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

JESSE R. MERRIAM*

In the culture war between the religious right and the secular left, much of the fighting centers around sex education. Appearing ubiquitously in various media outlets and academic commentary,¹ both sides advance familiar arguments. The religious right contends that to protect teenagers from pregnancy and sexually transmitted diseases (STDs), public high schools must encourage students to abstain from sexual activity.² In contrast, the secular left claims that because young people will have sex regardless of whether schools teach them sexual abstinence, public high schools must teach teenagers how to engage in safe sex.³ What many Americans may not

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

2. The legislative enactment best expressing the religious right's approach to sex education is the Adolescent Family Life Act ("AFLA"), Pub. L. No. 97-35, 95 Stat. 578, (codified at 42 U.S.C. § 300z) (1981). Republican Senators Orrin Hatch and Jeremiah Denton sponsored the Act, which was designed to deprive the comprehensive sex education movement of federal funding. According to UC Berkeley sociologist Professor Kristin Luker, "AFLA is where the idea of 'abstinence education' made its debut on the national scene . . ." LUKER, *supra* note 1, at 222. Abstinence sex education was formalized as a Republican stance in 1988 when the Republican National Platform stated: "We oppose any programs in public schools which provide birth control or abortion services or referrals. Our first line of defense . . . must be abstinence education . . ." *Id.* at 18 n.5.

3. The Democrats expressed their stance on the sex education issue in 1978 when Senator Edward Kennedy led the expansion of comprehensive sex education. LUKER, *supra* note 1, at 221-22. Recently, in response to the growing Republican attack on comprehensive sex education, the Democrats strengthened their attack on abstinence education. In December of 2004, Representative Henry A. Waxman, a Democrat from California, released a report providing examples of inaccurate information (for example, "that HIV can be contracted through exposure to sweat and tears") included in federally funded abstinence-only sex education programs. See ACLU, *Responsible Spending: Real Sex Ed for Real Lives*, Feb. 18, 2005, available at <http://www.aclu.org/reproductiverights/sexed/12622res20050218.html>. This report has bolstered the secular left's argument against

know is that in some places the dispute about *how* to teach sex education is not yet relevant because the public schools have not answered the threshold question of *whether* to teach sex education. This article addresses this threshold question.

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

That some people go through public education without receiving any sex education is both troubling and surprising. It is troubling because widespread sex education, either encouraging abstinence or safe sex, has only beneficial effects.⁷ It is surprising because an

abstinence sex education.

4. A 2004 study found that only twenty-two states require their public schools to teach sex education. See Debra Sorgan, *Sexuality, Gender, and Curricula*, 5 GEO. J. GENDER & L. 343, 343-44 (2004).

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

6. Some of the confusion is due to the fact that some studies consider the percentage of schools requiring sex education, rather than the percentage of students actually receiving sex education. See, e.g., *id.* Another cause of the confusion is that the term *sex education* seems to mean different things to different people. This article uses the term *sex education* to describe a formal educational program covering human sexual anatomy, reproduction, and intercourse. Covering these subjects adequately would likely take several class periods. According to a 1999 Kaiser Family Foundation survey, however, "three out of four of those actually charged with teaching sex said that in their schools, the subject was covered in only a few class periods, sometimes as few as one." LUKER, *supra* note 1, at 251. If people interpret one class period as constituting adequate sex education, one should not be surprised that between ninety-five and ninety-seven percent of teenagers report having some sex education. *Id.* Based on the data in the CDC and Kaiser Family Foundation studies, a significant percentage of teenagers who report receiving sex education likely learn only the bare basics about sex in the classroom and are not actually receiving sex education.

7. To determine the efficacy of sex education, the CDC assembled a panel of experts to synthesize seventeen studies on the subject. The research synthesis found that sex education has no negative effects (for example, sex education, whether comprehensive

overwhelming majority of citizens support some form of sex education.⁸ This fact makes for a highly important and interesting question: Why don't more public schools teach sex education?

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

Part I describes the hypothetical problem, which is based on real situations school districts face.¹⁰ According to this hypothetical, some students and parents, the liberals in the culture war, favor sex education but live in a district where the public schools do not teach sex education and in a state that does not currently require its public

or abstinence-based, does not accelerate or increase sexual activity), and some sex education programs have positive effects (for example, some programs delay sexual activity and increase condom use). See National Education Association Health Information Network, School-Based HIV, STD, and Pregnancy Prevention Education: What Works?, available at <http://neahin.org/programs/reproductive/works/index.htm> (last visited Feb. 21, 2007).

8. According to Professor Luker, although opposition to sex education has always existed, the opposition has never been popular. LUKER, *supra* note 1, at 220. Only the most conservative groups, like the John Birch Society, have opposed all forms of sex education. *Id.* In fact, Professor Luker writes, "opinion leaders of almost every stripe believed that sex education was the best response to the twin problems of teenage pregnancy and HIV/AIDS." *Id.*

9. Note that this article's thesis is that the Constitution is *a* factor, not that the Constitution is the only factor. In other words, the goal of this article is *not* to resolve conclusively why so many public schools do not teach sex education, but rather to generate more discussion on this issue. For this reason, although framing the problem in constitutional and theoretical terms, this article acknowledges, and indeed embraces, the need for a more empirical examination of the problem.

10. This hypothetical problem is based loosely on the conflict that recently arose in Montgomery County, Maryland. For coverage of the conflict, see Lori Aratani & Daniel de Vise, *Montgomery Blindsided Over Sex-Ed: Program Backers Blame Conservative Movement*, WASH. POST, May 7, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/06/AR2005050601648.html>; Daniel de Vise, *Sex-Ed Plan Could Revive Heated Debate From 2005*, WASH. POST, January 5, 2007, at B4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/04/AR2007010401808.html>. This hypothetical problem also draws from case studies presented in LUKER, *supra* note 1 (examining the sex education conflict by interviewing parents and leaders in four representative communities).

schools to do so. Therefore, to pressure the schools to teach the subject, these students and parents claim that they have a constitutional right to have their public schools teach sex education. Opposing these liberals are the conservatives who claim that they have a constitutional right not to be taught sex education.

Part II analyzes the constitutional dimensions of the sex education debate.¹¹ This analysis branches into the two premises upon which this article's thesis is based. Part II.A analyzes the constitutional arguments in favor of sex education, whereas Part II.B considers the constitutional arguments for exemptions from sex education.

Based on the relative strengths of these constitutional arguments, Part III offers a solution to the problem: not to teach sex education. After noting that this solution is not a solution at all, in that it will not solve the social, health, and economic problems that result when young citizens are uninformed or misinformed about sex, Part III departs from Part II's descriptive format and briefly explores, as a normative matter, whether society should break the constitutional constraints that lead public schools to make this problematic decision. Given that applying act-utilitarianism¹² to judicial decision making rarely makes for good jurisprudence,¹³ and, more importantly, that various American political institutions have already acted to solidify these constraints, Part III concludes that any practical solution to the problem must work from within, rather than against, the constraints. Accordingly, Part III offers a constitutional compromise consisting of three proposals as to how the government may educate children and teenagers about sex within these constraints.

11. Part II merely describes the constitutional arguments available in case law, rather than arguing why courts should reach a particular outcome as a matter of policy. Part II is framed this way so that normative judgments do not conceal the fact that the Supreme Court's interpretation of the Constitution has played a role in discouraging public schools from teaching sex education. In this respect, this article is a part of a growing body of scholarship on how the Constitution and the judiciary's role in interpreting it can exacerbate and even cause major national crises. See, e.g., MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* (1998); MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

12. *Act-utilitarianism* is the term philosophers use to describe an application of utilitarianism that permits a departure from utilitarian rules when such a departure maximizes happiness. See ROGER CRISP, *MILL ON UTILITARIANISM* 113 (1997). Rule-utilitarianism, by contrast, adopts rules that maximize happiness and does not permit exceptions to such rules, even in the instances when allowing for an exception would maximize happiness. See *id.*

13. For commentary on the problems that arise when judges tailor doctrines to discrete fact patterns, see generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

The article ends with a consideration of how the preceding discussion contributes to developing an understanding of the Constitution and those charged with interpreting it.

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

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

To avoid this litigation, some board members propose allowing all students who can show that sex education violates their religious beliefs to opt out of sex education class. This exemption clause, however, worries many board members and parents. The district has not previously taught sex education precisely because so many public school students have parents who vigorously oppose sex education. Given their opposition, these parents will probably invoke the exemption clause, and, given their strongly held religious beliefs, they will do so successfully. A large percentage of the students thus could be exempt from sex education class while the other students are compelled to attend the class. Some board members worry that by giving students different schedules on the basis of their religious backgrounds, the exemptions could highlight the differences among different religious groups, thereby increasing the likelihood of school violence. In addition, many conservative parents have expressed concern that their opted-out children will feel alienated from their classmates,¹⁴ and many liberal parents question the efficacy of a sex education program that exempts those students who need the education most.¹⁵

14. This concern is common among sex education opponents. For example, Professor Luker explains how, in response to one mother's opposition to sex education, other families wonder why she does not simply have her child opt out and go to the library while the other children attend sex education class. LUKER, *supra* note 1, at 27. Professor Luker writes that this opt-out suggestion angers the mother just as much as her refusal to opt out angers others. *Id.* One reason why it angers the mother so much is that "she thinks her son will feel weird and different going to the library when everyone else stays behind." *Id.*

15. Proponents of sex education may worry that parents who opt their children out

Weighing the costs of the disorder and tension that exemptions might create against the limited benefits of a sex education program in which a large percentage of the most information-starved students are exempt from class, the majority of the board believes that compulsory sex education with exemptions is a bad idea. For these board members, the solution is either to institute compulsory sex education without an exemption or to do nothing at all. In response to the board's failure to institute compulsory sex education, some students and parents who support sex education have threatened to file lawsuits, claiming that all public high schools are compelled by the United States Constitution to teach sex education.¹⁶

Confused by the fact that both the supporters and the opponents of sex education seem to think that the Constitution is on their side, the school board has come to you, its attorney, with two questions that are critical to how it will respond to the litigation threatened by these groups. The questions are: (1) whether the Constitution requires public high schools to teach sex education, and (2) whether the Constitution requires public high schools to exempt from class those students who claim that sex education burdens their or their parents' religious beliefs.

II. AN ANALYSIS OF THE SEX EDUCATION PROBLEM UNDER THE UNITED STATES CONSTITUTION

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

At least one commentator has noted the absence of a single "case upholding the child's affirmative right to access to sex education and holding that the school has a duty to make sex education or condoms

of sex education will not teach sex education adequately at home, and that as a result the community will have some sexually uneducated children, who in turn will spread the risks of uninformed sex to others. *Id.* at 29-30. According to Melanie Stevens, a sex education supporter in Professor Luker's field study, opt-outs are dangerous because one ignorant child in the community puts "all of our precious, beautiful children . . . at risk of death." *Id.* at 30.

16. Note that the claim here is not that all public schools must teach sex education but that all public *high schools* must teach sex education. The claim is limited to high schools because the strongest argument for a right to sex education would come from mature minors and their parents. See *Bellotti v. Baird*, 443 U.S. 622, 640-43 (1979) (explaining how mature minors might have constitutional rights that less mature minors do not possess); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 244 (1999) ("There is of course a [constitutional] distinction between limiting the ideas to which a preschooler is exposed and limiting those that reach an adolescent.").

accessible to all students.”¹⁷ Accordingly, this section extrapolates from the case law the strongest arguments for such a right. The three constitutional provisions that most strongly support the claim that the Constitution requires public high schools to teach sex education are: (1) the Free Speech Clause,¹⁸ (2) the Due Process Clause of the Fourteenth Amendment,¹⁹ and (3) the Establishment Clause.²⁰

1. *The Free Speech Clause*

The Free Speech Clause expressly guarantees a right to speak.²¹ Intrinsically tied to the right to speak is the right to know;²² the Supreme Court has recognized this link when ruling that the Free Speech Clause guarantees citizens a right to acquire information.²³ Based on the Supreme Court’s free speech jurisprudence, the right to acquire sex information may be applicable to public schools in two ways. The stronger free speech right to acquire sex information in public school means that when public schools make curricular decisions, they must consider the interests that students have in acquiring sex information. This right translates into a public high school student’s constitutional right to take sex education classes. A weaker free speech right limits the power that public schools may exercise when they deprive students of access to sex information. This right does not require public high schools to teach sex education but instead prohibits public high schools from withdrawing sex information that they already have in their possession. Although the focus of this article is the state’s obligation to educate young people about sex, not its weaker obligation to provide access to sex information, the scope of each right is important to the solutions proposed in Part III, and the following section discusses each accordingly.

17. Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging “The Power of Parents to Control the Education of Their Own”*, 11 CORNELL J.L. & PUB. POL’Y 481, 491 (2002).

18. “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I.

19. “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV § 1.

20. “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I.

21. *See supra* note 15.

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

23. *See, e.g., Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (holding unconstitutional, on the basis of limiting free speech, a statute requiring the post office to destroy unsealed communist mailings from foreign countries if the addressee did not return a reply card).

a. The Right to Acquire Sex Information in the Classroom

The strongest free speech right to acquire sex information would empower public high school students with the right to take sex education classes. Supporters of this right can draw inspiration from *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.²⁴ The dispute in *Pico* arose after the local school board decided to remove controversial fiction books from the public junior high school and high school libraries.²⁵ Some students and parents challenged this decision, arguing that because the Free Speech Clause guarantees a right to acquire information,²⁶ the school board violated the students' free speech rights.²⁷

Writing for a plurality of the Court, Justice Brennan found that the school board may have violated the Free Speech Clause, depending on the school board's reasoning for removing the books.²⁸ Although public schools may remove books from their libraries for many reasons, public schools may not remove a book on the basis that it is controversial.²⁹ Although Justice Brennan addressed only the removal of books from libraries, a court could extend Justice Brennan's reasoning to other media besides books and to locations outside of the library.

To persuade a court to extend this reasoning, sex education supporters could argue that the right to acquire information in public schools should be based on the recipient's *interest* in the information.³⁰ By connecting one's interest in information with how much one *values* the information, sex education supporters can argue that the strength of a student's right to acquire certain information should be based on how much the student values it. With informational value as the primary criterion, sex education supporters can argue that the right should not be limited to a particular location or to a particular medium.

24. 457 U.S. 853 (1982).

25. *Id.* at 857-58.

26. *Id.* at 867.

27. *Id.* at 859.

28. *Id.* at 872. This proposition, however, is dictum because the actual holding in the case was to remand for development of the facts, that is, to determine why the library removed the books. *Id.* at 875.

29. *Id.* at 874-75. Additionally, lower courts have interpreted *Pico* to mean that public schools may not deprive students of information on the basis of the information's controversial content. *See, e.g., Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 (9th Cir. 1998) (interpreting *Pico* to mean that "students' First Amendment right of access to information is violated when schools remove books from [the] library in [a] content-based manner").

30. *See, e.g., Monteiro*, 158 F.3d at 1027 n.5.

Moreover, if the strength of this right is based on the informational value, then sex information should receive more constitutional protection than the literary works at issue in *Pico*. Unlike the literary works in *Pico*,³¹ sex education is not only important to the intellectual development of students, but it is also crucial to the health of students. Under this analysis, a public school should have less discretion in depriving students of access to sex information than it had under *Pico* in removing controversial works of fiction.³² The supporters of sex education thus could argue that not only are public schools *prohibited* from depriving students of sex information in the library, but public schools are also *required* to provide sex information in the classroom, and accordingly, public high schools must teach sex education.

This argument, however, would prevail only if a court were to interpret Justice Brennan's plurality opinion in *Pico* broadly, applying it to information transmitted to students outside of the library.³³ If, as is more likely, a court were to read Justice Brennan's opinion narrowly, applying it only to the removal of library books,³⁴ a court could easily find that the Free Speech Clause does not guarantee a right to sex education classes. Under a narrow reading of *Pico*, the Court's other cases considering the question of how much discretion public schools may exercise in regulating the curriculum are more relevant than *Pico*. Two important decisions in this respect are *Hazelwood School District v. Kuhlmeier*³⁵ and *Epperson v. Arkansas*.³⁶

31. Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. *Pico*, 457 U.S. 853, 856-58 (1982).

32. *Id.* at 870-71, noting that the school board has significant discretion to determine the content of school libraries. But that discretion may not be exercised in a narrowly partisan or political manner Our constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions.

33. Although no court has held that *Pico* requires public schools to teach sex education, some courts have held that *Pico* provides a right to information that extends outside the library. *Brown v. Board of Regents of Univ. of Nebraska*, 640 F. Supp. 674, 678 (D. Neb. 1986) ("Therefore, [*Pico* means that] the Constitution is violated where the 'decisive factor' in a school board's decision is the intent to deny the students access to the ideas with which the board disagrees."). Some academic commentators have interpreted *Pico* in this manner also. See, e.g., Tyll van Geer, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 231 (1983) ("Thus, Justice Brennan moved toward the view that the first amendment imposes an affirmative duty on schools to assure that students are exposed to a variety of viewpoints . . .").

34. The holding in *Pico* was narrow in scope. *Id.* at 871 (noting that the Supreme Court was only concerned with the suppression of ideas and thus the "holding . . . affects only the discretion to *remove* books").

35. 484 U.S. 260 (1988).

36. 393 U.S. 97 (1968).

In *Hazelwood*, the Supreme Court held that a public school's regulation of curriculum-related speech does not raise free speech concerns if the regulation is "reasonably related to legitimate pedagogical concerns."³⁷ The *Hazelwood* decision establishes that students do not have an unlimited right to expression in the classroom. As a result the decision strongly suggests that students do not have a free speech right to take sex education classes. Indeed, if public schools have the power to regulate what kind of information is *expressed* in the classroom, as the Court held in *Hazelwood*,³⁸ then it follows that public schools have the power to regulate what type of information students *acquire* in the classroom.

Furthermore, Justice Black's concurrence in *Epperson* provides ample support for the proposition that students have no free speech right to sex education.³⁹ In *Epperson*, the Court held that Arkansas violated the Establishment Clause by endorsing a creationist interpretation of human development.⁴⁰ In his concurrence, Justice Black argued that Arkansas did not violate the Constitution simply by condemning natural science.⁴¹ He reasoned that because students do not have a constitutional right to learn a certain subject in public school, a public school therefore may decide not to teach a subject either because the subject is not a priority for the school or because the school considers the subject too controversial for public consumption.⁴² Thus, even if a state wanted to remove biology from the curriculum because it found the subject too controversial, it could do so without violating the Constitution.⁴³

Notably, considerable tension exists between Justice Brennan's plurality opinion in *Pico* and Justice Black's concurring opinion in *Epperson*. Whereas Justice Brennan's analysis in *Pico* focused on the school's motive for depriving students of access to information,⁴⁴ Justice Black's opinion in *Epperson* disregarded the school's motive for withdrawing information from the curriculum so long as that motive is not clearly religious.⁴⁵ The tension between these opinions is noteworthy because a court might look to both Justice Brennan's plurality opinion and Justice Black's concurrence for guidance when

37. *Hazelwood*, 484 U.S. at 268-69.

38. *Id.*

39. *Epperson*, 393 U.S. at 113-14.

40. *Id.* at 109.

41. *Id.* at 113.

42. *Id.*

43. *Id.*

44. Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870-71 (1982).

45. *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968).

dealing with the question of whether the Free Speech Clause requires public schools to teach sex education.

Although the Supreme Court decided *Pico* after *Epperson*, *Epperson* is likely more relevant because, unlike *Pico*, it dealt with a curricular decision.⁴⁶ Given that neither *Epperson* nor *Pico* provide mandatory authority for a lower court,⁴⁷ and that *Epperson* probably has more persuasive authority with regard to curricular questions, a court would probably look to *Epperson* when determining whether students have a free speech right to sex education. Therefore, despite *Pico*'s broad language, a court probably would hold that under *Epperson* and *Hazelwood* students do not have a free speech right to acquire sex information in the classroom, regardless of how important that information might be to some students.

b. The Right to Acquire Sex Information in the School Library

Although one can stretch *Pico* to apply to curricular decisions, a more faithful reading would treat *Pico* as constraining only a school's decisions regarding library books. If this reading were to apply to school library books containing sex information ("sex information books"), students might have a free speech right to acquire sex information in the school library. This free speech right to acquire sex education materials in the school library could have two applications: one obligating public school libraries to *acquire* such books and another obligating them to *retain* books they have provided in the past. The latter is more consistent with the facts at issue in *Pico*.

In determining whether the holding in *Pico* requires public school libraries to provide any sex information books, a critical fact in the case is that the Island Trees School District *removed* the books from the school's library.⁴⁸ Not only did the facts of the case not involve the acquisition of the books, Justice Brennan's plurality opinion suggested that a constitutional distinction exists between a public school's decision not to acquire books and a public school's decision to remove books.⁴⁹ Accordingly, a court can hold that *Pico* creates an obligation

46. Compare *Epperson*, 393 U.S. at 113 ("[T]here is no reason . . . why a state is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools") with *Pico*, 457 U.S. 853, 872 ("[L]ocal school boards may not remove books from [the] school library shelves simply because they dislike the ideas contained in the book").

47. Of course, a court could simply ignore both opinions, because neither Justice Black's concurrence nor Justice Brennan's plurality is controlling precedent.

48. *Pico*, 457 U.S. at 856-58.

49. *Id.* at 862 (noting that "[r]espondents have not sought to compel their school

on the part of public schools to provide controversial books to students only *after* the school has acquired and shelved such books. This interpretation is indeed how many lower courts have interpreted *Pico*.⁵⁰

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

An important case in this respect is *San Antonio Independent School District v. Rodriguez*.⁵¹ In *Rodriguez*, parents claimed that unequal funding of public education⁵² violated the Equal Protection Clause "because [education] is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote."⁵³ To support this claim, the parents noted that if a person does not receive the training to speak and think intelligently, the rights to speak and vote are meaningless.⁵⁴ Without education, the marketplace of ideas is an empty market, and the ballot is just a blank piece of paper.

Writing for the majority, Justice Powell began his analysis by searching the text of the Constitution for a right to public education.⁵⁵ He determined that because no provision in the Constitution

Board to add to the school library shelves any books that students desire to read" but "[r]ather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by the school authorities, or without objection from them").

50. Lower courts have interpreted *Pico* to mean only that public schools may not remove certain books from the library. See, e.g., *Kitzmiller v. Dover Area School Dist.*, 2005 WL 578974, at *3 (M.D. Pa. Mar. 10, 2005) (holding that *Pico* "would only be relevant if Plaintiffs were seeking to *remove* books from Dover Area School District's public school libraries") (emphasis added); *PMG Intern. Div., LLC v. Cohen*, 57 F. Supp. 2d 916, 919 (N.D. Cal. 1999) ("[E]ven the [*Pico*] plurality opinion expressly limits its application to the situation where a school *removes* certain books from library shelves"), *aff'd*, *PMG Intern. Div. L.L.C. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 (9th Cir. 1998) (interpreting *Pico* to mean that "students' First Amendment right of access to information is violated when schools remove books from library in a content-based manner").

51. 411 U.S. 1 (1973).

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

53. *Id.* at 35.

54. *Id.*

55. *Id.*

even suggests such a right,⁵⁶ the only way the parents could prevail is if they could show that public education is necessary to fulfill a textual right.⁵⁷ Justice Powell rejected that argument as applied to the plaintiffs because even if public education were a nexus for free speech, Texas had not destroyed that nexus by providing universal but unequal education.⁵⁸

At first glance, *Rodriguez* seems to invalidate the proposition that the Free Speech Clause requires the government to provide sex information. Surely if the government does not have the obligation under the Free Speech Clause to provide education, then it must not have the greater obligation to provide information about a specific subject. On further examination, however, the *Rodriguez* decision might interpret the Free Speech Clause as imposing subject-specific educational obligations upon states. Because *Rodriguez* involved a dispute over a decision to provide universal but unequal education,⁵⁹ whether states have an obligation to provide universal education remains an unsettled question.

In *Rodriguez* Justice Powell indicated that the Constitution might require the government to teach citizens only “the basic minimal skills necessary for the enjoyment of the rights of speech.”⁶⁰ Thus one could still argue after *Rodriguez* that the government may not deny its citizens information fundamental to communication. In other words, the door remains open for a future court to find a state obligation to provide information that is necessary to a citizen’s ability to communicate with others.⁶¹

Sex education supporters could argue that this door is still open for a state obligation to provide sex information because sex education

56. Note however that some state constitutions provide an explicit right to education. See, e.g., CONN. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; N.J. CONST. art. VIII, § 4; N.D. CONST. art. VIII, §§ 1 and 2.

57. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-37 (1972).

58. *Id.* at 37.

59. *Id.* at 10-16 (describing Texas’s state and local tax system utilized to fund public education).

60. *Id.* at 37, declaring that

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

(emphasis added).

61. Some commentators have described this idea as the “unheld holding” of *Rodriguez*. See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 566 (1992).

is more fundamental to communication than many general subjects considered central to the high school curriculum. For example, sex education is arguably more fundamental to communication than math. This argument may not be intuitive. After all, a basic understanding of math is probably necessary for a person to participate in the marketplace. Nonetheless, one could argue that sex education is more fundamental to communication for the majority of American citizens because sex education teaches a person how to express to others how she feels about such fundamental matters as her desire to procreate or her interest in remaining healthy. Moreover, by enabling people to become comfortable with their sexual identities, sex education facilitates a person's ability to communicate with others.⁶² For this reason, some rank the importance of sex education with the traditional "three R's," reading, writing, and arithmetic.⁶³ Viewed in this light, the idea that sex education is more fundamental to communication than a general subject like math may be quite sensible. For many individuals, lessons about health and family planning apply to daily communication, unlike forgotten lectures on sine curves.

This application of *Rodriguez* to sex education may appear implausible because an understanding of sex is not *necessary* to communication.⁶⁴ Admittedly, much can be said for this critique, as people have communicated for years without an advanced understanding of sex. Even if one rejects the argument that sex education is necessary to communication, one cannot deny that sex education is of great importance to a person's physical and psychological health.⁶⁵ It therefore follows that sex education is at least important to communication.

Because sex education is important to, rather than necessary to, communication, a court could find that although the state has no affirmative obligation under *Rodriguez* to *teach* sex education,⁶⁶ the government may have the lesser obligation to provide *access* to sex information. If the state has such an obligation, courts may require local libraries or public school libraries to provide sex information. As a consequence, if the local library does not permit young people to access sex information, these students could argue that the government must provide sex information elsewhere, such as the public school library.

62. JAMES HITCHCOCK, WHAT IS SECULAR HUMANISM 107 (1982) (declaring that "[t]he aim of sex education" is now "to help students 'get over their hangups'").

63. RICHARD GREEN, SEXUAL SCIENCE AND THE LAW 176 (1992) ("Advocates of sex education rank its importance with the 'three R's'; thus failure to receive education in this area significantly handicaps a person in later life.").

64. See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1972).

65. See NAT'L EDUC. ASSOC. HEALTH NETWORK, *supra* note 7 (discussing CDC research synthesis finding that sex education has only positive effects).

66. See *Rodriguez*, 411 U.S. at 36-38.

This shifting obligation from the local library to the public school library is particularly relevant after *United States v. American Library Association*, in which the Supreme Court upheld a congressional act forbidding public libraries receiving federal funding from granting uninhibited Internet access to minors.⁶⁷ After this decision, many minors might not be able to acquire sex information on the Internet in their local public libraries because such information could be blocked by a filter.⁶⁸ If minors cannot acquire sex information from their local public libraries, *Rodriguez* might require the government to provide some sex information in public school libraries. In addition, under *Pico*, if this sex information is provided in the form of books, the state may not remove the books from the public school library on the basis of their controversial content.⁶⁹ Thus, even under the liberal interpretations provided in this section, the strongest obligation on public schools is to provide some sex information books in the library.

2. *The Due Process Clause*

The Supreme Court has interpreted the Due Process Clause to mean that the government may not unreasonably burden the exercise of certain unenumerated privacy rights.⁷⁰ Under this reading of the Due Process Clause, students could assert that they have a constitutional right to acquire sex information. Furthermore, parents could argue that they have a constitutional right to have their tax dollars used to inform their children about sex. This article examines the students' due process argument in Part II.A.2.a and the parents' due process argument in Part II.A.2.b.

a. *A Student's Constitutional Right to Make Private Decisions*

Students can argue that they have a right to acquire sex information because they have a due process right to make private decisions.⁷¹

67. 539 U.S. 194 (2003).

68. See Children's Internet Protection Act, Pub. L. No. 106-594, 114 Stat. 2763 (codified as amended in scattered sections of 20 U.S.C. § 9134 and 47 U.S.C. § 254) (requiring libraries who receive certain federal funds to put into place a "technology protection measure" to prevent minors from accessing pornography, obscenity, or other materials that could be "harmful to minors").

69. Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871-72 (1982).

70. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (noting that a state law that creates "a substantial obstacle in the path of a woman's choice [to terminate her pregnancy] cannot be considered a permissible means of serving its legitimate ends").

71. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), noting that

If students have such a right to sex information, a court could find that public schools must teach sex education or alternatively must provide access to sex information. Whatever the extent of the right, however, a due process right to sex information would require public schools to provide an educational service.

The Supreme Court has not found a positive obligation in the Due Process Clause. Instead, the Court has found only negative liberties: the right to be free from unreasonable governmental intervention when making decisions that implicate liberty interests.⁷² The Court has held that citizens have a right to be free from unreasonable governmental intervention when they make decisions regarding contraception,⁷³ abortion,⁷⁴ and their sexuality.⁷⁵ Thus, the strongest argument for a due process right to acquire sex information connects the power to make these constitutionally protected decisions with the acquisition of sex information.

Several commentators have noted the close analytical relationship between these decisions and sex information. For example, in her groundbreaking article on the constitutional rights of minors to receive information, Professor Catherine J. Ross notes that, "[t]he right of minors to information about sexuality and contraception flows analytically from the privacy right to obtain an abortion without parental consent."⁷⁶ The freedom to choose is predicated on decisional power, which requires information.

This relationship is significant in terms of a constitutional right to sex education because strong evidence shows that students do not have access to accurate sex information outside of school.⁷⁷ Studies suggest that for two related reasons many students in the United States do not have access to accurate sex education outside of school. One reason is that many parents do not provide sex education at home.⁷⁸ The other reason is that many adolescents learn about sex

[t]he Constitution does not explicitly mention any right of privacy [however] the Court has recognized that a right of personal privacy . . . does exist under the Constitution. [Case law makes] it clear that only personal rights that can be deemed 'fundamental' or 'implicit in ordered liberty,' are included in this guarantee of personal privacy [, which] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

72. See, e.g., *Pico*, 457 U.S. at 863-64.

73. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

74. *Roe*, 410 U.S. 153-54.

75. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

76. Ross, *supra* note 16, at 259.

77. See GREEN, *supra* note 63, at 184 (noting that "only 15 percent of mothers and less than 8 percent of fathers of children up to eleven years old had talked to their children about premarital intercourse"). Studies suggest that even fewer parents talk to their pre-adolescent children about sexually transmitted disease or birth control. *Id.*

78. See *id.*

from other adolescents.⁷⁹ According to research, many generations of American children have learned about sex from other children.⁸⁰ A 1926 study found that eighty percent of children received their sex information from other children.⁸¹ Amazingly, almost sixty years later, researchers found in a similar study that other children are still the most common source of sex information for children.⁸² As these studies suggest, the majority of students do not learn about sex at home or school, but from other students.⁸³

The problem with students acquiring sex information from other students is that the information is often false. For example, a common myth among teenagers is that a girl cannot become pregnant the first time she has intercourse.⁸⁴ As some teenagers acquire sex information only from other students, these teenagers likely will have difficulty verifying the validity of sex information. Indeed, without a rudimentary understanding of human sexuality, false sex information is virtually indistinguishable from true sex information. Clearly the constitutionally protected right to make private decisions about sex means little if one needs sex information to make these decisions, but one's only access to sex information is unverifiable and often false. Unfortunately this predicament is reality for many American public school students; their constitutional rights to make private decisions about sex is not very meaningful because they cannot fully exercise their rights.

Notwithstanding this unfortunate situation, students probably do not have a constitutional right to acquire sex information under the Due Process Clause because the Supreme Court has found that so long as people can exercise the right to make private decisions free from governmental intervention, the government does not impinge on their rights by refusing to assist citizens in exercising their right to information.⁸⁵ Under the Court's interpretation of the Due Process Clause, the mere existence of the right to make private decisions free from governmental penalty, even without the necessary information to make those decisions intelligently, is sufficient.⁸⁶

Maher v. Roe was the first case in which the Court considered the relationship between government benefits and the due process

79. *Id.* at 184-85.

80. *Id.*

81. *Id.* at 184.

82. *Id.* at 185.

83. *Id.*

84. Nikki Katz, *Teen Sex Myths Exposed*, in ALL INFO ABOUT WOMEN'S ISSUES (2005), http://allinfoaboutwomensissues.com/teen_sex_myths_exposed.html.

85. See *Maher v. Roe*, 432 U.S. 464, 469-70 (1977).

86. *Id.*

right to an abortion.⁸⁷ The dispute in *Maher* arose after Connecticut denied its citizens Medicaid benefits for medically unnecessary abortions.⁸⁸ The Court found that because the government does not have an obligation to assist women in exercising their right to have an abortion, Connecticut did not violate the Due Process Clause by denying the use of government benefits for the purpose of obtaining medically unnecessary abortions.⁸⁹

In *Harris v. McCrae*, the Court followed *Maher's* reasoning by holding that the federal government could refuse to fund abortions altogether.⁹⁰ In *McCrae*, Justice Stewart explained why the government does not have an obligation to fund abortions even though citizens have a constitutional right to choose whether to have an abortion.⁹¹ Justice Stewart pointed out that the Due Process Clause guarantees liberty, and that this guarantee of liberty does not require any governmental action.⁹² Instead it protects people from governmental action.⁹³ Thus, even though the Due Process Clause guarantees the right to have an abortion, "it simply does not follow [from *Roe*] that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."⁹⁴ Justice Stewart then applied his understanding of the Due Process Clause to other privacy rights:

It cannot be that because government may not prohibit the use of contraceptives, [*Griswold*] or prevent parents from sending their child to a private school, [*Pierce*] government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.⁹⁵

The Court extended Justice Stewart's reasoning in *Rust v. Sullivan*.⁹⁶ In *Rust*, a restriction on abortion counseling for people receiving federal family planning funds was challenged as an unconstitutional interference with a woman's right to an abortion.⁹⁷ The Court found that because the Due Process Clause does not

87. 432 U.S. 464, 464 (1977).

88. *Id.*

89. *Id.* at 469-70.

90. 448 U.S. 297, 317-18 (1980).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 316.

95. *Id.* at 318 (citations omitted).

96. 500 U.S. 173 (1991).

97. *Id.* at 203.

require the government to assist citizens in exercising their right to have an abortion, the government may prohibit its employees from providing abortion counseling.⁹⁸

Notably, Justices wrote dissents in these abortion cases claiming that if the government does not assist women in exercising the right to have an abortion, this right may become meaningless for many women. In *Rust*, for example, Justice Blackmun wrote that “[b]y suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of . . . freedom of choice.”⁹⁹ Justice Blackmun concluded that by limiting information, “the Government will have obliterated the freedom to choose as surely as if it had banned abortions outright.”¹⁰⁰

Justice Blackmun’s dissent rested on the proposition that the freedom to choose is predicated upon decisional power.¹⁰¹ Because this decisional power requires information, the mere existence of the freedom to choose, without the information necessary to choose, is meaningless in any practical sense. Applying this reasoning to abortion, Justice Blackmun found that women who are unaware of the benefits and risks of abortion cannot fully exercise their power to decide whether to have an abortion.¹⁰² Because these women may not know what will happen if they choose to have an abortion, they are unable to choose in any meaningful way whether to have an abortion.

As the Court has enunciated in various contexts, the language of the Due Process Clause does not support Justice Blackmun’s reasoning.¹⁰³ Although the text clearly prohibits the government from depriving citizens of liberty, it does not require the government in any way to protect citizens from other private actors seeking to take away their liberty.¹⁰⁴ In other words, the Due Process Clause does not guarantee liberty; rather the Clause guarantees that the *government* will not *take away* liberty.¹⁰⁵ It follows that the text of the Due Process Clause does not suggest that the government has an obligation to inform women of the risks and benefits of obtaining an abortion. Indeed, just as the government does not have an obligation to protect

98. *Id.* at 201-202.

99. *Id.* at 216 (Blackmun, J., dissenting).

100. *Id.* at 217.

101. *Id.*

102. *Rust v. Sullivan*, 500 U.S. 173, 215-17 (1991) (Blackmun, J., dissenting).

103. *See, e.g., Harris v. McCrae*, 448 U.S. 297, 317-18 (1980).

104. *See, e.g., Deshaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189, 195-96 (1989) (holding that the government does not have the constitutional obligation to protect a child from his physically abusive father).

105. *Id.*

citizens from private actors, the government does not have an obligation to protect uninformed women from their ignorance. Thus, although Justice Blackmun's dissent in *Rust* is logically sound in terms of what it means to exercise true choice, his analysis is not in tune with the tenor of the Due Process Clause.¹⁰⁶ Consistent with the text of the Due Process Clause, the Court has held repeatedly that states do not have an affirmative duty to provide the services necessary for women to choose whether to have an abortion.¹⁰⁷

Based on the Court's textual interpretation of the Due Process Clause, minors do not have a right to acquire sex information under the Clause. Just as the Constitution does not protect women from their ignorance, it does not protect children from the misinformation disseminated on the playground.¹⁰⁸ Additionally, just as women are not entitled to cost-free abortions, minors do not have a right to cost-free sex information.¹⁰⁹ Thus, even if the government burdens a minor's private access to sex information, courts will invalidate the impediment only if it effectively makes the information inaccessible.¹¹⁰ This level of inaccessibility might be limited to situations in which the government imposes a civil or criminal penalty on the acquisition of the information. When the government imposes a minimal burden on the acquisition, however, such as deciding not to facilitate the acquisition of the information, courts will not find a due process violation.¹¹¹

The government's obligations under the Due Process Clause are likely satisfied when it refuses to provide sex education, even if this refusal leaves only private avenues as the means through which teenagers can acquire sex information, such as buying books or renting videos. This refusal satisfies the government's obligations even if the costs of acquiring the information, whether in the form of paying money or enduring humiliation, place the information out of reach for some teenagers. So long as teenagers can obtain sex information without fear of suffering a civil or criminal penalty, the government has no due process obligation to inform students about sex so that they can make constitutionally protected private decisions.

106. *Rust*, 500 U.S. at 215-17 (Blackmun, J., dissenting); *Harris*, 448 U.S. at 326.

107. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 201 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 509-10 (1989).

108. *Rust*, 500 U.S. at 201-02 (holding that the government did not have a positive obligation to provide funds for abortion counseling).

109. See *Harris v. McCrae*, 448 U.S. 297, 317-18 (1980) (holding that the government does not have to supply funds for women to have abortions).

110. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (holding that the government cannot place an undue burden in a woman's path to receiving an abortion, a fundamental liberty).

111. *Id.* at 875-77. The Court makes clear that "not all regulations must be deemed unwarranted" and that "[n]ot all burdens on the right to decide . . . will be undue." *Id.* at 876.

b. The Right to Raise One's Own Child How One Sees Fit

Until this point, the discussion of the Due Process Clause has focused solely on the liberty interests of *students* in sex education. A public school may also violate the Due Process Clause if it impinges upon the liberty interests of *parents*. As parents are rarely in a position to educate their children by themselves, the government acts as a surrogate for parents in educational matters.¹¹² In this role, the government may exercise discretion to give effect to parental interests. The government's interests and a parent's interests sometimes conflict. The Supreme Court ruled in *Meyer v. Nebraska*¹¹³ and *Pierce v. Society of Sisters*¹¹⁴ that when such a conflict arises between the government and the parent, the Due Process Clause limits the power that the government may exercise over a child.

The Supreme Court's analysis in *Meyer* and *Pierce* is relatively straightforward. Conflicts of educational interests between parents and the government trigger a balancing test.¹¹⁵ If the government's interests are not strong, the balance will swing in favor of the parent, as indicated in the Court's decisions in *Meyer* and *Pierce*.¹¹⁶ As in all balancing tests, however, the difficult part lies in weighing the interests. In this respect, the facts of the cases are helpful. In *Meyer*, for instance, the Court declared that the government's interest in linguistic uniformity is too weak to trump a parent's interest in having her child learn a foreign language.¹¹⁷ Additionally, in *Pierce*, the Court noted that the government's interest in patriotism is too weak to

112. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

113. *Id.* In *Meyer*, the Court struck down a Nebraska law forbidding instruction in any modern language other than English. *Id.* at 403. The purpose of the law was to create linguistic uniformity in a region with a large foreign population. *Id.* at 397-98. The dispute in *Meyer* arose after Nebraska used this statute to convict a teacher who was instructing a class in German. *Id.* at 396-97. The Court found that, although the government may "improve the quality of its citizens," the government may not unreasonably interfere with a parent's duty to educate his children. *Id.* at 401. The Court invalidated the Nebraska law because it ignored the interests that parents had in their children learning foreign languages and because Nebraska's interest in linguistic uniformity was not sufficiently weighty to overcome these parental interests. *Id.* at 403.

114. 268 U.S. 510 (1925). In *Pierce*, the Court invalidated an Oregon statute requiring parents and legal guardians to send all children between the ages of eight and sixteen to public schools. *Id.* at 534-36. Oregon passed this law to prevent Catholic and foreign parents from sending their children to parochial schools. *Id.* at 530-31. As it had in *Meyer*, the *Pierce* Court struck down the statute because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

115. *Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 534-36.

116. *Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 534-36.

117. *Meyer*, 262 U.S. at 403.

trump a parent's interest in obtaining private education for his or her child.¹¹⁸

By comparing parents' interests in having their children learn about sex to parents' interests in having their children learn foreign languages and attend private schools, parents can argue that the Due Process Clause requires public schools to teach sex education to their children. In making this argument, parents can emphasize how the government's refusal to teach sex education interferes with the private relationship between parents and their children: the government's refusal to teach sex education places the educational responsibility on parents. This responsibility is especially burdensome in American culture, where open sexual dialogue between parents and children is rare and even taboo.¹¹⁹ Moreover, this burden is enhanced by the fact that many parents may feel that if public schools do not teach sex education, then they must instruct their children about sex in order to protect their children from STDs and pregnancy.¹²⁰ Accordingly, a school's failure to teach sex education may make some parents feel compelled to initiate uncomfortable conversations with their young children, a situation that could be avoided if public schools educated students about sexual matters.¹²¹ Accordingly, under *Meyer* and *Pierce*, because the government's interest in not teaching sex education is not very strong, the parental interests in having the government teach sex education should prevail.¹²²

The problem with this argument is that it ignores the fact that some parents strongly believe that public schools should not provide sex education. Because *Meyer* and *Pierce* protect the interests that all parents have in their children's education, the two decisions are limited to situations in which the government can accommodate one group of parental interests without impinging on another group of parental interests. A brief examination of what would happen if conflicting parental interests did not limit *Meyer* and *Pierce* demonstrates that the holdings in both cases must be limited in this way.

Assume that one group of parents wants the government to do *x*, a second group of parents wants the government to do *y*, and the goals achieved in doing *x* and *y* are contradictory. Furthermore, the government decides to do *x*, even though doing *x* conflicts with the

118. *Pierce*, 268 U.S. at 534-36.

119. RICHARD POSNER, *SEX AND REASON* 270 n.10 (1992).

120. See Cynthia Dailard, *Sex Education: Politics, Parents, Teachers and Teens*, THE GUTTMACHER REPORT ON PUBLIC POLICY (Feb. 2001), available at <http://www.guttmacher.org/pubs/tgr/04/1/gr040109.html>.

121. See *id.*

122. See *supra* notes 113 and 114 and accompanying text for a discussion of the holdings in *Meyer* and *Pierce*.

interests of the second group of parents. If conflicting parental interests did not limit *Meyer* and *Pierce*, the second group of parents could argue that the Due Process Clause requires the government to do *y*. If, however, the Clause required the government to satisfy the interests of the second group of parents, and if in doing so the government ignored the conflicting interests of the first group of parents, the Clause would require the government to ignore the interests of the first group of parents in their children being educated a certain way.

If the Due Process Clause required satisfying all interests, it would require the government to do precisely what the Constitution forbade. Unless one subscribes to a Gödelian view of constitutional interpretation,¹²³ one must read the Constitution so that it does not compel contradictory actions. Accordingly, *Meyer* and *Pierce* must be limited when the government makes a decision regarding matters in which parental interests conflict. In such situations, the government must be free to make reasonable decisions, even if in making those decisions the government must side with one group of parents over another.

In light of the competing parental interests in the sex education debate, the government's decision to ignore the interests of parents who want sex education should be permissible under *Meyer* and *Pierce* so long as the decision is either an effort to please parents who oppose sex education or the reasonable judgment of the local school board. Indeed, some lower courts have suggested that for this reason neither parents who support sex education nor parents who oppose sex education may prevail in their claims to challenge the government's decision either to institute or not to institute sex education.¹²⁴

123. The phrase *Gödelian view of constitutional interpretation* refers to an approach to constitutional interpretation that adopts the incompleteness theorem proposed by the mathematician Kurt Gödel in his famous 1931 paper. KURT GÖDEL, *On Formally Undecidable Propositions in Principia Mathematica and Related Systems I* (1931), in GÖDEL'S THEOREM IN FOCUS (Stuart G. Shanker ed., 1988). For the proof, see *id.* at 17. According to this theorem, axioms in a consistent system sufficiently powerful to produce propositions will always produce propositions that cannot be proven to be consistent by the system itself. *Id.* Only under such a system can the Fourteenth Amendment require the government to accommodate parental child-rearing interests when doing so violates other parental child-rearing interests. For another example of how Gödel's incompleteness theorem might relate to constitutional interpretation, see Jesse R. Merriam, *Finding a Ceiling in a Circular Room: Locke v. Davey, Religious Neutrality, and Federalism* 16 TEMP. POL. & CIV. RTS. L. REV. 103, 130 (2007).

124. Lower courts have found that *Meyer* and *Pierce* do not grant parents the constitutional right to control the public school curriculum. See, e.g., *Brown v. Hot, Sexy & Safer Prods, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (holding that a policy prohibiting part-time attendance did not violate parents' right to control their children's education); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) (holding that compulsory AIDS awareness assembly attendance did not violate the rights of

As a result, the Due Process Clause does not guarantee parents a right to have their children learn about sex in school.

3. *The Establishment Clause*

Proponents of sex education may assert another argument for sex education: that public schools violate the Establishment Clause¹²⁵ by deciding not to teach sex education. This argument is by good measure the weakest of the constitutional arguments for sex education. Even assuming that students or parents could invoke the Establishment Clause to invalidate a decision that the school board did not make, which is a generous assumption, it is doubtful that under the Court's existing Establishment Clause doctrine, the *Lemon* test,¹²⁶ a court would find that a public school violates the Establishment Clause by making the decision not to teach sex education. This likelihood is reduced from improbable to effectively impossible when one considers how the Court's dissatisfaction with the *Lemon* test has led it to apply the test with a strong emphasis on the government's obligation to act neutrally towards religion.¹²⁷ Despite the unlikelihood of finding that a public school that does not teach sex education violates the Establishment Clause, it might nevertheless be helpful here to describe how one could analyze a public school's decision not to teach sex education under the *Lemon* test and to explain how one could analyze the issue under the Court's recent Establishment Clause jurisprudence.

In 1971, the Court announced an Establishment Clause test in *Lemon v. Kurtzman*.¹²⁸ Under this test, a governmental act violates the Establishment Clause if: (1) the government's purpose in the act is religious; or (2) the act's primary effect advances or inhibits religion; or (3) the act excessively entangles government and religion.¹²⁹ Twenty-six years later, in *Agostini v. Felton*, the Court collapsed the "entanglement" prong of the *Lemon* test into the "effects" prong by explaining that the factors used to determine whether a government program excessively entangles government and religion are the same

parents to control their children's education because that right does not include free flow of information in public schools).

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

126. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

127. See *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (noting that government actions should neither endorse nor disapprove of religion).

128. *Lemon*, 403 U.S. at 612-13.

129. *Id.*

as the factors used to examine the religious effects of the program.¹³⁰ The extent of that collapse is not important here, as no conceivable argument suggests that a governmental institution is entangled with religion by not teaching sex education. Thus, only the first two prongs merit discussion below.

Under the first prong of the *Lemon* test, sex education supporters could argue that when a public school decides not to teach sex education, the public school's purpose is to promote religion.¹³¹ In the unlikely case that a school board revealed its religious motives for deciding not to provide sex education, this argument would be easy to make. In such a case, sex education supporters could make a *prima facie* Establishment Clause case by simply pointing to these religious motives.¹³²

Many state decisionmakers, however, disguise their religious motives in secular rhetoric when they nevertheless have religious motives for making decisions with religious overtones.¹³³ Decoding the religious nature of the secular rhetoric poses some difficulties. To accomplish this task, one would have to argue that despite the government's professed secular reasons for making the decision, religious motives were at play. A concealed motive, however, is very difficult to prove, and courts rarely invalidate laws based on the first prong of the *Lemon* test.

Showing religious motive is particularly difficult in the sex education context because many secular reasons for not teaching sex education exist. For example, a school board might frame the issue in terms of health, an interest that the Court has found to be secular even when the government uses religious organizations as the primary vehicle for its promotion.¹³⁴ This connection between a public school's decision not to teach sex education and the school's interest in health is supported by research indicating that many people believe that sex discussion increases the likelihood of adolescent

130. 521 U.S. 203, 206 (1997).

131. See *Lemon*, 403 U.S. at 612 (describing the first prong of the *Lemon* test as prohibiting government acts with religious purposes).

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

133. For example, in *Edwards v. Aguillard*, 482 U.S. 578 (1987) the Court considered whether the Louisiana legislature's professed secular motive for passing the "Balanced Treatment for Creation-Science and Evolution-Science Act" immunized the law from invalidation under the Establishment Clause. Although the legislators tried to disguise their obviously religious motives by citing an interest in the open pursuit of scientific truths, the Court struck down the law. *Id.* at 586, 589.

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

sex,¹³⁵ and that adolescent sexual activity is psychologically and physically dangerous.¹³⁶

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

Under the second prong of the *Lemon* test, sex education supporters could argue that the promotion of religion is the primary effect of the government's decision not to teach sex education.¹³⁷ This argument connects the values expressed in not teaching sex education with religious objectives. This assertion relates to another argument, that the Establishment Clause prohibits public schools from teaching abstinence sex education, an argument advanced by Gary Simson and Erika Sussman.¹³⁸ In making this claim, Simson and Sussman draw on the close relationship between the Christian Coalition's objectives and the effects that flow from a public school's decision to teach abstinence sex education.¹³⁹

135. A BBC poll of teenagers found that one in ten teenagers believes that sex education "made them more likely to have sex." BBC News, *Young Take Risks with Sex*, (Feb. 13, 2000), available at <http://news.bbc.co.uk/1/hi/health/639566.stm>. A poll conducted by National Public Radio, the Kaiser Family Foundation, and Harvard's Kennedy School of Government found that fifty-five percent of Americans believe that "giving teens information about how to obtain and use condoms will not encourage them to have sexual intercourse earlier than they would have otherwise." NPR, *Sex Education in America: An NPR/Kaiser/Kennedy School Poll* (Jan. 2004), available at <http://www.npr.org/templates/story/story.php?storyId=1622610>. But see NAT'L EDUC. ASSOC. HEALTH NETWORK, *supra* note 7 (discussing CDC research synthesis finding that sex education does not actually increase sexual activity).

136. One study found that sexually active adolescents are less likely to be happy and more likely to commit suicide than non-sexually active adolescents. See Karen S. Peterson, *Study Links Depression, Suicide Rates to Teen Sex*, USA TODAY, June 2003, available at http://www.usatoday.com/news/health/2003-06-03-teen-usat_x.htm. In addition, sexual activity always involves some risk to a person's physical health, even when condoms are used. See POSNER, *supra* note 119, at 270.

137. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

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

139. Simson and Sussman point to the fact that "Sex Respect," the most widely used

One can make a similar argument when a public school refuses to teach any form of sex education. This argument would draw on the fact that many in the religious right reject the discussion of sex in a public manner,¹⁴⁰ and a rejection of public discussion of sex is precisely what a public school achieves when it decides not to teach sex education. This argument, however, would not prevail because the *Lemon* test forbids only those religious effects that the court finds to be *primary*, not those that are merely incidental.¹⁴¹ Thus, the effects prong in the *Lemon* test cannot be applied to find a state act unconstitutional simply because it coincides with a religious objective.¹⁴² Instead, a government act satisfies the effects prong when its secular effects clearly outweigh its religious effects.¹⁴³ As such a situation seems to arise when a public school does not teach sex education, most courts would probably find that public schools have no obligation to teach sex education under the effects prong.

To prevail under the *Lemon* test, supporters of sex education would either have to decipher government motives or connect the absence of a sex education program to primarily religious objectives.¹⁴⁴ Because accomplishing either of these tasks would be difficult, prevailing under the *Lemon* test would be almost impossible.

Making matters more difficult, the Court has modified the scope of the Establishment Clause by emphasizing in many cases that the Establishment Clause does not require complete separation between religion and government but that the Clause requires the government to act *neutrally* towards religion.¹⁴⁵ Applying this neutrality requirement to government funding, the Court has found that the government may fund religious organizations so long as the government does not discriminate on the basis of religion and the effect of the act is not inherently religious.¹⁴⁶

abstinence-only curriculum in the United States, is modeled after religious manuals, encourages participation from the religious community, and often incorporates religious beliefs. Indeed, many of the basic lessons of Sex Respect, for example, the sanctity of marriage, the immorality of abortion, the abnormality of homosexuality, are based heavily on literal scriptural interpretation. *Id.* at 284, 287-88.

140. For example, one religious right organization, Concerned Women for America, opposes "gay rights, sex education, drug and alcohol education." Concerned Women for America, *Profile* (Feb. 17, 2004), <http://rightweb.irc-online.org/profile/1459>.

141. *Lemon*, 403 U.S. at 612.

142. *Id.* at 614.

143. *Id.* at 615.

144. *Id.*

145. See Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 816-18 (2001).

146. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (upholding a voucher program that resulted in the government indirectly aiding sectarian schools because the

If a court were to apply this neutrality requirement to a school board's decision not to teach sex education, it would be virtually impossible to find an Establishment Clause violation. First, a school board does not discriminate on the basis of religion when it decides not to teach sex education. Second, the decision not to teach sex education is not an inherently religious decision; indeed, because research connects adolescent sex to real secular harms¹⁴⁷ and because some people believe that sex education increases adolescent sex,¹⁴⁸ the basis for making the decision is not inherently religious, even if we find it misguided as a policy matter. Therefore, under the Court's recent case law, even in the unlikely case that a plaintiff could prove either that the government had a religious purpose for not teaching sex education or that the government achieved religious objectives by not teaching sex education, it would be very difficult for sex education supporters to succeed in using the Establishment Clause to compel a public school to teach sex education.

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

Continuing the school district hypothetical, suppose the school district decides that all public high school students must attend multiple class periods of sex education as part of a mandatory health course.¹⁴⁹ The question remains whether those students who oppose

program was "neutral with respect to religion"); *Mitchell v. Helms*, 530 U.S. 793, 810-11 (2000) (plurality opinion) (upholding the government's direct aid of sectarian schools because the aid program was neutral between sectarian schools and others, and the government did not engage in religious indoctrination by providing the aid); *Agostini v. Felton*, 521 U.S. 203, 203 (1997) (allowing Title I services in private, religiously-affiliated schools); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (holding a congressional statute authorizing funding for religious organizations to provide adolescent sexual counseling facially valid under the Establishment Clause).

147. See, e.g., Robert Rector, Kirk A. Johnson, & Lauren R. Noyes, *Sexually Active Teens Are More Likely to Be Depressed and to Attempt Suicide*, in A REPORT OF THE HERITAGE CENTER FOR DATA ANALYSIS 1, 3 (June 2, 2003) (noting that eight thousand teens are infected with an STD each day, teenage mothers are very likely to live in poverty, and sexually active teens are more likely to be depressed and attempt suicide than non-sexually active teens), available at http://www.heritage.org/Research/Family/upload/43062_1.pdf.

148. See, e.g., Simson & Sussman, *supra* note 139, at 288 (quoting the SEX RESPECT—TEACHER MANUAL as stating that teens should not be taught about contraception because "sex outside of marriage is not healthy for the teens [therefore] why offer them advice on 'how to do it'?").

149. As explained *supra* Part II.A.2.a, although the Constitution certainly does not require public schools to teach sex education, the Free Speech Clause probably prohibits public schools from removing sex information from their libraries and might require states to provide access to sex information. In addition, the Due Process Clause might forbid states from unreasonably burdening adolescent access to sex information.

sex education for religious reasons are entitled under the Free Exercise Clause to exemptions from sex education.¹⁵⁰

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

Before the Supreme Court decided *Employment Division v. Smith*,¹⁵¹ the only means through which a citizen could claim a free exercise exemption from a law was to demonstrate that the law substantially burdened the exercise of his or her sincerely held religious beliefs,¹⁵² unless the government could show that denying an exemption was necessary to serve a "compelling state interest."¹⁵³ Under this pre-*Smith* standard, the Court held in *Wisconsin v. Yoder* that Amish students were entitled to exemptions from a Wisconsin compulsory school attendance law.¹⁵⁴ Currently *Yoder* provides the strongest argument for students and parents seeking exemptions from compulsory sex education. *Smith*, however, radically changed the free exercise doctrine, and determining the status of *Yoder* after *Smith* is critical to an analysis of the strength of a citizen's argument for exemptions.

150. Some lower courts have found that students are not entitled to all-out exemptions from sex education under the Free Exercise Clause. Most notably, the Second Circuit upheld a Catholic student's compulsory attendance in health class when he could opt out of family-life instruction and AIDS education classes, *Leebaert v. Harrington*, 332 F.3d 134, 141-43 (2d Cir. 2003), and the First Circuit upheld the one-time compulsory attendance of a ninety minute AIDS awareness program, *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995). Neither of these cases, however, addressed what is at issue here: whether religious students are entitled to exemptions from multiple class periods of sex education. Note also that courts have enjoined entire sex education programs for directly challenging religious views on sexuality. See, e.g., *Citizens For A Responsible Curriculum v. Montgomery County Public Schools*, 2005 WL 1075634, at *13 (D. Md. May 5, 2005) (granting a temporary restraining order from teaching sexual education curriculum that depicted homosexuality as a valid lifestyle choice because the teachings violated the First Amendment rights of the plaintiffs). Such a religion-hostile program presents relatively easy questions under the Establishment and Free Speech Clauses. See, e.g., *Posting of Eugene Volokh to The Volokh Conspiracy*, <http://volokh.com/> (May 6, 2005, 13:44 EST) ("The curriculum involves the public school unconstitutionally taking a stand on theological questions."). Such a program is *not*, however, the focus of Part II.B. As the goal of this article is to determine whether the Constitution discourages schools from teaching even the most basic and seemingly benign forms of sex education, Part II.B will deal with the more difficult case of whether students are entitled to exemptions from a sex education program that, while seeking to teach children about sex without addressing religious matters, nonetheless offends some religious beliefs.

151. *Employment Div., Dept. Of Human Res. v. Smith*, 494 U.S. 872 (1990).

152. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 420 (1963).

153. *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

154. 406 U.S. 205, 235-36 (1972).

In *Smith*, the Court upheld an Oregon law that prohibited the use of peyote.¹⁵⁵ Although the law substantially burdened the exercise of a Native American religious ritual, the Court held that the law did not violate the Free Exercise Clause because the law applied to the general population and the government did not target a religious practice or religious group in passing the law.¹⁵⁶ The Court has applied *Smith* to mean that laws that incidentally burden religious exercise, no matter how much, are presumptively valid and therefore do not need to satisfy strict scrutiny.¹⁵⁷

Under the post-*Smith* standard, compulsory sex education does not violate the Free Exercise Clause. If the program applies to all schoolchildren and does not target any religious group or practice, it is religion-neutral and generally applicable, and, as such, the program is presumptively valid under *Smith*.¹⁵⁸ Accordingly, students and parents do not appear to have a constitutional right under the post-*Smith* Free Exercise Clause to an exemption from compulsory sex education. Indeed, some lower courts have held just that.¹⁵⁹

Students and parents seeking exemptions from compulsory sex education might prevail under the stricter standard established in *Yoder*.¹⁶⁰ For the *Yoder* standard to apply to their claim, however, students and parents seeking exemptions must first demonstrate that *Yoder* survives *Smith*. In this respect, an important part of the *Smith* opinion is the section dealing with "hybrid situation[s]."¹⁶¹

Writing for the majority in *Smith*, Justice Scalia tried to explain why the court in *Smith* applied a lower standard than the Court had applied in previous free exercise cases.¹⁶² In explaining one category

155. *Smith*, 494 U.S. at 872.

156. *Id.* at 879-80.

157. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (invalidating a Hialeah ordinance that targeted a religious group's practice of animal sacrifice). Note that pre-*Smith* strict scrutiny still applies under the Religious Freedom Restoration Act ("RFRA") when federal laws substantially burden religious exercise. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb(1)-(4) (1993). In addition, laws passed in states with their own RFRAs are subject to strict scrutiny when they substantially burden religious exercise. *See, e.g., People v. DeJonge*, 442 Mich. 266 (1993).

158. *See Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 878 (1990).

159. *See, e.g., Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 538-39 (1st Cir. 1995) (rejecting a Free Exercise Clause challenge to sexually explicit public school assembly because the school's decision to have the assembly was neutral and generally applicable).

160. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). For a subsequent application of *Yoder*, *see, e.g., Ware v. Valley Stream H.S.*, 550 N.Y.S.2d 167, 177-78 (1989) (suggesting that a New York State Department of Education's regulation requiring students to attend classes on AIDS might be invalid as applied to some religious believers).

161. *Smith*, 494 U.S. at 882.

162. *Id.* at 881.

of the Court's previous free exercise cases, Justice Scalia claimed that a higher free exercise standard applied to cases that presented hybrid situations.¹⁶³ According to Justice Scalia, a hybrid situation arises when a law substantially burdens both a person's religious exercise and another constitutional interest.¹⁶⁴ With respect to a hybrid situation, a higher standard than the *Smith* standard applies even when the law is religion-neutral and generally applicable.¹⁶⁵

Justice Scalia claimed in *Smith* that this hybrid exception explains why the Court applied a higher standard to the religion-neutral and generally applicable law at issue in *Yoder*.¹⁶⁶ The *Yoder* case was a hybrid situation because the compulsory school attendance law at issue both substantially burdened the Amish parents' sincerely held religious beliefs and impinged upon their constitutional interest in rearing their children how they saw fit.¹⁶⁷ Thus, even though the compulsory school attendance law was religion-neutral and generally applicable, the Amish parents were entitled to exemptions for their children.¹⁶⁸

Applying this hybrid situation language to compulsory sex education, religious students and parents can make a strong argument for exemptions. Indeed, if the government cannot demonstrate that denying exemptions from sex education is necessary to achieve a compelling governmental interest, public schools must provide exemptions to those students who can show that sex education both substantially burdens their or their parents' religious exercise and impinges on another constitutional interest of theirs or their parents. One problem with this argument is that because the Supreme Court has not clarified which claims fall under this hybrid exception, the Circuit Courts follow three different approaches to the hybrid exception, each approach pointing the claimant in a different direction.

One approach, which the First Circuit supports, applies the hybrid exception when a plaintiff articulates a free exercise claim and an independent constitutional interest upon which he or she could prevail.¹⁶⁹ Justice Souter has sharply criticized this approach on the basis that it does not change the substantive or procedural rights of claimants.¹⁷⁰

163. *Id.* at 881-82.

164. *Id.*

165. *Id.*

166. *Id.* at 881.

167. *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 881 n.1 (1990).

168. *Id.*

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

170. This approach does not seem to change the substantive rights of plaintiffs because under this approach a plaintiff who can win on another constitutional claim does not

A second approach to the hybrid exception applies the exception when a plaintiff brings a colorable claim in addition to the free exercise claim. The Ninth and Tenth Circuits have applied this approach to mean that the non-free exercise claim must be serious, even though it need not be sufficiently strong to win the case.¹⁷¹ The problem with this approach is that many plaintiffs could color their free exercise claims to meet this requirement.¹⁷² Thus, litigants in courts following this approach could use the hybrid exception that *Smith* created to swallow the *Smith* rule.

A third approach to the hybrid exception does not treat the exception as an exception at all. The Second and Sixth Circuits ignore *Smith's* hybrid situations language under the premise that it does not make sense for free exercise standards to change because of the existence of another constitutional interest.¹⁷³ Some Justices and commentators have made this point, suggesting that Justice Scalia

need to make the free exercise claim at all; she can prevail with or without the free exercise claim. As Justice Souter declared in *Lukumi*,

if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring). This approach does not seem to change the procedural rights of plaintiffs either; before *Smith*, the Federal Rules of Civil Procedure already allowed plaintiffs to join federal constitutional claims. See Fed. R. Civ. P. 18(a) ("A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.").

171. See, e.g., *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 703 (9th Cir. 1999) rehearing granted, opinion withdrawn by, 192 F.3d 1208, 1999 WL 965613 (Oct. 19, 1999); *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999) (relying on *Thomas*); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (holding that claiming a hybrid exception "at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child").

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

173. See, e.g., *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (holding that a father's right to direct the education of his child does not require his son's school to exempt him from a compulsory health class because the court could see "no good reason for the standard of review [in free exercise cases] to vary simply with the number of constitutional rights that the plaintiff asserts have been violated"); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (stating that *Smith's* "language relating to hybrid claims is dicta and not binding on this court"); *Kissinger v. Bd. of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) (stating that the proposition that the legal standard of the Free Exercise Clause changes when a Free Exercise claim is brought with another constitutional interest is "completely illogical").

discussed hybrid situations in the *Smith* opinion not to create a new doctrine but for the sole purpose of reconciling the discrepant outcomes in *Yoder* and *Smith*.¹⁷⁴

The sharp split among the circuits in applying the hybrid exception renders the status of *Yoder* unclear. If a plaintiff raises a claim in a Circuit that applies either the first or the second approach, the hybrid exception exists, but depending on the Circuit, the exception might mean that the parents in *Yoder* prevailed on the basis of either: (a) their child-rearing interest alone; (b) their free exercise claim alone; or (c) the special relationship between the two claims.¹⁷⁵ Thus, whether the Circuit follows the first or second approach might be quite significant to a parent seeking an exemption from sex education for her child. Depending on the approach, the parent might frame her argument differently, claiming that sex education impinges upon her child-rearing interests or that sex education violates his or his child's religious beliefs, or perhaps even that some type of synergy of both claims exists.

Alternatively, a plaintiff brings a claim in a Circuit that does not recognize the hybrid exception, then the question remains of whether *Yoder* survived *Smith*. In *Yoder*, the Supreme Court analyzed the Amish parents' claim exclusively in terms of the Free Exercise Clause,¹⁷⁶ and thus the case is probably best understood as a free exercise case, as Justice O'Connor contended in *Smith*.¹⁷⁷ Under the *Smith* free exercise standard, the law at issue in *Yoder* is valid.¹⁷⁸ Therefore, if the hybrid exception does not exist, as the third approach opines, then *Yoder* is no longer good law.

174. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case."). Justice O'Connor raised this point in her dissenting opinion in *Smith*:

The Court endeavors to escape from [these] decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence.

Employment Div. Dept. of Human Res. v. Smith, 494 U.S. 872, 896 (1990).

175. Compare *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (utilizing the first approach in which a hybrid exception is only available when the plaintiff claims an independent constitutional interest) with *Swanson v. Guthrie Indep. Sch. Dist.* No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (utilizing the second approach in which the plaintiff need only bring a colorable claim in addition to the free exercise claim).

176. The *Yoder* Court explicitly stated that it struck down the law because it violated "the basic religious tenets of the Amish faith." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

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

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

Where does that leave an analysis of a claim for an exemption from compulsory sex education? If the hybrid exception exists, the analysis varies depending on the Circuit. If, however, the hybrid exception does not exist, then compulsory sex education must be analyzed under *Smith*, which would not give students a constitutional entitlement to exemptions from compulsory sex education.¹⁷⁹ Clearly, with so much doctrinal uncertainty in this area of constitutional law, it is nearly impossible to analyze a student's constitutional claim for an exemption with any certainty.

Despite this uncertainty, it must be emphasized that the Court has never overruled *Yoder*. To the contrary, the *Smith* Court confirmed that *Yoder* was decided correctly.¹⁸⁰ Indeed, although the court in *Smith* might have reconfigured *Yoder* by explaining *Yoder* as a hybrid situation, the *Smith* Court never suggested that it would have decided *Yoder* differently.¹⁸¹ As one district court stated:

Whatever the hybrid-rights exception may mean in other contexts, the *Smith* Court's decision to distinguish, rather than overrule, *Yoder* suggests its belief that a statute or policy that implicates the particular combination of rights at issue in that case, free exercise and the parental right to direct the religious upbringing of her children, necessitates the application of heightened scrutiny.¹⁸²

Thus the narrow holding of *Yoder*, that no state may compel children to participate in an activity that threatens the existence of their parents' religious community, survived *Smith*.¹⁸³ Accordingly, regardless of whether a hybrid exception exists, the best argument for those seeking religious exemptions from sex education is to show how similar their situation is to that of the Amish children and parents in *Yoder*.

2. Applying Yoder to Compulsory Sex Education

A closer examination of the facts in *Yoder* reveals the parallel between compulsory sex education for some religious groups and compulsory school attendance for the Amish. In *Yoder*, Amish parents claimed that Wisconsin's compulsory school attendance law threatened the harmony of the Amish community.¹⁸⁴ The Amish parents

179. Under *Smith* a school's decision to provide compulsory sex education is probably valid. See *supra* notes 153-55 and accompanying text.

180. *Employment Div. Dept. of Human Res. v. Smith*, 494 U.S. 872, 881 (1990).

181. See *id.*

182. *Hicks v. Halifax County Bd. of Educ.*, 93 F.Supp.2d 649, 661 (E.D. N.C. 1999).

183. *Id.*

184. *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972).

explained how, because the Amish loathe pride and value humility,¹⁸⁵ Amish children must avoid the competition and materialism that pervade high school life.¹⁸⁶ For this reason, Wisconsin substantially burdened the Amish tradition by requiring Amish children to attend high school.¹⁸⁷ Writing for the Court, Chief Justice Burger agreed with the Amish parents that the Wisconsin law violated the Free Exercise Clause,¹⁸⁸ basing his opinion on the premise that high school “places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group.”¹⁸⁹

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

A central aim of sex education is to make young people feel comfortable with their sexual desires.¹⁹⁰ With this aim in mind, many sex educators teach students that homosexuality is natural and morally acceptable.¹⁹¹ Many religions, however, teach that homosexuality is unnatural and therefore sinful. The Vatican, for example, teaches that homosexuality is sinful because it violates God’s design.¹⁹²

185. *Id.* at 210-11.

186. *Id.*

187. *Id.* at 211-12.

188. *Id.* at 234.

189. *Id.* at 211. Many commentators have criticized the Court’s opinion for romanticizing the Amish way. *See, e.g.*, MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 131 (2005) (explaining that the *Yoder* decision is her “vote for the worst Religion Clause case in the United States” and that she would “deep-six it for its romantic, rose-colored depiction of Amish life”).

190. A good illustration of this aim is found in the University of Michigan Health System’s suggested sex education books. Most of the titles refer to the body and its responses to sexual stimuli. University of Michigan Health System, *Sex Education: Resource List* (2006), http://www.med.umich.edu/1libr/pa/pa_blsexedu_pep.htm. An example of such a title is KAREN GRAVELLE, *WHAT’S GOING ON DOWN THERE?: ANSWERS TO QUESTIONS BOYS FIND HARD TO ASK* (1998).

191. *See, e.g.*, NATIONAL EDUCATION ASSOCIATION, *When Kids Don’t Have a Straight Answer*, <http://www.nea.org/neatoday/0103/health.html> (last visited Feb. 21, 2007) (discussing methods schools can use to create a supportive environment for homosexual teens).

192. CATECHISMUS ECCLESIAE CATHOLICAE [CATECHISM OF THE CATHOLIC CHURCH], *You Shall Love Your Neighbor As Yourself: Chastity and Homosexuality* pt. II, § 2, ch. 2, art. VI.ii, para. 2357 (1992), available at http://www.vatican.va/archive/ENG0015/_P85.HTM. This section of the Catechism states:

Basing itself on Sacred Scripture, which presents homosexual acts as acts

Following the Vatican, many Roman Catholics condemn homosexual conduct.¹⁹³ When analyzing *Yoder's* applicability to religious sex education exemptions based upon homosexuality, one must differentiate between a person who condemns homosexual conduct because of the Vatican's teachings (religious reasons) and a person who condemns homosexual conduct because of social norms or individual fears (secular reasons). A Roman Catholic can argue that any suggestion that homosexuality is moral contradicts her sincerely held religious beliefs, and as a result a Roman Catholic student can pose a strong argument that a school's decision to discuss homosexuality in amoral terms substantially burdens her religious beliefs.¹⁹⁴ Furthermore, because a Roman Catholic parent almost certainly has a more difficult time inculcating her child with Roman Catholic beliefs when her child's school expressly contradicts Roman Catholic teaching, in many situations compulsory sex education will substantially burden the child-rearing interests of Roman Catholic parents, just as Wisconsin's compulsory school attendance law burdened the child-rearing interests of Amish parents.¹⁹⁵

Even if a sex education program did not discuss homosexuality and instead merely taught students how to engage in safe sex, many religious groups could still make a strong case for exemptions from compulsory sex education. Again, the strongest reaction might come from Roman Catholic students because a central tenet of Roman Catholicism is that any intentional interruption of the natural reproductive process is an unjustifiable violation of God's plan.¹⁹⁶ A public

of grave depravity (citation omitted) tradition has always declared that 'homosexual acts are intrinsically disordered' (citation omitted). They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.

Id.

193. See, e.g., LeMonyne College/Zogby International, *Contemporary Catholic Trends*, Nov. 16, 2001, <http://www.zogby.com/news/ReadNews.dbm?ID=506> (noting that a survey of 1,508 American Catholics found that sixty-one percent believe that homosexuality violates "natural law").

194. See *supra* note 192.

195. *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972).

196. Professor Christine Gudorf writes:

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

Christine Gudorf, *Contraceptives and Abortion in Roman Catholicism*, in *SACRED RIGHTS*:

school therefore violates a Roman Catholic student's religious beliefs by forcing her to attend instruction on contraception or abortion.

Jewish students and parents also can argue that a compulsory sex education program that teaches family planning violates their religious beliefs.¹⁹⁷ The Jewish argument against family planning is based on the premise that some Jewish people are taught that it is their duty, as members of the sacred covenant between God and Israel, to produce Jewish progeny.¹⁹⁸ Jewish parents might have a legitimate concern that by teaching students how to have sex with minimal procreative risk, public schools effectively encourage Jewish students to have sexual relationships with non-Jewish students, and, consequently, this increased sexual activity with non-Jewish students will reduce the number of Jewish offspring.¹⁹⁹ Jewish parents thus can argue that the government's religion-neutral instruction on family planning works against the efforts of Jewish people to follow a Jewish imperative. Because public schools do not encourage Jewish students to procreate with Jewish people only (indeed, they may not lawfully encourage this practice because of the Establishment Clause), a Jewish parent could claim that her child must be exempt from any discussion of family planning.

THE CASE FOR CONTRACEPTION AND ABORTION IN WORLD RELIGIONS 55, 67 (Daniel C. Maguire ed., 2003).

197. Laurie Zoloth, *Each One an Entire World*, in SACRED RIGHTS: THE CASE FOR CONTRACEPTION AND ABORTION IN WORLD RELIGIONS 21, 23 (Daniel C. Maguire ed., 2003).

198. Rabbi Elliott Dorff, a leading commentator on Judaism, frames in both historical and metaphysical contexts the Jewish duty to procreate with other Jewish people. He explains the duty historically, writing that because of the enormous loss of Jewish life in the Holocaust, Jewish reproduction is "the most important *mitzvah* of our time." *Id.* at 26. He also explains its metaphysical significance, citing Maimonides's claim that "whoever adds even one Jewish soul is considered as having created an entire world." *Id.* Professor Laurie Zoloth discusses this duty in terms of the future of Judaism. She writes that "the Jewish tradition . . . is suggestive of a principle for Jewish views on the ethical problem of population and family planning" and that "[s]uch a view forms the duty toward a specific future." *Id.* at 23.

Notice how the Jewish argument against family planning instruction is much broader than the Roman Catholic argument against safe-sex instruction. The Jewish argument calls for an exemption from all discussion of family planning that does not encourage intra-faith procreation, whereas the Roman Catholic argument applies only to safe-sex instruction that contravenes the Roman Catholic Church's teaching that contraception and abortion are immoral. One could argue, however, that the Jewish argument is much weaker than the Roman Catholic argument because the immorality of contraception is central to Roman Catholic belief, whereas the concept of procreation in Judaism is merely a religious value or principle, not a religious command. Although this argument might be true, Jewish parents can bolster their argument against family planning with strong religious commands, such as that found in the Mishnah in tractate Yevamot, which some commentators have interpreted to stand for the proposition that abortion violates Jewish law. *Id.* at 33-34.

199. See *id.* at 23.

Even a sex education class limited to a textbook description of human sexual anatomy, reproduction, and intercourse still might burden religious beliefs because some religious believers interpret their religions to mean that they must avoid sex discussion with non-believers altogether. Some Muslims, for example, strictly follow the Shari'ah, the code of Islamic law based on clerical interpretation of the Koran.²⁰⁰ The Shari'ah has specific rules that apply to sexual conduct, and some Islamic authorities have interpreted these rules to prohibit premarital sex, homosexual acts, and adultery.²⁰¹ In a school where Muslims are not the majority, sex educators, of course, do not incorporate these rules into the classroom discussion. Thus, even when a public school limits sex education to a description of human sexuality, it might highlight for Muslim children that other people ignore their religious laws, which they believe emanate from Allah. By instituting even a biologically-based sex education course, the government might suggest to Muslim students that the state believes that Islamic law is wrong and hence that the Islamic God is wrong. Muslim parents, therefore, could claim that the government threatens Islamic beliefs by teaching sex education.

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

To be sure, sex education does not prohibit these students from following their religious beliefs. Nothing about sex education would prevent a Roman Catholic student from believing that homosexuality and contraception are wrong, a Jewish student from procreating with other Jewish people, or a Muslim student from following the Shari'ah. Nonetheless, the metaphysical questioning raised by sex education can be quite burdensome for a believer, especially for a

200. See Seyyed Hossein Nasr, *Islam*, in OUR RELIGIONS 426, 464-66 (Arvind Sharma ed., 1993).

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

young believer who has not yet developed the analytical skills to ascertain how and why her family's beliefs differ from those of her classmates. Moreover, sex education can lead to questioning that might go well beyond the recesses of a student's mind. The questioning could lead to challenging confrontations at home and perhaps to dramatic changes in the religious community.

Significantly, these changes to a religious community are precisely what concerned the *Yoder* Court.²⁰² The Court was not concerned about what would happen to a few Amish children if they fraternized with other high school students or learned about popular culture, but about what would happen to the *Amish community* if all the Amish children in Wisconsin were exposed to non-Amish practices.²⁰³ That the Court was concerned about the Amish community and not the individual is evident from its extensive discussion of the importance of the Amish religion to the American experience,²⁰⁴ the historical significance of the Amish religion,²⁰⁵ the danger that compulsory education posed to the community,²⁰⁶ and the consistency of Amish practices.²⁰⁷

Many other religious groups are similar to the Amish in these ways. Undoubtedly, many students who strongly believe in Roman Catholicism, Judaism, or Islam are members of traditional religious communities that have played a significant role in American society.²⁰⁸ Furthermore, as demonstrated above, sex education may threaten the consistently held beliefs practiced by these communities.²⁰⁹ Therefore, if *Yoder* is still good law, these groups, and probably

202. *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972).

203. *Id.*

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

205. The Court traced Amish beliefs to the "beginning with the Swiss Anabaptists of the 16th century." *Id.*

206. The Court found that "compulsory high school attendance could . . . ultimately result in the destruction of the Old Order Amish church community." *Id.* at 212.

207. The Court found that the Amish consistently practiced their ways for "almost 300 years." *Id.* at 219.

208. Note however that some commentators have suggested that Christian groups have the best chance of prevailing under *Yoder*. See Stephen M. Feldman, *A Christian America and the Separation of Church and State*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 261, 262-63 (Stephen M. Feldman ed., 2000).

209. Note however that the Second Circuit ruled that a Catholic man, Mr. *Leebaert*, could not exempt his son from health class because his "belief that 'drugs and tobacco are [not] proper subjects'" did not prove an "irreconcilable *Yoder*-like clash between the essence of [his] religious culture and the compulsory health curriculum." *Leebaert v. Harrington*, 332 F.3d 134, 144-45 (2d Cir. 2003). The *Leebaert* case demonstrates how claimants, like Mr. *Leebaert*, who do not assert a strong connection between the challenged subject matter and the religious community's beliefs and practices are not entitled to exemptions. Nevertheless, many claimants can make very strong arguments that they

many more, are constitutionally entitled to exemptions from compulsory sex education. Indeed, this result seems particularly likely when compared to some of the cases finding exemptions for such seemingly harmless restrictions as uniform requirements, necklace prohibitions, and hair codes.²¹⁰

In conclusion, regardless of how courts treat the hybrid exception, different religious groups can present very strong arguments under *Yoder* for constitutionally required exemptions from sex education. If the claim is litigated in a circuit that applies the hybrid exception, then the religious parents can simply articulate their child-rearing interests as an interest in raising their children in their religious background, much the way the Supreme Court in *Smith* framed the parental interests at stake in *Yoder*.²¹¹ Even if the claim is litigated in a circuit that does not apply the hybrid exception, religious students and parents can point to *Yoder* as controlling precedent. So long as *Yoder* is good law²¹² and the claimant is a member of a religious group that resembles the Amish in the ways emphasized by the Court *Yoder*,²¹³ the claimant is constitutionally entitled to an exemption from compulsory sex education. The government may, nevertheless, refuse to grant this exemption if the denial is necessary to serve a compelling government interest.²¹⁴

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

If the government can show that compulsory sex education is narrowly tailored to meet a compelling governmental interest, then it can refuse to allow religious exemptions.²¹⁵ The government's strongest interest in compulsory sex education is almost certainly protecting students from STDs,²¹⁶ which is probably a compelling interest. The government probably cannot show, however, that compelling students

are entitled to exemptions from compulsory sex education because sex education, as opposed to health education, creates a *Yoder*-like clash with many religious values.

210. See, e.g., *Hicks v. Halifax County Bd. Of Educ.*, 93 F.Supp.2d 649, 669 (E.D. N.C. 1999); *Chalifoux v. New Caney Independent School Dist.*, 976 F.Supp. 659, 671 (S.D. Tex. 1997); *Alabama & Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School Dist.*, 817 F. Supp. 1319, 1335-36 (E.D. Tex. 1993).

211. *Employment Div., Dept. of Human Res. v. Smith*, 496 U.S. 872, 881 (1990).

212. As argued above, despite the tension between *Smith* and *Yoder*, *Yoder* likely remains good law because the Court has not overruled its primary holding.

213. *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972).

214. *Id.* at 221.

215. *Id.*

216. See, e.g., *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 571 (N.D. Tex. 2004) (stating that both the state and the school have a compelling interest in protecting students from sexually transmitted diseases).

to attend several class periods of sex education is narrowly tailored to achieve the government's compelling interest in protecting students from STDs.

a. The Government's Compelling Interest in Protecting Students from STDs

The Supreme Court has established that the health of American citizens ranks as one of the government's strongest interests. In *Jacobson v. Massachusetts*, for instance, the Supreme Court held that Massachusetts's interest in protecting the general public from smallpox was sufficiently strong to overcome a citizen's liberty interest in not being vaccinated.²¹⁷ The Court based its ruling on the "fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State.'"²¹⁸

The Supreme Court also has established that the government's interest in protecting the health of all its citizens can trump one citizen's interest in exercising her religious beliefs. In *Prince v. Massachusetts*, for instance, a minor's legal custodian challenged a Massachusetts child labor law prohibiting minors from selling newspapers.²¹⁹ The legal custodian and minor were both Jehovah's Witnesses,²²⁰ and as such they believed their religious duty was to spread religious material.²²¹ In fulfilling this duty, the legal custodian and the child distributed religious newspapers.²²² After being charged under the child labor law, the legal custodian claimed that the law violated both her freedom to exercise her religious beliefs and her right to rear her child.²²³ In defense of the law, Massachusetts claimed that it was necessary to protect the health and welfare of children.²²⁴ Balancing each party's interests, the legal custodian's religious and child-rearing rights and the state's interest in protecting children from labor exploitation,²²⁵ the Court ruled that the state's interest outweighed the legal custodian's interest in fulfilling a religious duty through a child.²²⁶

217. 197 U.S. 11, 39 (1905). In *Jacobson*, Mr. Jacobson refused to be vaccinated because he thought the vaccination would make him ill. *Id.*

218. *Id.* at 26 (quoting *Railroad Co. v. Husen*, 95 U.S. 465, 471 (1877)).

219. 321 U.S. 158, 160-61 (1944).

220. *Id.* at 161.

221. *Id.* at 163.

222. *Id.* at 161-62.

223. *Id.* at 164.

224. *Id.* at 165.

225. *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944).

226. *Id.* ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.").

Based on *Jacobson* and *Prince*, the government's interest in protecting young people from STDs is clearly compelling.²²⁷ Some STDs are certainly as dangerous to young people as smallpox,²²⁸ and many STDs could potentially be significantly more dangerous to young people than labor. Thus the government's interest in protecting citizens from STDs is probably as strong as the government's interest in protecting citizens from smallpox and significantly stronger than its interest in protecting young people from labor exploitation. Accordingly, it follows that the government's interest in preventing adolescents from acquiring STDs²²⁹ outweighs the interest that some religious groups have in being exempt from sex education classes.

b. Compulsory Sex Education as a Means of Protecting Children from STDs

The constitutional problem with compulsory sex education, however, is that compulsory sex education is not as narrowly tailored in protecting children from STDs as either smallpox vaccinations are in controlling smallpox or as child labor laws are in protecting children from labor exploitation. At least three arguments show why sex education laws have a broader scope than mandatory vaccinations.²³⁰

First, compulsory sex education is less effective than vaccinations. Because sex education works only if a person makes sexual decisions consistent with her education, a person with sex education who ignores her education by practicing unsafe sex is not any safer from STDs than is a person who has not had sex education. As it seems that people who oppose sex education on religious grounds will be less likely to follow sex education lessons, sex education taught to students who oppose sex education is probably less effective than sex education taught to students who favor sex education.²³¹ For example,

227. Note that some religious groups, like the Amish, do not need a high school education in order to be productive and self-sufficient. See *Wisconsin v. Yoder*, 406 U.S. 205, 228-29 (1972). No religious group, however, has developed a way of life that has immunized its believers from the risks of uninformed sex. Accordingly, the government's interest in providing sex education to all children is certainly stronger than its interest in providing a high school education to all children.

228. HIV, like smallpox, is highly contagious and often fatal. See CENTERS FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS AMONG YOUTH 2 (2006), available at <http://www.cdc.gov/hiv/resources/factsheets/PDF/youth.pdf> ("Since the beginning of the epidemic, an estimated 40,059 young people in the United States had received a diagnosis of AIDS, and an estimated 10,129 young people with AIDS had died.").

229. *Id.* At least the state's interest in preventing people from acquiring HIV is arguably as strong as the state's interest in preventing people from acquiring smallpox.

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

231. Additionally, many people still question the efficacy of sex education for those students who do not oppose it on religious grounds. See LUKER, *supra* note 1, at 248.

a Roman Catholic student who opposes sex education because she rejects the use of contraception will probably not use contraception simply because the government forced her to attend sex education classes.²³² Thus the marginal benefits of teaching sex education to all students over teaching only those students who want to learn sex education are slight. A vaccination, by contrast, is effective even if a person who receives the vaccination opposes it or is unaware of having received it. Moreover, if the government inoculates a person who opposes the vaccination on religious grounds, that person cannot then dispel the vaccination. Thus, unlike sex education, the marginal benefits of inoculating all citizens over inoculating only those who want vaccinations are great.

Second, many people who do not take sex education classes are protected from STDs whereas many people who do not receive a vaccination are not protected from the relevant virus. Although one could argue that basic sex information is necessary to have safe sex, this information may be acquired outside of sex education class for a small fee (by buying books or renting movies) or for no monetary cost at all (by talking to relatives or reading books at the public library).²³³ Given these alternate means of accessing sex information, the government need not teach sex education in order to protect people from STDs. By contrast, the government might have to provide vaccinations to protect citizens from a virus; some people are not protected from a virus unless they receive a vaccination, and many people without access to healthcare cannot obtain vaccinations.

Third, the burdens created by a vaccination and sex education are dramatically different. Although some might argue that a vaccination is more burdensome because it is an actual invasion of the body, sex education is probably more burdensome because it is an enduring invasion of the conscience. Sex education's invasion does not just last the vaccination's few uncomfortable seconds; the effects of sex education on a religious person or community can be permanent.²³⁴ Even though a vaccination might be burdensome to an individual who opposes vaccinations on religious grounds, the government can protect a person from a virus in very few ways without similarly burdening the individual. The government has many ways, however, of preventing STD transmission that are less burdensome than compelling students to attend sex education class.²³⁵

232. *See supra* note 196 and accompanying text for a discussion of Roman Catholic beliefs in regards to contraception.

233. In fact, many opponents to compulsory sex education argue that sex education is most effective when taught at home, rather than in school. *See, e.g.,* LUKER, *supra* note 1, at 134, 175.

234. *Id.* at 126-27.

235. For example, instead of compelling students to attend sex education class, the

Compulsory sex education is not narrowly tailored because the government does not need to teach sex education to protect children from STDs, and furthermore because it can achieve its interest in protecting children from STDs through less burdensome means. Thus, even though the government probably has a compelling interest in protecting children from STDs, public schools would most likely be constitutionally required to exempt from compulsory sex education those students who can show that sex education substantially burdens her or her parent's religious beliefs.²³⁶

III. THE DESCRIPTIVE AND NORMATIVE SOLUTIONS

As discussed in Part II.A, very little in the United States Constitution suggests that public schools have an obligation to teach sex education. The Free Speech Clause, the Due Process Clause, and the Establishment Clause are the only provisions in the Constitution that arguably guarantee a right to acquire sex information.²³⁷ The strongest constitutional arguments that sex education supporters can make are that the Free Speech Clause compels the government to provide access to sex information in either local or public school libraries and prohibits the government from removing sex information books from the public school library,²³⁸ and the Due Process Clause prohibits the government from unreasonably burdening the acquisition of sex information.²³⁹ These arguments do not come very close to creating a state obligation to teach sex education.

As discussed in Part II.B, however, the constitutional arguments for exemptions from compulsory sex education are much stronger than sex education supporters' arguments for requiring sex education. Sex education touches on areas that religion traditionally has controlled, and therefore it is virtually impossible for a public school not to offend some religious belief when it teaches sex education. Indeed, both comprehensive and abstinence sex education invariably draws some religious beliefs into question. This questioning can be burdensome on some religious communities. Under *Yoder*, the government may create this type of burden on religious communities only if it can show that the cause of the burden is narrowly tailored

government can simply provide sex information in local or public school libraries. This alternative is discussed *infra* p. 590 as a way in which the state can accomplish the important objective of instructing young people about sex without substantially burdening the religious beliefs of students and parents.

236. See *supra* Part II.B.2.

237. See *supra* notes 15-17 for the specific language of these clauses.

238. See *supra* Part II.A.1 and accompanying text.

239. See *supra* Part II.A.2 and accompanying text.

to meet a compelling state interest.²⁴⁰ Sex education is almost certainly not sufficiently narrowly tailored to achieve the Government's interest in protecting children from STDs. Therefore, if *Yoder* is still good law, sex education opponents can make a very strong case for exemptions from sex education. Given these two premises, that the Constitution almost certainly does not require public schools to teach sex education and that the Constitution probably requires public schools that teach sex education to exempt certain religious students from class, a school district pressured to teach sex education has three options.

One option is to teach sex education without exemptions for any students. The problem with this option is the inevitable constitutional litigation. Many school districts have found that when they do not allow students to opt out of sex education, high-profile and controversial constitutional disputes follow.²⁴¹ This type of litigation, won or lost, can be quite costly, both in terms of the legal expenses and the negative publicity.²⁴² Even in jurisdictions where courts have already considered related issues, litigation is likely because the constitutionality of compulsory sex education is far from resolved. Not only will a school district face continuous challenges, but it may encounter different results as the doctrines for religious liberty and child-rearing rights develop. This development could be particularly great and unpredictable in the area of religious liberty, where state and federal statutes have joined forces with state constitutions to

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

241. The Montgomery County School District recently learned about the costs and negative media attention arising from such disputes. After the district court enjoined the sex education program in *Citizens For A Responsible Curriculum v. Montgomery County Public Schools*, 2005 WL 1075634, at *12 (D. Md. May 5, 2005), the school district settled for thirty-six thousand dollars in attorneys' fees. See Nancy Trejos and Fulvio Cativo, *Montgomery Reaches Sex-Ed Agreement*, WASH. POST, June 28, 2005, at B5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/27/AR2005062701635.html>. For the settlement agreement, see Montgomery Public Schools, Board Resolution and Settlement, <http://www.mcps.k12.md.us/info/pdf/BoardResolution&Settlement.pdf>. Note that the Montgomery County case presented relatively easy constitutional questions. Litigating the doctrinally uncertain and normatively controversial issue analyzed in Part II.B would likely be more expensive and contentious.

242. As evidence of how governments evaluate the costs of constitutional litigation, consider the Public Expression of Religion Act of 2005, H.R. 2679, 109th Cong. § 2(b) (2005), which, if passed, would exempt Establishment Clause claims from the attorney's fee award provision in 42 U.S.C. §1988. Congress's stated reason for proposing this exemption was to eliminate the chilling effect that constitutional litigation imposes on state and local officials. For further discussion of the legal and policy costs that constitutional litigation imposes on government defendants, see generally Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217 (1994) and Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1 (1995).

wage war against *Smith*.²⁴³ Even though school districts have won most of the litigation so far, the landscape is evolving, and the political and financial costs could add up quickly.

A second option for school districts is to teach sex education but to make exemptions available for students who satisfy certain conditions. This option also presents problems. One problem is that students will receive different information according to their personal or their parents' religious beliefs. As a result, some religious communities might not acquire potentially life-saving information. Not only might this lack of information harm particular religious groups, but it also might spread the harmful results of one group's sexual ignorance to others. This option also raises the problem of offering exemptions to students on the basis of religious affiliation. This religion-specific treatment could increase tension among different religious and ethnic groups, a tension that already may be alarming in many communities.²⁴⁴ This increased tension could anger both sex education supporters and opponents.²⁴⁵

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

Nevertheless, although not teaching sex education might be the solution to the local problem posed in Part I, it is hardly a solution to the national problems that arise from uniformed sexual activity; this "solution" would only ensure that the United States will continue to

243. As explained *supra* note 157, in response to *Smith*, Congress passed RFRA, which restored the strict scrutiny framework. Then, after the Court held in *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) that Congress had overreached in using its Section 5 power to apply RFRA to the states, about twelve states enacted their own RFRAs. See EUGENE VOLOKH, *THE FIRST AMENDMENT* 977 (2001). Also in response to *Smith*, states have interpreted their constitutions to require pre-*Smith* strict scrutiny when the government substantially burdens religious exercise. See, e.g., *State v. Miller*, 549 N.W.2d 235, 240-41 (Wis. 1996). For a general discussion of how and why states have rejected *Smith*, see Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to Employment Division v. Smith*, 68 NOTRE DAME L. REV. 747 (1993).

244. See LUKER, *supra* note 1, at 214. See generally Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1666 (2006).

245. See *supra* notes 13-14, explaining why both sex education supporters and opponents often dislike opt-outs.

suffer enormous social,²⁴⁶ health,²⁴⁷ and economic²⁴⁸ problems. If these problems were limited to those parents and students seeking constitutional exemptions from sex education, one might find this situation distressing but nonetheless tolerable. However, when these problems apply to even those parents and students who favor and seek sex education, such as the hypothetical sex education supporters discussed in Part I, the people must seriously question whether they are willing to accept the costs of a constitutional system committed to individual liberty (with a strong emphasis on religious liberty) and circumscribed governmental power (with a strong emphasis on negative rights and a correspondingly limited provision of positive rights). Accordingly, any analysis of the constitutional problem addressed in this article must go beyond mere description and probe the problem normatively.

To determine what changes to American constitutional law might be desirable, it will be helpful to examine briefly the constitutional limitations in other countries and to question whether those countries have fared any better in educating their young people about sex. Whereas the United States Constitution clearly does not require the government to teach sex education, some have interpreted the European Convention on Human Rights ("ECHR") to require member states to teach sex education.²⁴⁹ Indeed, one commentator argues that

246. Although rates have decreased substantially over the last decade, teen pregnancy rates are higher in the United States than in any other developed country. See THE ALAN GUTTMACHER INSTITUTE, CAN MORE PROGRESS BE MADE?: TEENAGE SEXUAL AND REPRODUCTIVE BEHAVIOR IN DEVELOPED COUNTRIES 3 (2001), available at http://www.guttmacher.org/pubs/summaries/euroteens_summ.pdf; see also AM. COLL. OF OSTEOPATHIC FAM. PHYSICIANS, DEBATE OVER HOW TO REDUCE HIGH RATE OF TEEN PREGNANCY (2003). Between sixty-six and ninety-five percent of teen pregnancies are unplanned, and some researchers have explained these high percentages as "both a symptom and consequence of extreme poverty and social disorganization." AM. COLL. OF OSTEOPATHIC FAM. PHYSICIANS, DEBATE OVER HOW TO REDUCE HIGH RATE OF TEEN PREGNANCY (2003). Research suggests that "[a]dolescents are more likely than adults to suffer negative consequences from their sexual behavior." Elizabeth A. S. Kelts, M.D., et al., *Where Are We on Teen Sex?: Delivery of Reproductive Health Services to Adolescents by Family Physicians*, 33 FAM. MED. 376, 376 (2001).

247. From 2000-2004, the Centers for Disease Control and Prevention (CDC) found that more than half of all new HIV infections in the United States occurred among young people under age twenty-five, and that most of these infections were transmitted sexually. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 227, at 1. Recent research suggests that the health problems resulting from uninformed teen sex are getting worse. According to a 2004 Kaiser report, approximately sixty-five percent of all sexually transmitted infections contracted by Americans occur in people under twenty-four, and twenty-five percent of new HIV infections occur in people under twenty-two. Molly Masland, *Carnal Knowledge: The Sex Ed Debate* (2006), <http://msnbc.msn.com/id/3071001/print/1/displaymode/1098>.

248. A study of teenage mothers found that, within five years of pregnancy, most had dropped out of high school and 60% were on welfare. GREEN, *supra* note 63, at 184.

249. See Corinne Packer, *Sex Education: Child's Right, Parent's Choice or State's*

Article 10.1 of the ECHR, which provides the right “to receive and impart information and ideas without the interference by public authority,”²⁵⁰ creates a right to sex information that might obligate member states to teach sex education.²⁵¹

Even more strikingly, the Committee on the Rights of the Child has interpreted the Convention on the Rights of the Child (“CRC”) to require member states to teach sex education.²⁵² In fact, the Committee has interpreted three provisions of the CRC to mean that member states have a duty to educate adolescents about sex,²⁵³ and the Committee has applied this interpretation to its recommendations to member states. For example, in a recommendation to the Government of Uganda, the Committee advised Uganda to “pursue and strengthen its family planning and reproductive health education programmes, including for adolescents.”²⁵⁴ Pursuant to its recommendations, the Committee has demanded information from member states regarding their compliance with CRC’s sex education mandate.²⁵⁵ Indeed, the Committee requested information from Ireland regarding “what steps the Government had taken with regard to those school teachers who had refused to teach sex education, whether they were permitted to keep their posts, and, if so, how the sex-education curricula was taught.”²⁵⁶ The United States is not a party to either the ECHR or the CRC.²⁵⁷

Obligation, in OF INNOCENCE AND AUTONOMY: CHILDREN, SEX, AND HUMAN RIGHTS 163, 171 (Eric Heinze ed., 2000).

250. Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11 (European Convention on Human Rights) art. 10, ¶ 1, Sept. 2003, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

251. See Packer, *supra* note 250, at 171.

252. *Id.* at 168.

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

254. U.N. Convention on the Rights of the Child, Comm. On the Rights of the Child, *Concluding Observations of the Comm. on the Rights of the Child: Uganda*, ¶ 32, 16th Session, U.N. Doc. CRC/C/15/Add.80 (Oct. 10, 1997).

255. See generally Office of the United Nations High Commission for Human Rights, Committee on the Rights of the Child, <http://www.ohchr.org/english/bodies/crc/> (last visited Feb. 21, 2007).

256. U.N. Convention on the Rights of the Child, Comm. On the Rights of the Child, *Summary Record of the 438th Meeting: Ireland* ¶ 20, 17th Session, U.N. Doc. CRC/C/SR.438 (Jan. 13, 1998).

257. See EUROPEAN COURT OF HUMAN RIGHTS, DATES OF RATIFICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ADDITIONAL PROTOCOLS (2006), <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification+of+the+European+Convention+on+Human+Rights+and+Additional+Protocols/>; OFFICE

Moreover, although the United States Constitution most likely does not permit either the federal, state, or local governments to compel students to attend sex education class if attendance substantially burdens their or their parents' religious beliefs, the ECHR may permit member states to compel attendance so long as they have a rational basis for doing so.²⁵⁸ Article 9.2 of the ECHR allows member states to impinge on religious freedom if doing so is necessary for the protection of public order or morality.²⁵⁹ The European Court of Human Rights has interpreted Article 9.2 under the doctrine of "margin of appreciation."²⁶⁰ As the late Father Drinan explained in his last book on religious liberty and international law, the margin of appreciation doctrine "assumes at its discretion that the national lawmaking groups in Europe got it right when they decided issues of religious freedom."²⁶¹ This doctrine is similar to rational basis review in United States constitutional law.²⁶² A sex education law that violates a person's religious beliefs is thus presumed valid under the ECHR, whereas such a law might have to satisfy a higher standard of review, such as strict scrutiny, under the United States Constitution.

With this flexibility, many European nations require their public schools to teach sex education, and not coincidentally, these nations have experienced the greatest success in reducing teen pregnancy and STD transmission.²⁶³ The experiences of these European nations highlight the relationship between the United States Constitution

OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2004), available at <http://www.unhchr.ch/pdf/report.pdf>.

258. See Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11 (European Convention on Human Rights) art. 9, ¶ 2, Sept. 2003, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

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

260. ROBERT F. DRINAN, CAN GOD AND CAESAR COEXIST? 90 (2004).

261. *Id.*

262. According to Father Drinan, the margin of appreciation doctrine is "roughly equivalent to the presumption of constitutionality that the courts in the United States employ when they review laws." *Id.* In applying this presumption, however, the European Court of Human Rights is even more deferential than are United States courts. *Id.* For examples of cases in which the European Court of Human Rights has applied this deferential standard to uphold laws burdening religious exercise, see *id.* at 90-92.

263. For example, Sweden, France, and Great Britain all require their public schools to teach sex education, usually, but not always, with a greater emphasis on comprehensive sex education. Sweden, the country with the lowest teen birthrate, has required sex education longer than any other country. See THE ALAN GUTTMACHER INSTITUTE, *supra* note 246, at 5.

and teen sex problems and how this relationship will constrain the United States as it tries to address its sex education dilemma.

Should Americans accept these constraints? This question is too big to be resolved here, but a few notes should be made about this issue. One noteworthy point concerns institutional legitimacy and competency. These constitutional constraints are not the outgrowth of a single Supreme Court decision. They are a part of a network of decisions finding in the Constitution a cluster of individual liberties that cannot be trumped easily by communitarian interests. Because this commitment to individual liberty provides many social benefits, many approve of, and some favor strengthening, the doctrines directing the particular result addressed in this article. Unless Americans want their courts to reduce constitutional provisions to particularized social utility analyses, they should be careful about urging courts to approach sex education differently from how they have approached other religious liberty issues. Put more concretely, if citizens feel that France has it wrong²⁶⁴ and that religious liberty means that at all public schools a Jewish boy has the right to wear a yarmulke and a Muslim girl has a right to wear religious headdress,²⁶⁵ then perhaps the United States should also accommodate sex education opponents, even though doing so has greater and more deleterious social consequences than accommodating religious headgear. As demonstrated time and time again, courts creating constitutional doctrine according to social exigency are doomed to fail as expositors of the law.²⁶⁶

Also notable is that the sex education problem, unlike the constitutional deficiencies addressed in Sandy Levinson's recent book, results from ambiguity in the relevant constitutional provisions.²⁶⁷

264. French law prohibits students from wearing to public school any clothing, insignia, or symbols that "conspicuously manifest a religious affiliation." Law No. 2004-228 of Mar. 15, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190; JCP G 2004, No. 13, Actu. 168, available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L>.

265. Most Americans probably think that France has it wrong. See MARCIA HAMILTON, *GOD VS. THE GAVEL* 128 (2005) (describing America's "drive to accommodate religious conduct"). For the thoughts of a particularly influential citizen on the wisdom of the French law, see *Locke v. Davey*, 540 U.S. 712, 734 (2004) (Scalia, J. dissenting).

266. Some of the Supreme Court's most critiqued decisions ignore broad constitutional rules in the name of public necessity. See, e.g., *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (holding that the Fifth Amendment's equal protection requirement that the federal government treat all races equally does not prohibit the United States military from restricting access to areas on the basis of race because "[p]ressing public necessity may sometimes justify the existence of such restrictions"). See generally Frederick Shauer, *Do Cases Make Bad Law?*, U. CHI. L. REV. 883 (2006).

267. *Our Undemocratic Constitution* focuses on constitutional provisions not subject to interpretation. See Levinson, *supra* note 11, at 163. Levinson focuses on such provisions to advance his thesis that radical changes, not just shifts in judicial doctrine, are

Indeed, part of the problem here is attributable to constitutional uncertainty. Recall that in *Smith* the Court relaxed free exercise requirements to stabilize the Court's uneven treatment of free exercise claims. By affirming *Yoder* in the process, however, the Court sent lower courts in a maelstrom of doctrinal confusion, which only made the prospect of constitutional litigation more ominous for school districts. If the Court is prepared to deal with less free exercise protection, the Court should clearly overrule *Yoder* so that state decision-makers can be free from this uncertainty. As the Court said in *Casey*, "[l]iberty finds no refuge in a jurisprudence of doubt."²⁶⁸

As a final note, it must be emphasized that the Supreme Court's decisions are not the only forces at issue here. Private citizens, state court decisions, and legislative enactments (both state and federal) all come together to discourage public schools from compelling students to take sex education classes. These factors form our constitutional culture and cannot be easily defeated by changing one Supreme Court decision.²⁶⁹

Thus as a practical matter, if school districts are to tackle this problem, they will have to work within these constraints. Taking the following three actions is a good place to start. First, the school districts must make sex information available to those young people who want it. They can accomplish this goal by providing sex information in public libraries. As discussed in Part I.A.2, public schools are probably forbidden from removing sex information that they have in their libraries on the basis of the information's controversial content. Sex education opponents will not have any success mounting a free exercise challenge as the mere availability of sex information in the library does not substantially burden a person's religious beliefs.

Second, the school districts must make contraception available to young people. Public schools can do this by providing free contraception in health offices, along with information on how to use

necessary to address the constitutional defects identified in his book. For a discussion of his proposed radical changes, see *id.* at 167-80.

268. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

269. Some, of course, see a problem in America's devotion to religious liberty. Marci Hamilton notes that "[t]he problem in the United States is that too often the drive to accommodate religious conduct takes flight from common sense." HAMILTON, *supra* note 265, at 128. Hamilton is right that Americans have a strong drive to accommodate religious conduct. In criticizing this drive, she offers two examples of voluntary accommodation: a school board in Lafayette, Louisiana permitting eight Rastafarian children to wear coverings over their dreadlocks, and a college dean supporting a Muslim student's right to wear a hijab. *Id.* at 126. Although Hamilton is surely right in describing the existence of this drive, she is probably wrong in characterizing it as irrational. A less tendentious way of characterizing this "problem" is that Americans rationally express their sincere belief in universal religious liberty by seeking to accommodate even those religious practices in which the majority does not engage.

contraception. Because a student's acquisition of contraceptives would be entirely voluntary, religious students and parents would almost certainly lose in a claim that the government has violated their religious beliefs or familial privacy.²⁷⁰

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

CONCLUSION

What makes the Constitution so fascinating is its protean quality. While announcing broad legal and moral propositions, the Constitution provides more than a political philosophy. It is not simply abstract or theoretical, but relentlessly practical. It touches mundane matters that affect all of our lives, even such local decisions as whether to teach the community's children about sex. Furthermore, political actors must always consider its weight, as the Constitution reaches beyond its borders, inserting itself into political decision-making as a factor to be considered even when its text does not clearly dictate the conclusion. The area outside its textual circumference can rule our lives just as if it lay within its core.

As some of the Court's conservative members have admonished their liberal colleagues, the Constitution does not authorize the federal judiciary to cure all of the nation's problems. Indeed, the Constitution does not speak to every political problem. As demonstrated in Parts II and III, not only does the Constitution not solve every social problem, it also raises new conflicts. For instance, this article elucidates how, by making the provision of sex education more difficult for public schools, the Constitution can discourage schools

270. See, e.g., *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 587 (Mass. 1995) (holding that "[b]ecause . . . the [condom availability] program lacks any degree of coercion or compulsion in violation of the plaintiffs' parental liberties, or their familial privacy, we conclude also that neither an opt-out provision nor parental notification is required by the Federal Constitution"). Note however that one case, *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (App. Div. 1993), has held that the United States Constitution requires opt-out provisions for contraception availability programs. It is likely that *Alfonso* was decided wrongly. The *Alfonso* dissent argued, "the mere fact that parents are required to send their children to school does not vest the condom . . . program with the aura of 'compulsion' necessary to make out a viable claim of deprivation of a fundamental constitutional right." *Id.* at 272 (Eiber, J., dissenting).

from selecting what is probably the most effective policy solution to the problem of STDs and teen pregnancy.

The problem addressed in this article raises fundamental questions about what citizens want from their Constitution and judiciary. Some might be tempted to say that courts must interpret the Constitution differently to reach the right conclusion, in this case to encourage public schools to teach sex education. After all, the Constitution, as stated above, is not merely an abstract piece of political philosophy but rather a practical document, and as such we must be able to shape it to meet our political needs. Others, of course, inveigh against this idea of politics seducing the judiciary into interpreting a living Constitution. Regardless of the merits of these warring interpretive approaches, it is clear that we must develop greater care in describing, and less deference in criticizing, a document that can be a source of significant social problems. Only through this critical dialogue can communities determine their needs and limitations, and consequently develop the policies that effectively address the problems posed by this article.