Theory, Working Paper No. 343, 2007), available at <http://papers.ssrn.com/abstract=1008544>.

¹³⁴ *Id.* at 9–11.

¹³⁵ Rubin, *supra* note 6.

¹³⁶ *Id.* at 10.

¹³⁷ *Id.* at 11–12.

¹³⁸ *Id.* at 12.

is raised to a higher moral plane.¹³⁹ Sex not open to procreation is base.¹⁴⁰ I would add that over time sex comes to be seen as redemptive not only in the context of procreation, but also in the context of companionate marriage.¹⁴¹ Sex in the context of that divinely created institution is a gift from God to be enjoyed on God's terms.¹⁴² This complex of explicitly theological attitudes would explain and justify the position taken by abstinence-only sex education because it is generally agreed that school age children are too young to get married and (especially) to have children.¹⁴³

According to the morality of self-fulfillment, satisfying sexual desires is an intrinsic good and an important component of a fulfilling existence.¹⁴⁴ The standard for sex is that it should not interfere with the self-fulfillment of oneself or others.¹⁴⁵ The implications for sex education are that young people should be given the information about contraception that will protect them from having their self-fulfillment derailed by an unplanned pregnancy.¹⁴⁶ Rubin notes that it is unclear what the morality of self-fulfillment says about school age sex, but adds that under this value system teen sexual activity will be condemned not because it is immoral, "but because it can be an upsetting experience, and because it may impair the person's ability to have a fully rewarding sex life in the future."¹⁴⁷

¹³⁹ *Id.* at 12.

¹⁴⁰ *Id.* at 10–13.

¹⁴¹ *See, e.g.*, John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1068 (2001) ("Particularly, since the Second Vatican Council (1962–1965), the Catholic Church has emphasized the need to keep these three marital goods [i.e., *fides*, *proles*, and *sacramentum*] in balance and has held out the covenant of marital love as the new organizing idiom of the goods of marriage." (citation omitted)).

¹⁴² *See id.* at 1068–69.

¹⁴³ Rubin, *supra* note 6, at 24. Rubin notes connections between his analysis and the now-familiar, but still illuminating, suggestion of George Lakoff that liberals and conservatives see the world through basic images related to family structure: the "strict father" of conservatives versus the "nurturing mother" of liberals. GEORGE LAKOFF, *MORAL POLITICS: HOW CONSERVATIVES AND LIBERALS THINK* (2d ed. 2002); GEORGE LAKOFF, *DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE* (2004). The "strict father" mentality rejects abortion and contraception because it sees each as an effort to evade responsibility for wrongful behavior; in contrast, "taking responsibility" would require bearing the costs of one's actions. (In contrast, sexual liberals tend to link "taking responsibility" in the sexual sphere to "planning ahead," which includes, among other things, contraception. LUKER, *supra* note 7, at 190–94.) The strict father imagery is disturbing to many (including me) insofar as it suggests that abortion is problematic not so much because of harm to the fetus as because it allows young women who have engaged in improvident sex to escape the punishment of unwanted pregnancy. I would have thought Lakoff was making this up, but for my experience hearing undergraduates repeatedly make the same argument when I taught a "contemporary moral issues" class that covered abortion.

¹⁴⁴ Rubin, *supra* note 6, at 13.

¹⁴⁵ *Id.* at 13–18.

¹⁴⁶ *Id.* at 26.

¹⁴⁷ *Id.* For polling data suggesting that a large majority of parents (including, presumably,

Granted that Rubin is constructing ideal types, his portrait of contrasting moralities rings fairly true to the sex education debates and also explains some of their rancor. Unsurprisingly, proponents of the morality of higher purposes find the other side immoral and insufficiently respectful of the sacral character of sex. Proponents of the morality of self-fulfillment regard the sex-is-sacred theme as mystification.¹⁴⁸ Rubin advances a sort of sexuality secularization thesis:¹⁴⁹ we are in a time of transition from the older to the newer sexual morality, but progress is uneven across time and place.¹⁵⁰ I would add that if such a transition is taking place, it is also uneven *within* individuals. In between the two ideal types, there are no doubt many people who retain vestigial attachments to various aspects of the morality of higher purposes, but who have lost some or all connection to the religious narrative that underwrites that morality.¹⁵¹

Though the matter could be developed at much greater length, the foregoing should be enough to support my claim that the sex education debate is inescapably about values. More specifically, clashes over abstinence education are symptoms of a cultural transition between different models of family life, and perhaps even different models of human flourishing. What follows if this is true?

V. CULTURE CLASH AND INSTITUTIONAL ROLES: FEDS, COURTS, AND SCHOOLS

Contests among competing norms and social meanings are nothing new, particularly in relation to issues about sex, family, and gender. These value conflicts are being negotiated—with varying degrees of success—in innumerable private settings every day.¹⁵² Over time, convergence in partly independent private choices and beliefs can produce shifts in cultural meaning. Government actors and institutions are not

many sexual liberals) want their children to abstain from sex at least until graduation from high school, see *infra* note 197 and accompanying text.

¹⁴⁸ See Rubin, *supra* note 6, at 14–18; see also LUKER, *supra* note 7, at 100 (“So what sexual conservatives see as honoring the sacred nature of sex, liberals see as making a big and detrimental fuss over something as normal and natural as any other human drive.”).

¹⁴⁹ The secularization thesis is an immense topic well beyond the scope of this Essay. For some representative discussions, see generally RELIGION AND MODERNIZATION: SOCIOLOGISTS AND HISTORIANS DEBATE THE SECULARIZATION THESIS (Steve Bruce ed., 1992).

¹⁵⁰ Rubin, *supra* note 6, at 27–28.

¹⁵¹ Cf. Cahn & Carbone, *supra* note 106, at 492 (suggesting that sexual attitudes are on a continuum and that in the middle are people who are uneasy about non-marital sex, but much more worried about non-marital births and, therefore, see increasing the use of contraception as critical).

¹⁵² Cf. Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1621–22 (1997) (arguing for an “institutional account” of antidiscrimination law premised on the notion that sharply disputed questions about social values should be “debated outside the workplace in other fora deemed more appropriate—say, churches, movies, novels, editorials, dinner-table conversations, etc.”).

bystanders in this process. They face complex questions about how to respond to cultural value conflicts. In this part of the Essay, I attempt to situate conflicts about abstinence-only sex education within a larger set of questions about the proper roles of various institutional actors in responding to social change. Offering a complete account of these questions is both beyond the scope of this Essay and beyond my competence, but I do reach some tentative conclusions about the proper institutional roles of the federal government, the courts, and the public schools in sex education policy.

My proposal is that these conclusions about institutional role flow from a proper recognition of the value-laden character of sex education. To see how this is so, consider the various arguments that might be advanced against teaching the values of abstinence-only sex education in the public schools. Described at a fairly high level of generality, there are four basic possibilities:

- (1) Schools shouldn't be in the values business.
- (2) These are the wrong values; let's teach other values instead.
- (3) These values are religious, and therefore teaching them as true is unconstitutional.
- (4) Even if the schools can teach some values, values *of this general type* are off limits because:
 - (a) they rest on "comprehensive views,"
 - (b) they don't reflect a social consensus,
 - (c) some parents would object,
 - (d) these values are extraneous to the proper role of schools in a liberal democracy, which is . . . , or
 - (e) [insert your favorite candidate here].

The first argument type would rule out abstinence-only sex education, and probably every other kind of sex education as well; but its extreme commitment to value neutrality in the public schools is implausible for reasons made familiar by others.¹⁵³

A. *Feds*

The second type of argument is more interesting, and many criticisms of abstinence education properly take this form.¹⁵⁴ It seems fairly clear, though, that "my values are better than theirs" is generally an argument directed to policymakers rather than courts. Which policymakers? That, too, seems fairly clear. Especially in the context of educational curricula—an area traditionally controlled at the state and local

¹⁵³ See, e.g., AMY GUTMANN, *DEMOCRATIC EDUCATION* 33–41 (rev. ed. 1999).

¹⁵⁴ See, e.g., MCCLAIN, *supra* note 75, at 256–89 (presenting a liberal feminist critique of the "conservative sexual economy" embedded in the movements for abstinence education and a "return to courtship").

level¹⁵⁵—there is no need for the federal government¹⁵⁶ to resolve (or strongly influence the resolution of) sharply contested value questions about sex education.¹⁵⁷ State and local educational policymakers should consider the policy merits of abstinence-only sex education as opposed to its alternatives. Many will conclude (and have concluded) that a more comprehensive approach to sex education is appropriate,¹⁵⁸ but consensus on this point is unlikely because different communities have different visions of what sex education is trying to do.¹⁵⁹ One virtue of federalism is that it would allow these differences to play themselves out.¹⁶⁰ Accordingly, it makes little sense for the federal government to aggressively and exclusively promote abstinence-only sex education, as it did during the Bush and (to a lesser extent) Clinton administrations.¹⁶¹ Whatever else might be said about the Bush administration's

¹⁵⁵ It might be thought that this is no longer true in light of the federal No Child Left Behind Act (NCLB), yet even NCLB's unprecedented federal involvement in education leaves states a significant amount of local control over the specifics of what schools will teach. *See generally* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004) (portraying NCLB as an unstable amalgam in which the federal government requires testing but the states determine the specific content of the tests and what will count as success on the tests).

¹⁵⁶ In case this is not clear from the context, here "the federal government" refers to the legislative and executive branches. The institutional roles of federal (and state) courts are discussed in the next section.

¹⁵⁷ *Cf.* Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 FORDHAM L. REV. 769, 770 (2006). Hills discusses the merits of "Westphalian" liberalism (after the Peace of Westphalia): "The essence of this form of liberalism is that, recognizing that citizens have passionate and irreconcilable religious or ideological differences, the U.S. Constitution devolves decisions about these differences to an intermediate level of government—states, provinces, cantons, etc." *Id.*

¹⁵⁸ *See supra* notes 58–59 and accompanying text (discussing the trend away from abstinence education at the state level).

¹⁵⁹ *See* Ross Douthat, *Sex Ed in Washington*, N.Y. TIMES, Feb. 1, 2010, at A19 (arguing that the real problem with federal abstinence funding is that it "drags the national government into a debate that should remain intensely local" and that the federal government should not try to "encourage Berkeley [California] values in Alabama, or vice versa").

¹⁶⁰ For some discussions of the importance of federalism in the family law context, see, e.g., Carbone & Cahn, *Judging Families*, *supra* note 127; Vivian E. Hamilton, *Religious v. Secular Ideologies and Sex Education: A Response to Professors Cahn and Carbone*, 110 W. VA. L. REV. 501 (2007).

¹⁶¹ *See supra* notes 47–55 and accompanying text. Although I believe the case for state and local control of sex education is strong, federal involvement in sex education has a long history. For an engaging account of how pervasive federal involvement has been, see generally ALEXANDRA M. LORD, *CONDOM NATION: THE U.S. GOVERNMENT'S SEX EDUCATION CAMPAIGN FROM WORLD WAR I TO THE INTERNET* (2010).

approach, it appears to be another instance of “selective federalism”¹⁶² and its passing is welcome.

The current federal approach includes more extensive funding for comprehensive sex education coupled with the retention of Title V abstinence-only funding.¹⁶³ From a perspective informed by federalist values, this is surely an improvement since states and local communities may obtain federal financial support for a variety of approaches to sex education. One might wonder, though, whether this goes far enough. The most straightforward conclusion from the claim that sex education in the public schools is a matter of local values would seem to be that the federal government should either (a) provide no funding targeted for sex education, (b) provide sex education funding with no strings attached, or perhaps (c) provide equal funding for different approaches to sex education. Instead, the current federal approach allocates \$50 million annually for abstinence-only sex education, \$75 million for “abstinence-plus” education, another \$75 million for sex education replicating programs that have been proven effective (which, in practice, will favor more comprehensive sex education), and \$25 million for refining and testing unproven approaches.¹⁶⁴ All told, this puts the federal thumb on the comprehensive side of the sex education scales. Further, but for Senator Hatch’s successful effort to reinstate Title V funding, the federal thumb would have pressed still more strongly in favor of comprehensive sex education. Readers may reasonably ask whether this would have been acceptable under my approach.

The question is a good one, and it can easily slide into an objection. At least when addressing the likely readership of a law review article, it is easy to criticize exclusive federal support for abstinence-only education. Such criticism, however, may be well-received in part because of an assumption that instead the federal government should be exclusively funding comprehensive sex education. If I am saying that would be wrong, some readers will conclude that my overall position must be mistaken. I offer three points in response.

First, I acknowledge that on my view there must be some limits on the degree to which the federal government should favor comprehensive sex education.¹⁶⁵ If, for example, the federal government were to fund only sex education that complied with some 8-point definition drawn from the SIECUS Guidelines,¹⁶⁶ I would find this

¹⁶² Cf. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 434 (2002) (“When federalism and substantive conservatism come into conflict [on the Supreme Court], substantive conservatism frequently dominates.”).

¹⁶³ See *supra* notes 60–69 and accompanying text.

¹⁶⁴ See *supra* notes 60–69 and accompanying text.

¹⁶⁵ To be clear, I do not imagine these federalism-based limits to be *judicially enforceable* against either exclusive federal support for abstinence education or exclusive federal support for comprehensive sex education.

¹⁶⁶ *Supra* note 120. The SIECUS GUIDELINES FOR COMPREHENSIVE SEXUALITY EDUCATION include some discussion of abstinence, *see id.* at 53, but it is a fairly minor motif in a vision of sexuality education that is more “safe sex” than “abstinence-plus.”

as problematic as tying funding to the A-H definition of abstinence-only education. Either approach would involve the federal government embracing one side in a hotly contested debate about sex and family values, and the thrust of my argument is that this is a bad idea.¹⁶⁷ Second, I think it is a much closer question whether the federal government should enact what would likely amount to a de facto preference for comprehensive sex education by tying federal funding to demonstrated effectiveness as the Obama administration does in the 2010 appropriations bill.¹⁶⁸ The federal government has a legitimate interest in seeing that its money is not wasted on ineffective programs, and funding decisions based on “effectiveness” seem more neutral than funding only sex education with specific content. I have argued, however, that some measures of “effectiveness” implicitly embrace a “morality of protection” and thereby privilege comprehensive sex education;¹⁶⁹ thus the question of effectiveness would need to be handled carefully.¹⁷⁰ Perhaps doubts should be resolved with the reminder that there is no necessity that the federal government provide any funding specifically marked for sex education. Third, I argue below that conscientious state and local decisionmakers have non-judicially enforceable obligations to opt for an approach to sex education that would strongly emphasize abstinence for school-age children while also providing basic information about contraceptives.¹⁷¹ Although I would hope that such decisions would be made at the state and local level, perhaps it would also be appropriate for the federal government to encourage this kind of sex education with preferential funding. In sum, I think my position would allow some federal preference for some kinds of more comprehensive approaches to sex education, but I remain skeptical of the apparently widespread assumption that the federal government should play a large role in shaping the content of sex education in the public schools.

B. Courts

The third argument invokes the Establishment Clause, and it is of course properly addressed to courts. I have already indicated that in my view the Establishment Clause questions are close and difficult. It is one thing for courts to enforce the Establishment Clause when the state explicitly declares religious truth or requires religious observances. But judicial invalidation of facially secular abstinence education would come perilously close to invalidating policies simply because they are religiously motivated. This sends a divisive and, in my view, misguided message that religious conservatives may not be full participants in the political process.¹⁷² Given the difficulty of

¹⁶⁷ That my personal policy preferences would be much closer to the SIECUS Guidelines than the A-H definition does not change the point.

¹⁶⁸ See *supra* notes 60–64 and accompanying text.

¹⁶⁹ See *supra* notes 114–24 and accompanying text.

¹⁷⁰ I say more about measuring effectiveness in Taylor, *supra* note 8.

¹⁷¹ See *infra* notes 197–201 and accompanying text.

¹⁷² This statement presupposes a particular set of positions in the “public reason” debate.

the questions and the cultural stakes at issue, I doubt the wisdom of courts using the Establishment Clause to invalidate abstinence education across the board. If conflicts over sex education are really just one flash point in a cultural contest between red and blue family values, should courts declare, in effect, that the Establishment Clause favors blue families? If we are indeed in the midst of the withering away of religious sexual morality, should courts use the Establishment Clause to crystallize and speed the cultural transition? It seems doubtful that courts could be the appropriate venues for sorting out such conflicts.¹⁷³ The question of the proper role of courts in leading and/or managing social change is enormously complex and heavily contested, of course, and I do not pretend to have a complete theory of the matter. Yet the themes of leaving space for resolution of cultural value conflicts through democratic deliberation¹⁷⁴ and private institutions¹⁷⁵ are familiar in the literature, and their relevance to conflicts about sex education is apparent.¹⁷⁶ I would further submit that one function of the religion clauses is to defuse the social conflict often spawned by religious difference.¹⁷⁷ Having courts use the Establishment Clause to settle the value conflicts in debates about sex education would have the opposite effect, and might even call into question the courts' own legitimacy.¹⁷⁸

For prominent discussions supporting the idea that it is generally morally proper for religious people to offer religious reasons for supporting particular policies, see, e.g., MICHAEL J. PERRY, *UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (2003); Douglas Laycock, *Freedom of Speech That is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793 (1996).

¹⁷³ Perhaps dim recognition of this point explains why, so far as I am aware, no party has ever filed a lawsuit challenging the constitutionality of a facially secular abstinence-only sex education program. Carbone & Cahn, *Judging Families*, *supra* note 127, explicitly address the sorts of institutional concerns I am stressing here and provide a sensitive discussion of the proper role of courts in mediating cultural conflicts about family values.

¹⁷⁴ See, e.g., Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

¹⁷⁵ See, e.g., Hills, *supra* note 152.

¹⁷⁶ See Sunstein, *supra* note 174, at 8 (“[A] minimalist [judicial] path usually—not always, but usually—makes sense when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise).”); Hills, *supra* note 152, at 1628 (arguing that private institutions are often better fora than government institutions for sorting out value conflicts “where there is no broad-based consensus in society about whether or not some social practice is arbitrary”).

¹⁷⁷ The need to avoid political conflict along religious lines is among the most common justifications for the Establishment Clause. For a thorough if skeptical overview, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

¹⁷⁸ Cf. Cahn & Carbone, *supra* note 133, at 64–65 (explaining that family law courts have played an important role in managing social conflict, but that they “cannot do so . . . when caught in a culture war that sees judicial outcomes as exercises of power in which one ideological side ‘wins’ over the other. When that happens, the moral authority of the courts becomes a casualty.”). An alternative formulation of a similar thought can be found in Neil Siegel’s account of the virtue of judicial statesmanship:

Statesmanship charges judges with approaching cases so as to facilitate

I can make my concerns a bit more concrete with an illustration. Imagine that School District A adopts a facially secular abstinence-only sex education curriculum that fully complies with the federal A–H definition. The district’s classes forthrightly espouse the traditional view that sex should be reserved for marriage, and they say nothing about contraception. School District B, in contrast, decides to adopt a “safe sex” curriculum. District B explicitly promotes a sexual ethic centered around the moral norm of protection, and tells students they can begin having sex whenever they feel ready to be “responsible” about it. Indeed, District B tells students that having a number of different sexual partners before marriage is a normal and expected part of growing up.

As different as they may seem, District A and District B have a good deal in common. In each case, district policymakers can be disciplined at the polls if their sex education choices prove unpopular. In each case, the districts espouse the correctness of a fairly comprehensive vision of sexual morality that is presented in secular terms. In each case, it is highly likely that some families disagree with the district’s policy. A key difference is that District A’s policy theoretically stands at some risk of judicial invalidation while District B’s does not;¹⁷⁹ and this difference is related to the fact that District A’s policy appears to have religious origins while District B’s does not.

My suggestion is that judicial invalidation of District A’s policy on the ground that it is “too religious” would be unwise. There are, however, ways of looking at the hypothetical that would see *both* policies as problematic for the same reasons. This is the territory covered by my fourth type of argument, which tries to identify limits on the kinds of values that public schools can teach. A “type-four” argument might suggest that the policies of both districts are wrong in exactly the same way because each represents an improper attempt to use the public schools as strategic weapons in the culture wars.

C. Schools

Arguments of this fourth type could be developed in different directions depending on the claims made about the proper role of the public schools in our democracy.¹⁸⁰

the capacity of the legal system to legitimate itself by accomplishing two paradoxically related preconditions and purposes of law: expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement.

Siegel, *supra* note 110, at 963. I could summarize my argument in the last paragraph by saying that in my view, using the Establishment Clause to invalidate facially secular abstinence education would almost certainly fail to display the virtue of judicial statesmanship.

¹⁷⁹ I say “theoretically stands at risk” to mark the disjunction between scholarly opinion, *see supra* note 6, and lawyerly practice, *see supra* note 166, regarding the constitutionality of facially secular abstinence education.

¹⁸⁰ Notable contributions to the vast literature on this topic include EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* (1997); GUTMANN,

Maxine Eichner's work on civic education provides a theoretically ambitious illustration of the sort of strategy I have in mind.¹⁸¹ She argues that a proper approach to civic education in a liberal democracy would recognize the legitimacy of three basic interests: liberal interests relating to the rights and autonomy of children and their parents, democratic interests of the community in collectively directing the education of its youth, and civic interests of the polity in fostering the civic virtues necessary to sustain the proper functioning of a liberal democracy.¹⁸² Applying her theory to sex education, Eichner argues that the state has a responsibility to develop students' basic capacities for autonomy even if parents object, and that this capacity "includes ensuring that [students] have the basic knowledge to understand and control their reproductive capacities."¹⁸³ Accordingly, she concludes that the state is required to provide students with "the basic facts of birth control" and that abstinence-only education therefore falls short of discharging the state's autonomy-fostering obligations.¹⁸⁴ This does not mean, however, that the sexual left should be given free rein in the public schools:

The school's sex education must be limited in particular respects, however. Most important, schools have no business offering comprehensive views regarding sexual conduct to students. They may not, for example, suggest to children that premarital sexual conduct or masturbation is an appropriate part of growing up. Comprehensive issues such as the propriety and morality of sexual conduct are for parents, not schools.¹⁸⁵

It is not my purpose here to defend every detail of Eichner's account¹⁸⁶ or to offer my own theory of civic education. For my purposes, the important point is that Eichner's account would find fault with the policies of *both* school districts in my hypothetical. Rather than focusing on which side of the debate is religious (and therefore illegitimate), Eichner principally attends to the proper scope of the state's teaching authority. If I understand her correctly, Eichner's proposals about sex education are not meant to

supra note 153; STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000).

¹⁸¹ Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339 (2007); *see also* MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (forthcoming 2010).

¹⁸² Eichner, *supra* note 181, at 1365–74.

¹⁸³ *Id.* at 1374.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1375. As I believe Eichner would acknowledge, in practice it is no easy matter to convey the "basic facts" about contraception in ways that would effectively reach students yet avoid communicating a "comprehensive" view of sexuality.

¹⁸⁶ For example, Eichner appears more sympathetic than I am to a Rawlsian account of public reason. *See id.* at 1370.

be judicially enforceable, but neither are they simply arguments that some approaches to sex education are bad policy. I would describe Eichner's view as articulating principled limits on legislators and school officials that are rooted in the values of our liberal democratic constitutional order. Conscientious officials should regard themselves as bound by these principles, whether they are judicially enforceable or not.

In contrast to Eichner's claims about autonomy and limits on the teaching of comprehensive views, a different example of a type-four argument begins from the proposition that a public school's teaching authority is limited by a kind of social contract between parents and schools. The basic terms of the contract are well described by Douglas Laycock:

Parents entrust the public schools with their children for important but particular purposes. Parents may expect the school to teach skills and values conducive to success in later life, and they may expect the schools to teach fundamental democratic values. But they do not expect the schools to indoctrinate their children on current political or religious questions that may be the subject of substantial disagreement among the parents themselves, either locally or nationally.¹⁸⁷

This "social contract" does not say that schools may not teach values.¹⁸⁸ Instead, it asks a series of questions about how far schools may go in doing so:

To what extent can a public school adopt inculcation of a viewpoint as part of its educational mission? To what extent can it indoctrinate students in that viewpoint by one-sided teaching or repeated emphasis? To what extent can it universalize instruction in that viewpoint by insisting that all students read or listen to the viewpoint, or be examined on it, without exempting those who conscientiously object? And finally, to what extent can it enforce its indoctrination in that viewpoint by suppressing all dissent?¹⁸⁹

¹⁸⁷ Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 119 (2008). I use the label "social contract" to describe the understandings described by Laycock. He does not.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 117. Laycock develops this framework in an article commenting on the Supreme Court's decision in *Morse v. Frederick*, 551 U.S. 393 (2007), the "Bong Hits 4 Jesus" case. The actions taken by the school in *Morse* involved the forcible suppression of contrary views, and Laycock argues that the category of views that schools may inculcate so aggressively must be very small. Laycock, *supra* note 187, at 120.

Norms about when schools have gone “too far” by using overly stringent means to promote contested cultural views are hard to articulate precisely, and enforcement is largely left to the political process.¹⁹⁰ Laycock plausibly points out that teaching the values of abstinence-only sex education is contested territory on his continuum; this may be pushing the envelope of the social contract, but there seems little likelihood that teaching these values violates any judicially enforceable right.¹⁹¹ The norms of the parent-school social contract are certainly not “constitutional norms” to the extent that the label implies norms that are enforceable by courts, though perhaps they could be described as rooted in constitutional values.¹⁹² Schools and the power of indoctrination they possess raise serious First Amendment issues—the government must not be able to create the conditions of its own legitimacy by manufacturing consent. Accordingly, it is widely thought that the constitution requires limits on government speech even if such limits are not judicially enforceable.¹⁹³

If, as I suppose, Laycock has correctly sketched the basic contours of the social contract governing the schools, this reinforces my earlier claim that abstinence education should be de-federalized.¹⁹⁴ If the “social contract” is enforced through the political process rather than the judiciary, this will work best if the levers controlling choice about sex education are held by local communities.¹⁹⁵

Summing up, I have argued that once we appreciate the value-driven character of sex education debates and their connections to a broad set of cultural transitions, we ought to be skeptical of efforts by the federal government and the courts to tip the balance in favor of one side or the other. A more promising approach involves what I have called type-four arguments, which can be used to criticize many forms of abstinence-only (and many forms of comprehensive) sex education, but do not turn on contrasts between religious and secular norms about sexuality. My sketches of the arguments offered by Eichner and Laycock may suggest convergence on a norm against allowing control of the public school curriculum to become a weapon in the cultural struggle between red and blue family values. School policymakers should regard themselves as bound by a constitutionally-rooted norm against the use of the schools to teach highly contested views about sex, marriage, and the family—even if they can be confident that violations of this norm are not judicially enforceable. From this perspective, the problem with full-blown abstinence-only-until-marriage

¹⁹⁰ Laycock, *supra* note 187, at 117.

¹⁹¹ *See id.* at 117–18.

¹⁹² *Cf.* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

¹⁹³ *See generally* MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* (1982).

¹⁹⁴ *See supra* notes 155–62 and accompanying text.

¹⁹⁵ *See Hills, supra* note 157, at 797; Neil S. Siegel, *International Delegations and the Values of Federalism*, 71 LAW & CONTEMP. PROBS. 93, 97 (2008).

sex education is not its religious roots, but its effort to use the public schools to inculcate a comprehensive set of sexual norms in the absence of social consensus.

These last claims about schools and culture war are controversial. One obvious objection is that sometimes we do use the public schools as engines of social transformation, as *Brown v. Board of Education*¹⁹⁶ illustrates. Why not use the schools to fight for blue (or red) family values as well? Some possible answers readily suggest themselves. For example, the state's interest in promoting racial equality seems significantly stronger than its interest in promoting comprehensive norms of sexuality. This is not the place, however, to attempt a full answer. Instead, I want to close by suggesting some practical implications of my argument that public schools should not become tools in the sexual culture wars.

D. Some Modest Proposals

Readers might reasonably wonder, though, whether there is any way for schools to avoid this fate. An objector might say, "Yes, but every choice about sex education is a value-laden choice and every choice is controversial—I had thought that was a central point of your analysis." Fair enough. No curricular choice will please everyone, nor would I contend that schools must exit the field of sex education altogether. There are, however, ways of shaping sex education curricula that at least minimize the degree to which schools promote highly contested views about sex, family, and morality. For example, schools should limit themselves to promoting the ideal that sexual abstinence is the "expected standard" for school age children rather than promoting "abstinence until marriage." The former view enjoys a wide degree of support from both red and blue families,¹⁹⁷ even though the grounds of that support are dif

¹⁹⁶ 347 U.S. 483 (1954).

¹⁹⁷ See NATIONAL PUBLIC RADIO, KAISER FOUNDATION, KENNEDY SCHOOL OF GOVERNMENT, SEX EDUCATION IN AMERICA: GENERAL PUBLIC/PARENT SURVEY 7 (2004), available at <http://www.kff.org/newsmedia/upload/Sex-Education-in-America-General-Public-Parents-Survey-Toplines.pdf> [hereinafter NPR/KAISER/KENNEDY SCHOOL POLL] (showing that sixty-two percent of the general public and a slightly higher percentage of parents agreed with the statement (drawn from the A–H definition) that "[a]bstinence from sexual activity outside marriage is the expected standard for all school-age children"). Interestingly, forty percent of poll respondents understood "passionate kissing" as an activity that must be foregone if a school-age child is to be considered abstinent. *Id.* at 8. If some of the people who adopted a broad definition of "abstinence" disagreed with the "abstinence as expected standard" message, it is possible that the sixty-two percent figure understates the degree of public support for the message that school-age children should refrain from activities less controversially labeled "sex" such as intercourse, oral, and anal sex. A 2003 Zogby poll found that ninety-one percent of parents with children eighteen years or younger approved of sex education classes teaching the message that teens should "abstain from sexual activity during high school years." ROBERT E. RECTOR, MELISSA G. PARDUE & SHANNAN MARTIN, THE HERITAGE FOUNDATION, WHAT DO PARENTS WANT TAUGHT IN SEX EDUCATION PROGRAMS (2004), available at <http://www>

ferent. In contrast, teaching “abstinence until marriage” seeks to use the schools to favor red over blue family values. In addition, it endorses an ideal whose support is “thin,” at least in the sense that very few Americans adhere to it.¹⁹⁸ Similarly, schools should teach contraception in ways that attempt to minimize the degree to which adolescent sex is “normalized” or treated merely as a “natural” behavior to be managed for the pleasure and self-fulfillment of the parties involved.¹⁹⁹ Such a position is as deeply socially contested and value-laden as the denial of all information about the benefits of contraception. The approach suggested would amount to true “abstinence-plus,”²⁰⁰ and probably comes as close as possible to the preferences of the median voter as reflected in the polling data.²⁰¹

Third, policymakers might consider a response suggested by Kristin Luker.²⁰² Conscientious decisionmakers who resist the urge to use the schools as tools in the sexual culture war may find themselves adopting a curricular approach so stripped down that students will be left wondering what the fuss is about. Or, more realistically, a “thin consensus” approach to sex education may have little capacity to affect

.heritage.org/research/abstinence/bg1722.cfm (discussing the Zogby poll).

¹⁹⁸ See *Finer, supra* note 27, at 73–74 (stating that roughly ninety-five percent of Americans have nonmarital sex at some point in their lives).

¹⁹⁹ Much dissatisfaction with abstinence-only sex education stems, I think, from the thought that it is wrong to withhold truthful information about contraception from young people who need it. At the same time, much of the distrust of comprehensive sex education stems from the thought that talking about condoms legitimates or even glorifies teen sex. The viability of any “middle way” in sex education depends on the claims that (a) there is a usable conceptual space between “providing information about contraception” and “legitimizing teen sex,” (b) that teachers can find and use that space effectively, and (c) that most—not all, but most—parents are open to “providing information about contraception” when this is coupled with a sufficiently strong abstinence message. I am guardedly optimistic that each claim is true.

²⁰⁰ As implied in the prior note, one likely source of parental anxiety about “comprehensive” or “abstinence-plus” sex education is a concern that the message conveyed to teens is not “you really should be abstinent, but just in case, you need to know about condoms,” but rather “it’s OK to have sex as long as you use condoms.” A Heritage Foundation study offers some support for this claim. The study coded the content of nine frequently used comprehensive sex education curricula and found that the amount of coverage devoted to abstinence was less than five percent. *MARTIN ET. AL, supra* note 117, at 13. The study authors suggest that “abstinence-plus” is a misleading label for comprehensive sex education curricula, and that it is therefore incorrect to treat “abstinence-plus” as a true compromise between the sexual left and right.

²⁰¹ See *NPR/KAISER/KENNEDY SCHOOL POLL, supra* note 197, at 14 (finding that a plurality of Americans support an “abstinence-plus” approach in which schools teach that abstinence is best but also teach about condoms and contraception). This 2004 poll found that only fifteen percent of Americans wanted abstinence-only education, while thirty-six percent thought abstinence was less important than teaching teenagers to make responsible decisions about sex. *Id.*

²⁰² See *LUKER, supra* note 7, at 258–59.

teens' decisions. Luker's suggestion is essentially that sex education courses might avoid at least the first of these problems by "teaching the controversy".²⁰³

Since the debate about sex education gets its passion from deeply felt ideas about gender, and women's roles in particular, why not tell young people that? . . . Why not acquaint them with the very real fact that Americans have a deep conflict about sex and gender, and that there is increasing evidence that this kind of conservative-liberal debate is driving political elections, not just sex education? If we realize that the fight about sex is both a moral and a political one, we can provide students—and their parents—with the kinds of information that they need to make choices.²⁰⁴

It may be objected that to present matters in this way is to heighten the consciousness of choice and to deprive the traditional sexual ethic of its aura of inevitability. To "teach the controversy" is inevitably to slant sex education in the direction of blue family values. But to raise this objection is an expression of "fundamentalism" in Berger's sense,²⁰⁵ and what the objection asks for is impossible. Red family values may survive and thrive—they may even prevail in the long run. The state should not use the public school's teaching power as a tool for their destruction. Yet, if they survive, they survive as a choice in an environment where choice between competing normative systems is unavoidable.

CONCLUSION

Abstinence-only sex education is a symptom of deep-seated cultural conflicts about sex, marriage, families, gender roles, and religion. These conflicts have been with us for some time, and they will not be going away in the foreseeable future. To the extent that the fundamentalist impulses of abstinence education would seek to make such conflicts invisible, they are destined for disappointment. To the extent that the sexual left would promote comprehensive sex education as the triumph of

²⁰³ The idea of "teaching the controversy" has acquired something of a bad name in recent years because of its use in conflicts regarding the teaching of evolution and "intelligent design" in the public schools. There, the proposal has been to "teach the controversy" regarding evolution and intelligent design *in science class*. This is indeed a bad idea. See, e.g., Jay D. Wexler, *Darwin, Design and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751, 824–25 (2003). But "teaching the controversy" in sex education is easily distinguishable. The distinction is this: there is no *scientific* controversy about evolution and intelligent design; there *is* a values controversy about sex education and related family values.

²⁰⁴ LUKER, *supra* note 7, at 258–59 (emphasis removed).

²⁰⁵ See *supra* notes 16–23 and accompanying text.

“science over values,” it succumbs to the illusion that sex education could ever be value-free. I have argued that full recognition of the value-laden character of sex education generates interesting conclusions about the proper roles of the federal government, the courts, and the public schools in sex education policy. Specifically, I cast doubt on whether the federal government or the courts have useful roles to play in resolving cultural struggles about sex education. The claim that the courts should invalidate even facially secular forms of abstinence education under the Establishment Clause strikes me as especially problematic. These government institutions should allow space for the value conflicts at stake in sex education to work themselves out in a decentralized fashion. The core of truth in constitutional critiques of abstinence-only-until-marriage sex education is the recognition that it involves the use of the public schools to promote a highly contested set of cultural norms.²⁰⁶ Legislators and school officials have duties to refrain from using the public schools as tools in the cultural struggle between red and blue family values. In practical terms, they should seek to forge policies that appeal to the “sexual middle” by stressing abstinence for school-age children while also providing basic information about contraception. These obligations have roots in constitutional values, but do not give rise to judicially enforceable constitutional rights.

²⁰⁶ See *supra* notes 180–96 and accompanying text.