

Government Schools, Parental Rights, and the Perversion of Catholic Morality

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The First Amendment’s free-exercise clause includes the right of parents to transmit their faith to their children. Although the Supreme Court, in general, has been solicitous of parental rights, in one area of education the courts evidence a striking disregard of those rights—the area of human sexuality. Focusing on cases involving sex education in public schools, this article first reviews the history and current legal status of such education, including a summary of cases involving challenges to these courses or their material. It then argues that, because of the religious dimensions of our understanding of human sexuality, a robust conception of religious liberty requires public schools to allow parental control over the sex education of children and that doing so poses little or no threat to legitimate state interests in education, health, and public safety.

Introduction

Freedom of religion is so foundational to the American experiment that it is listed first in the Bill of Rights. A two-sided coin, the First Amendment’s anti-establishment clause promises freedom from conscription into a state-ordained religion, while the free-exercise clause protects our ability to live according to our most deeply held beliefs. This latter freedom—the right to freely exercise our religion—includes the right of parents to transmit their faith to their children. As the Supreme Court observed in *Pierce v. Society of Sisters*, “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹ In explaining its rationale the Court noted, “The fundamental

theory of liberty upon which all governments in this Union repose excluded any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”

While cases regarding the existence and extent of parental right have arisen in a myriad of contexts, a common source of conflict has been the extent of parents’ authority over the education of their children. The Supreme Court has been called upon to decide whether parents may elect private over government-sponsored schools,² whether parents must subject their children to high school education that undermines children’s participation in their religious community,³ and even whether government could prohibit the teaching of foreign languages used in the home.⁴ In every case, the parents prevailed. As Justice O’Connor has observed, “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”⁵

And yet, notwithstanding the solicitude exhibited by the Supreme Court for parental rights in general, in one area of education the courts evidence a striking disregard of those rights—the area of human sexuality. In this article, I choose to focus on cases involving sex education in public schools, although this disregard is evident in other areas involving sexuality. Lower courts have denied parents the right to protect their children from intrusive surveys about sexual practices;⁶ to withdraw children from offensive sexual displays, exhibitions, and performances;⁷ and to be notified prior to public schools providing condoms to their children.⁸ In each instance the schools promoted a particular understanding of human sexuality that was antithetical to the parents’ understanding of sexual morality. To suggest that these government actions are religiously neutral public health measures ignores the intertwining of religious morality and sexual practice that has existed throughout history.

Pope John Paul II contrasted the contemporary secular understanding of sexuality with the Catholic understanding in his apostolic exhortation, *Familiaris Consortio*.

Faced with a culture that largely reduces human sexuality to the level of something common place, since it interprets and lives it in a reductive and impoverished way by linking it solely with the body and with selfish pleasure, the educational service of parents must aim firmly at a training in the area of sex that is truly and fully personal: for sexuality is an enrichment of the whole person—body, emotions and soul—and it manifests its inmost meaning in leading the person to the gift of self in love.⁹

The fact that at least some public schools teach human sexuality in a way that is “reductive and impoverished,” as described by the pope, is easily established.

Brown v. Hot, Sexy and Safer Productions, Inc., provides such an example. The case revolved around a mandatory ninety-minute AIDS awareness program in a Massachusetts public high school presented by Suzi Landolphi, author of the book *Hot, Sexy and Safer*. According to the complaint in the case, Landolphi

(1) told the students that they were going to have a “group sexual experience, with audience participation”; (2) used profane, lewd, and lascivious language to describe body parts and excretory functions; (3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; (4) simulated masturbation; (5) characterized the loose pants worn by one minor as “erection wear”; (6) referred to being in “deep sh--” after anal sex; (7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor’s entire head and blow it up; (8) encouraged a male minor to display his “orgasm face” with her for the camera; (9) informed a male minor that he was not having enough orgasms; (10) closely inspected a minor and told him he had a “nice butt”; and (11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.¹⁰

When students and parents complained that forced attendance at the assembly violated their statutory and constitutional rights, a federal district court dismissed their claim, finding that no viable cause of action had been pled. A three-judge panel for the First Circuit affirmed.¹¹

This school presentation could be dismissed as isolated and extreme except for the fact that Landolphi claims to have made similar presentations to over 1.5 million college and high school students.¹² Some also might be tempted to dismiss Landolphi’s approach to sex as a historical artifact of past awkward attempts to engage students on an important public health issue. After all, the case is more than twenty years old, and as the First Circuit concluded, the introductory remarks by the school principal and Landolphi “framed the Program in such a way that an objective person would understand that Landolphi’s allegedly vulgar sexual commentary was intended to educate the students about the AIDS virus rather than to create a sexually hostile environment.”

Yet recent news reports evidence that public schools continue to present sex in such a way as to link it “solely with the body and with selfish pleasure.”¹³ *It’s Perfectly Normal* is a popular book that has been approved for sex education in many public elementary and middle schools. It purports “to give children and teenagers an honest, accurate resource for the questions they don’t ask”¹⁴ and contains cartoons illustrating a variety of practices including masturbation,

sexual intercourse, and contraceptive use. In describing same-sex relationships, the book notes that “Some [people] feel that LGBT people should not have the right to marry.... These people’s views are based on fears or misinformation, not on facts. People are often afraid of people they know little or nothing about or who are different from them in some ways.”¹⁵ In discussing masturbation the author gives a nod to traditional religious views but quickly dismisses them.

Some people think that masturbation is wrong or harmful. And some religions call masturbation a sin. But masturbating cannot hurt you. And it does not result in pregnancy or in getting or passing on infections that are spread through sexual contact.

Many people masturbate. Many don’t. Whether you masturbate or not is your choice. Masturbating is perfectly normal.¹⁶

The author then goes on to explain and illustrate how to masturbate, which he promises will result in “a warm, good, tingly, exciting feeling all through [the reader’s] body.”¹⁷

The chapter “A Kind of Sharing: Cuddling, Kissing, Touching, and Sexual Intercourse” concludes with brief descriptions of anal and oral sex as “other ways people make love and have sex” with no mention of moral or health objections related to those practices. Similarly, the chapter “Families and Babies” is devoid of any mention of marriage as the optimal relationship for childbearing, although it does note that some children grow up in homes where the mother and father live together. In short, far from being values-neutral or respectful of religious views, this popular text promotes liberal secular views of sex with a clear emphasis on sexual “autonomy” or personal choice—even for children as young as ten.

Even when schools avoid texts with graphic illustrations or cavalier dismissals of religious concerns, the content of current sex education classes can be disturbing. In Jay, Oklahoma, parents were disconcerted when their middle-school children’s homework included defining anal and oral sex as well as masturbation and mutual masturbation.¹⁸ A ninth-grade science teacher in Oklahoma City public schools offered extra credit to all students who calculated the friction between two people having sex and to male students who masturbated and took projectile measurements afterwards.¹⁹ Sex education at Evanston Township High School in Illinois is reported to “touch ... on anal sex, prostate masturbation and the ‘g-spot’ before tackling ‘gender identity’ (‘gender is what is in your head’), ‘gender expression’ (‘gender expression is how you walk ... how you talk’), and ‘sex negativity,’ railing on schools that mistakenly teach teenagers not to have sex.”²⁰ My point here is not to shock or amuse readers, but to make the case that parents seeking to transmit traditional religious views about sex to their children

face an uphill battle, particularly if their children are enrolled in public schools as over 90 percent of American school children are.²¹

In the remainder of this article I attempt to persuade the reader that, because of the religious dimensions of our understanding of human sexuality, a robust conception of religious liberty requires public schools to allow parental control over the sex education of children and that doing so poses little or no threat to legitimate state interests in education, health, and public safety.

I begin with a review of the history and current legal status of sex education in public schools, followed by a brief description of cases involving challenges to these courses or their material. I argue that many cases do not give adequate weight to the constitutional values of religious liberty and parental authority insofar that lower courts rely on the right of parents to exit the public schools as the sole remedy for offensive instruction. This “my way or the highway” approach to constitutional adjudication²² ignores the economic reality of many American families,²³ as well as the state’s obligation of neutrality on matters of deep religious conviction.²⁴

The Past and Current State of Sex Education in America

Sex education has been provided by American public schools for more than a century. The National Education Association passed a resolution calling for sex education in the schools in 1912,²⁵ and Chicago became the first major school district to offer such instruction in 1913.²⁶ By 1927, 45 percent of public schools offered some type of sex education, often by integrating lessons into biology or physical education courses. Sex education continued without much controversy through the 1940s and 1950s as a part of “family life education,” emphasizing abstinence until marriage and prevention of sexually transmitted diseases. The public’s widespread agreement with this policy ended in the 1960s with the advent of the pill, the “sexual revolution,” and the fracturing of public consensus on sexuality morality.

Planned Parenthood and allied organizations such as the National Organization for Women assisted in establishing the Sexuality Information Education Council of the United States (“SIECUS”) in 1964.

[SIECUS] supported values-neutral “comprehensive” sex education that encouraged students to decide for themselves when to engage in sex, whether to seek an abortion, and how to obtain easy access to contraception. SIECUS maintained that the “old morality” of abstinence until marriage was widely

challenged and that the “new morality” of relativism offered the most hope for modern sex education.²⁷

This view was opposed by many, resulting in some states banning the use of SIECUS materials in public classrooms.²⁸

In many ways, the debate over sex education has not changed from the 1960s. There is still broad-based general support for some form of sex education in public schools.²⁹ Today’s arguments tend to focus not on whether such education should be offered, but what the goal of such education is, what its content should be, and what the role of parents should be in such education. Well-developed curriculums of both varieties address issues that parents uniformly support—prevention of teen pregnancy and transmission of sexually transmitted diseases including HIV through abstinence and some forms of contraception.³⁰ Comprehensive sexuality education claims to be value-free, covers additional topics such as forms of sexual expression and gender identity, and is favored by groups such as SIECUS, Planned Parenthood, the World Health Organization, and the American Academy of Pediatricians, along with parents who often identify themselves as “sex positive.” “Abstinence-based education” varies in content but shares a focus on encouraging students to refrain from intimate sexual contact until marriage. These programs are favored by groups such as the Heritage Foundation, the American College of Pediatricians, and many religiously affiliated public policy groups such as Focus on the Family.

According to a 2016 nationwide survey by the National Conference of State Legislatures, twenty-four states and the District of Columbia require that public schools teach sex education.³¹ Thirty-three states and the District of Columbia require students to receive instruction about HIV/AIDS. Thirty-eight states and the District of Columbia require school districts to allow parental involvement in sexual education programs, with four states requiring parental consent before a child can receive instruction. Thirty-five states and the District of Columbia allow parents to opt-out on behalf of their children.³² During the 2016 legislative year ninety-four bills related to sexuality education were introduced in twenty-nine states. Parental involvement was one of the most common subjects of proposed legislation, with thirty-six bills in nineteen states addressing the issue.³³

This then has become the crux of the issue: not whether to offer sex education, but what sex education should include. A large number of professional associations demand that every child receive instruction on a broad range of issues related to sexual morality, while emphasizing the child’s ability to make moral judgments independent of family or other influences. A majority of parents and legislators believe that public school instruction should be designed to address specific

public health issues such as teen pregnancy and sexually transmitted infections, encourage abstinence, and leave other topics to the guidance of families, faith communities, and private associations.

In surveys that assessed support for specific topics, only a few sexuality content areas received less than eighty percent support. These topics tended to be more controversial and included: sexual orientation, masturbation, oral sex, information on where teenagers can obtain birth control pills and informing young people that they do not need parental permission to visit a family planning clinic.³⁴

Few surveys have inquired about parental support for coverage of “grinding, sexual fantasy, [and] anal sex”³⁵ but I suspect pollsters would find substantial opposition to including these topics as well.³⁶

Basis for Religious Objections

Opposition to sex education generally, as well as inclusion and treatment of particular topics, is often, but not always, based on the religious views of parents. This is unsurprising given that teachings about sexual and reproductive behavior are an integral part of the major world religions. Rarely, if ever, is the “behavior” the exclusive or even primary focus of the teaching. The most common focus is the moral significance of the behavior to the person, his or her partner, and the community.

Pope Emeritus Benedict XVI has summarized the Catholic view of this matter very well:

[Full respect for human values in the exercise of a person’s sexuality] cannot be reduced merely to pleasure or entertainment, nor can sex education be reduced to technical instruction aimed solely at protecting the interested parties from possible disease or the “risk” of procreation. This would be to impoverish and disregard the deeper meaning of sexuality, a meaning which needs to be acknowledged and responsibly appropriated not only by individuals but also by the community.³⁷

Yet much of the instruction offered by public schools reduces sex to pleasure, entertainment, or technical competencies. The deeper meaning of sex that Benedict refers to can be found in Pope John Paul II’s “theology of the body.”

The human body, with its sex, and its masculinity and femininity seen in the very mystery of creation, is not only a source of fruitfulness and procreation, as in the whole natural order. It includes right from the beginning the nuptial

attribute, that is, the capacity of expressing love, that love in which the person becomes a gift and—by means of this gift—fulfills the meaning of his being and existence.³⁸

Sexual intercourse as an act of self-giving, both by he who enters and she who receives, is antithetical to the idea of sex as mere self-expression. To present sexual activity to children and teens as if it is (or even can be) merely recreational is a lie, and not a “little white lie,” but a lie laden with great moral consequence. It reduces what should be tumultuous yet tender, greedy yet generous, passionate yet pure, to “safe sex”—sex where the partners’ first concern is not communion but contraception, where they seek “protection” from each other and a future together. No wonder so many kids don’t believe what the educators are telling them, and those who do too often find themselves depressed and discontent if they act on what they have learned and discover it is false.

The explosion of sexually transmitted diseases, addiction to pornography, and single motherhood, as well as increasing depression, anxiety, and general unhappiness among sexually active youth and adults signals that sex cannot be rendered the risk-free recreation promoted by much of the media, entertainment industry, and professional “sex educators.”³⁹ We know that sexually transmitted diseases can be easily avoided by limiting sexual encounters to a single partner who has exercised similar restraint; that pornography can be addictive and lead to an inability to engage in sexual intercourse; and that single-motherhood rarely arises if couples reserve sex to the monogamous permanent relationship historically called marriage. We also know, or at least those who care to investigate know, that almost every couple can control the timing and spacing of children through understanding and conscientious attention to the cycles of the woman’s body.⁴⁰ But this truth, like the first two, would require that an education focus on self-knowledge and self-mastery—a curriculum much more difficult to develop and teach than one merely addressing anatomy of genitalia or the workings of various devices and drugs.

Christian anthropology is grounded in the unity of the human person as a being that is both spiritual and bodily, and the knowledge that we are created by and bear the image of God. This is the foundation of Catholic sexual morality. Understanding this anthropology is what makes doctrines such as chastity and monogamy intelligible and persuasive. Opposition to contraception, abortion, in vitro fertilization, and surrogacy are natural extensions of this understanding of the human person. Rejection of masturbation, fornication, adultery, pornography, homosexual acts, incest, prostitution, and bestiality, makes much more sense

when starting with the premise that we mirror God’s faithfulness, generosity, and fecundity in the proper exercise of our sexual powers.

This anthropology and understanding of human sexuality is not captured in the “just say no” caricature of some abstinence-based education, nor by the degradation that sometimes passes for “comprehensive” education. It is understandable that parents who accept the theology of the body would be unwilling to cede instruction on this important topic to others—especially others who are hostile to their beliefs.

Constitutional Limits on the Authority of Public Schools

On the surface it would seem that parents have compelling constitutional claims when seeking to exempt their children from all or parts of the sex-education curriculum offered by public schools. Unfortunately, recent cases reveal a very different situation.

Parental Rights

Parents’ fundamental liberty interest in the care of their children is one of the oldest non-textual constitutional rights protected by the Court.⁴¹ Recognizing this right, the Supreme Court has observed that “parents possess what a child lacks in maturity, experience, and capacity for judgment. . . .”⁴² As a “fundamental right” under contemporary due process jurisprudence, it would seem that once parents established that their right to direct the upbringing of their children was burdened by the state’s action or policy the state would be required to prove that its actions furthered a compelling state interest through narrowly tailored means. In cases involving education, however, the courts vary dramatically in the standards they employ.⁴³ This is largely because the Supreme Court itself has applied different tests over time, with the most factually similar precedent predating the development of contemporary privacy jurisprudence.

Given the ambiguity surrounding a “pure” substantive due process claim based on parental rights, it is unsurprising that many cases involve multiple claims, combining the due process right of parental direction with rights arising under other constitutional protections.⁴⁴ Parental complaints have included violations of free speech, privacy, procedural due process, and, most commonly, free exercise of religion.

Free Exercise of Religion

Historically there has been little doubt that freedom of religion includes the right of parents to “bring up their children in the faith.” The Supreme Court has stated unequivocally that “[t]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.”⁴⁵ These values hold such a high place that they trumped the state’s interest in requiring Amish children to continue public school beyond eighth grade in *Wisconsin v. Yoder*.⁴⁶ As generous as the *Yoder* opinion is in its treatment of parental rights and religious liberty, however, the decision appears to carry little weight in contemporary conflicts between public schools and parents.

Under the current interpretation of the Free Exercise clause many (but not all) courts require plaintiffs to show some form of government coercion to support a finding that the parents’ religious liberty is burdened. For these courts, compulsory exposure to objectionable ideas is insufficient.⁴⁷ Instead the school policy or program must require the student to affirm or profess a belief or take actions that are contrary to the family’s religious beliefs.⁴⁸ This requirement creates a stark contrast with the legal standard for violations of the Establishment Clause, which is satisfied by indirect coercion.⁴⁹ Thus, teachings seen to promote traditional religion are easily challenged in court, while teachings seen to denigrate traditional religion are difficult to challenge.

Under the current interpretation of the Free Exercise Clause in cases involving facially neutral laws of general applicability the government need only establish a rational basis for the law in order to prevail.⁵⁰ This is the lowest level of constitutional scrutiny and almost always results in the government winning. This interpretation is a substantial departure from the rule developed in *Serbert v. Verner*, requiring any burden on the free exercise of religion be “justified by a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.”⁵¹

To receive heightened scrutiny (and thus increase the chance of the plaintiff prevailing) for a Free Exercise claim, plaintiffs must show (1) the law is not valid, facially neutral, or of general applicability; (2) the law targets religion by its operation; (3) the law provides exemptions for nonreligious purposes but affords no such protection for religious objections; or (4) the law violates Free Exercise “in conjunction with other constitutional protections, such as ... the right of parents ... to direct the education of their children.”⁵² Once such a showing is made, the law or policy is subject to strict scrutiny and government must show that the action or policy serves a compelling state interest by means that are nar-

rowly tailored to achieve that interest. This level of review is often described as “strict in theory but fatal in fact.”⁵³ Yet in the context of religious liberty cases, the correct characterization may well be “strict in theory but feeble in fact.”⁵⁴

This “feeble in fact” characterization seems to apply with a vengeance to cases involving parental objections to sex education. Yet that may be attributable to Supreme Court precedent involving free exercise claims in the context of public education. The *Yoder* opinion itself admits that “the power of the parent, even when linked to a free exercise claim, may be subject to limitation under [*Prince v. Massachusetts*] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”⁵⁵ In the area of sex education it seems hard to dispute that the government has compelling interests in reducing sexually transmitted infections. Prevention of contagious diseases has been long regarded as part of the state’s police powers to protect public health.⁵⁶

In refusing to grant relief, lower courts have repeatedly opined that parental authority to direct the religious upbringing of their children does not “encompass ... a fundamental constitutional right to dictate the curriculum at the public school to which ... [the parents] have chosen to send their children.”⁵⁷ Nor do parents have a fundamental right generally to direct *how* a public school teaches their child.⁵⁸ One federal appellate court went so far as to opine, “[T]he Meyer-Pierce right [to direct the upbringing of children] does not extend beyond the threshold of the school door.”⁵⁹

Such courts often rely on language from *Yoder* cautioning against excessive judicial involvement in disputes between parents and public school officials:

Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill equipped to determine the “necessity” of discrete aspects of a State’s program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State’s legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements.⁶⁰

On this point, it appears that the courts may be engaging a straw man. Today few cases involve facial challenges to school policies or demands for curricular changes generally. Most cases involve demands for an exemption from offensive instruction⁶¹ or recovery for injuries from past offensive instruction by school officials.⁶² Yet, even when faced with these far more modest demands, courts reject parents’ claims, noting the burden that such exemptions would impose on school officials and the right of parents to place their children in private schools

with more congenial curriculums. In fact, neither of these rationales survives any serious examination.

Exemptions Are Common and Would Not Unreasonably Burden School Officials

The claim that allowing parents to exempt their children from offensive instruction, particularly on issues of sexuality which are so deeply imbedded with religious significance, would impose great burdens on public schools is belied by the fact that two-thirds of the states require such exemptions statutorily with little evidence of disruption or great difficulty. At least one state, New Hampshire, goes so far as to allow parents to opt their children out of any specific course material that families find objectionable.⁶³

The absence of any reports that exemptions unduly burden school officials may be because parental requests for exemptions are rare⁶⁴ or it may be due to educational innovations that increasingly emphasize individualized education plans for all children. Regardless of the reason, the widespread existence of such exemptions undercuts claims that they pose significant administrative problems, and evidence the fact that any curricular requirements without such exemptions are not narrowly tailored.

Private School Placement Is Inadequate Relief for Most Americans

Similarly, the fact that parents have a constitutional right to exit public schools in favor of private education is cold comfort for those parents who cannot afford several thousand dollars a year in private tuition for each child. No American court would seriously entertain the argument that free speech should be available only to the rich,⁶⁵ and it is ludicrous to suggest that freedom of religion should be so restrained.

Over 90 percent of all American schoolchildren are enrolled in public schools.⁶⁶ A large majority of the remaining students are enrolled in religiously affiliated or sectarian schools.⁶⁷ This fact is unsurprising given that the number one reason parents report that they choose to enroll their children in private schools is that they want religious values incorporated into their children's education.⁶⁸ Surveys show that a greater number of children would be enrolled in private schools but for economic and other barriers.

With the national average cost for private elementary school at \$8,918 per year and for private high school at \$13,524 per year,⁶⁹ private schools are simply

out of reach for many Americans. Even among Catholics, where there is long history of children attending parish schools and tuition is typically lower,⁷⁰ enrollment among middle-income families fell by half from 1987 to 2011. During that same time enrollment among high-income families remained relatively stable.⁷¹ Geographic barriers also exist for many rural families and for members of some smaller religious communities.

Even if it were feasible for parents to choose private education, they should not have to forfeit one of the most valuable benefits their tax dollars provide to avoid violation of their constitutional rights. At the end of the day it is not the parents' rights that should stop at the public schoolhouse door, but the government's power to standardize Americans beliefs on disputed moral questions. As the Supreme Court said decades ago,

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁷²

The ability of parents to exercise this right should not be dependent upon their wealth or the acceptability of their views on human sexuality.

Conclusion

Human sexuality is recognized as a driving force in human behavior by both secularists and religious believers. For centuries, religious thinkers have identified and refined their understanding and beliefs about the role of sex in our lives and in our relationship to God. Transmitting this knowledge to children has long been the province of family. It would be inconceivable to the founders that this duty would be taken from mothers and fathers and given to public officials.

Yet, with the advent of contraception, the experience of the "sexual revolution," and the emergence of public health threats resulting from the changing mores, public schools have increasingly sought (or been required) to instruct students on sexual behavior. When that instruction conflicts with parental understanding and authority, the courts have largely sided with school officials, while legislators have sided with parents. Yet the well-being of our children should not be decided by a competition between the various branches of government; it should be decided by parents. As the Supreme Court observed almost half a century ago,

[A] State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, “prepare (them) for additional obligations.”⁷³

For many, if not most, Americans, sex and morality and religion are intertwined in a way that is impenetrable by those who are not religious. Sex is more than body parts, friction, and emotions. It is about participating in the very mystery of creation—the creation of love, intimacy, and trust that accompanies the gift of self, as well as the potential creation of new human life. Imparting this knowledge is not within the province of the classroom, but rather the “high duty” and great privilege of parents, families, and communities of faith.

Notes

1. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).
2. *Pierce*, 268 U.S. 510 (1925).
3. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
4. *Meyer v. Nebraska*, 262 U.S. 390 (1923).
5. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).
6. *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005).
7. *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 536–537 (1st Cir. 1995).
8. *Curtis v. School Comm. of Falmouth*, 420 Mass. 749, 760 (1995).
9. Pope John Paul II, Apostolic Exhortation *Familiaris Consortio* (1981), no. 37, http://w2.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html.
10. *Hot, Sexy and Safer Productions, Inc.*, 68 F.3d at 529. A brief description of a similar performance at Princeton University is in Herbert I. London, *DECLINE AND REVIVAL IN HIGHER EDUCATION* at 135 (2010).
11. The Court of Appeals declared that parents had no constitutional right “to dictate the curriculum at the public school to which they have chosen to send their children,” and that the school’s failure to notify parents of the explicit sexual content of the

- program, while violating school policy, did not violate procedural due process because the failure to notify was a “random and unauthorized act” which state officials could not have foreseen. *Hot, Sexy and Safer Productions, Inc.*, 68 F.3d at 533, 536–57.
12. Robie H. Harris, *IT’S PERFECTLY NORMAL* at 10 (2014). A complete copy of the text is available at <https://www.scribd.com/document/272591283/Its-Perfectly-Normal>.
 13. *Familiaris Consortio*, no. 37.
 14. KJ Dell’Antonia, *20 Years After ‘It’s Perfectly Normal,’ What’s Changed?* (New York Times blogs, Sept. 17, 2014) at <https://parenting.blogs.nytimes.com/2014/09/17/20-years-after-its-perfectly-normal-whats-changed/>.
 15. Harris, *IT’S PERFECTLY NORMAL* at 11 (2014).
 16. Harris, *IT’S PERFECTLY NORMAL* at 43 (2014).
 17. Harris, *IT’S PERFECTLY NORMAL* at 44 (2014).
 18. <http://www.news9.com/story/36609941/sex-ed-lesson-upsets-green-country-parents>. A more detailed story appears at <http://www.breitbart.com/big-government/2017/10/25/livid-parents-force-halt-graphic-middle-school-sex-ed-program/>. During a parent forum to discuss future changes there was discussion of more parental educational forums and implementing an opt-in policy requiring parental consent prior to student instruction. Ginnie Graham, *Give Oklahoma Schools Credit when They Do Good* (Tulsa World, Oct. 29, 2017), at http://www.tulsaworld.com/homepagelatest/ginnie-graham-give-oklahoma-schools-credit-when-they-do-good/article_9dff21bc-6f4a-5a50-81d9-c30dc7a62b2c.html.
 19. <http://kfor.com/2017/10/04/metro-teacher-suspended-after-giving-students-inappropriate-assignment/>.
 20. North Cook News, *Sex Ed Week at Evanston H.S. Means the Birds, Bees and Much More* (May 21, 2017) at <https://northcooknews.com/stories/511118205-sex-ed-week-at-evanston-h-s-means-the-birds-bees-and-much-more>.
 21. Department of Education, National Center for Education Statistics, Private School Universe Survey (PSS), 1995–96 through 2013–14 (2015), Table 205.20, https://nces.ed.gov/programs/digest/d15/tables/dt15_205.20.asp.
 22. *See* *Mozert v. Hawkins Cnty. Bd. of Educ. (Mozert II)*, 827 F.2d 1058, 1074 (6th Cir. 1987) (Boggs, J., concurring) (In a controversy over the content of school-selected texts, “the school board is entitled to say, ‘my way or the highway.’”).
 23. Jordan Yadoo, *Private School Is Becoming Out of Reach for Middle-Class Americans*, Bloomberg (July 19, 2017). <https://www.bloomberg.com/news/articles/2017-07-19/private-school-is-becoming-out-of-reach-for-middle-class-americans>.

24. U.S. CONST. Amend. I.
25. See Valerie J. Huber & Michael W. Firmin. *A History of Sex Education in the United States since 1900*. INTERNATIONAL JOURNAL OF EDUCATIONAL REFORM, vol. 23, no. 1, 2014, p. 25+. A similar resolution was passed in 1914.
26. *Id.*
27. *Id.* at 37.
28. Huber & Firmin, *A History of Sex Education* at 37 (California banned the use of SIECUS materials in 1969).
29. Janet R. Heller & Helen L. Johnson, *Parental Opinion Concerning School Sexuality Education in a Culturally Diverse Population in the USA*, SEX EDUCATION, Vol. 13, No. 5, 548–559 (2013).
30. I use the term “some forms of contraception” due to the lack of research on parents’ views regarding the inclusion of the morning-after pill and contraceptive drugs and devices that act as abortifacients.
31. State Policies on Sex Education in Schools (Dec. 21, 2016) at <http://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx>.
32. *Id.*; see Kevin Rogers & Richard Fossey, *Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children Out of Curricular Discussions about Sexual Orientation and Same-Sex Marriage?*, 2011 BYU EDUC. & L.J. 423 (2011).
33. SIECUS 2016 Sex Ed Legislative Year End Report at 2 (2016) available on the SIECUS website at siecus.org.
34. Heller & Johnson, *Parental Opinion* at 549.
35. Sharon Slater, *How Federally Funded Sex Education Sexualizes Schoolchildren*, WASHINGTON TIMES (Oct. 17, 2017):

The widely used [federally funded Teen Pregnancy Prevention] program “Making a Difference,” which claims to be “abstinence education,” asks children, “How do people express their sexual feelings? What is Abstinence?” The manual says, “Answers may include oral sex, dancing, masturbation[,] grinding, sexual fantasy, anal sex, touching each other’s genitals[,] saying I like you.”
36. Consider the controversy over a recent issue of *Teen Vogue* promoting anal sex. <https://www.teenvogue.com/story/anal-sex-what-you-need-to-know>. News sources and commentators reflect the cultural divide on the issue. <https://www.nbcnews.com/feature/nbc-out/teen-vogue-s-guide-anal-sex-spawns-backlash-n784411>; <http://www.breitbart.com/big-journalism/2017/07/15/teen-vogues-tutorial-anal-sex-omits-serious-risks/>; https://www.huffingtonpost.com/entry/sex-is-garbage_us_59765b0de4b0940189700bf1; and <http://www.foxnews.com/us/2011/03/03/northwestern-university-professor-defends-explicit-sex-toy-demonstration.html>.

37. http://w2.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html#_ednref111.
38. John Paul II, *The Man-Person Becomes a Gift in the Freedom of Love*, L'OSSERVATORE ROMANO Weekly Edition in English (21 Jan. 1980, page 1) reproduced at <http://www.ewtn.com/library/PAPALDOC/jp2tb14.htm>.
39. Sandhya Ramrakha et al., *The Relationship Between Multiple Sex Partners and Anxiety, Depression, and Substance Dependence Disorders: A Cohort Study*, *Archives of Sexual Behavior* 42.5 (2013): 863–72. PMC. Web. 31 Oct. 2017; Jennie L. Connor, Robyn M. Kydd, and Nigel P. Dickson, *Alcohol Involvement in Sexual Behaviour and Adverse Sexual Health Outcomes from 26 to 38 Years of Age*, Ed. Javier R. Lama. PLoS ONE 10.8 (2015): e0135660. PMC. Web. 31 Oct. 2017. Giuseppina Valle Holway, Kathryn Harker Tillman, Karin L. Brewster, *Binge Drinking in Young Adulthood: The Influence of Age at First Intercourse and Rate of Sex Partner Accumulation*, *ARCHIVES OF SEXUAL BEHAVIOR* 46(2)(2017): 525–537. Published online 2015 Sep. 23. doi: 10.1007/s10508-015-0597-yPMCID: PMC4828321.
40. http://sympto.org/data/Fertility_awareness-based_methods_of_family_planning_2013.pdf and https://www.huffingtonpost.com/2015/01/15/contraceptive-app-natural-cycles_n_6472642.html.
41. *Troxel*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”). See, e.g., *Meyer*, 262 U.S. 390 (1923); *Pierce*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944).
42. *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *H.L. v. Matheson*, 450 U.S. 398, 409 (1981) (“[I]mmature minors often lack the ability to make fully informed choices”).
43. Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 years*, 38 J.L. & EDUC. 83, 101–2 (2009):

The Third and Sixth Circuit Courts of Appeals, as well as state courts in Washington, Ohio, Massachusetts and New York, have expressly classified parental interests as fundamental or have applied strict scrutiny in reviewing alleged violations. Other courts, including the Michigan Supreme Court, have explicitly stated that “parents do not have a constitutional right [to direct their children’s education] requiring strict scrutiny.” Somewhere in the middle, perhaps, is the Fifth Circuit Court of Appeals, which recently affirmed parental rights as fundamental but applied a rational basis test to the question of mandatory school uniforms. Similarly, the United States District Court for the District of New Hampshire appears to have employed a type of relaxed strict scrutiny in denying plaintiffs’ right to have their children removed from activities in the public schools that offended their religion.

44. “The courts also tend to reject another type of substantive due process infringement: restrictions on parents’ rights to control their children’s upbringing.” Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 864 (2006).
45. 406 U.S. at 214. Compare CATECHISM OF THE CHURCH, 2226:

Education in the faith by the parents should begin in the child’s earliest years. This already happens when family members help one another to grow in faith by the witness of a Christian life in keeping with the Gospel. Family catechesis precedes, accompanies, and enriches other forms of instruction in the faith. Parents have the mission of teaching their children to pray and to discover their vocation as children of God. The parish is the Eucharistic community and the heart of the liturgical life of Christian families; it is a privileged place for the catechesis of children and parents.

See also Proverbs 22:6 (“Train up a child in the way he should go, and when he is old he will not depart from it.” [RSV]); Deut. 4:9, 11:19 and Ephesians 6:4. Fr. Hardon, *The Responsibilities of Catholic Parents*, http://www.therealpresence.org/archives/Family/Family_029.htm.
46. 406 U.S. 205 (1972).
47. *Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (upholding compulsory attendance at sex education program noting that the plaintiffs did not “allege that the one-time compulsory attendance at the Program threatened their entire way of life” and was thus qualitatively different from facts of *Yoder*); *Parker v. Hurley*, 474 F. Supp. 2d 261, 274–75 (D. Mass. 2007), *aff’d*, 514 F.3d 87 (1st Cir. 2008) (upholding an elementary school’s use of books demonstrating tolerance towards homosexuality and same-sex marriage). But see *Ware v. Valley Stream High School Dist.*, 75 N.Y.2d 114, 126, 551 N.Y.S.2d 167, 175, 550 N.E.2d 420, 428 (1989) (in determining whether mandatory AIDS education for primary and secondary students violated parents’ free exercise rights, factual issues existed as to whether children’s exposure to certain ideas was itself contrary to a tenet of challengers’ religion and whether the state had compelling interest in educating children about AIDS that could not be addressed by parents).
48. *Abington School District v. Schempp*, 374 U.S. 203, 233 (1963) (“[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.”); *Mozert*, 827 F.2d 1058, 1064 (6th Cir.1987) (participation beyond reading and discussing assigned materials might implicate free exercise because the element of compulsion would then be present); *Johnson v. Dade County Public Schools*, 1992 WL 466902, at *7 (S.D.Fla.,1992) (“Plaintiffs have not alleged that the School System forced the students to profess belief in any of the messages or coerced them to take any affirmative action which

was against their religion. Nor, according to the complaint, are the students obliged to utilize [the religiously-objectionable resource].”)

49. *Lee v. Weisman*, 505 U.S. 577, 586 (1992) (“Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.”)
50. *Employment Division v. Smith*, 494 U.S. 872 (1990).
51. 374 U.S. 398 (1963).
52. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (finding a law violated the free exercise clause if it targets religion or was not generally applicable in application); *Employment Division*, 494 U.S. 872, 881 (1990). The pleading of multiple constitutional claims usually arises in an “as-applied challenge” to government actions, and constitutes a “hybrid claim” that requires heightened scrutiny under the First Amendment. *Id.* at 881–82.
53. Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); for an empirical examination, see Winkler, *Fatal in Theory*.
54. *Id.* at 859, n. 296; see also Gary J. Simson, *Endangering Religious Liberty*, 84 CAL. L. REV. 441, 459–60 (1996).
55. *Yoder*, 406 U.S. at 233–34.
56. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding state compulsory vaccinations).
57. *Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (rejecting substantive due process, procedural due process, sexual harassment under Title IX, free speech, and free exercise claims challenging requirement that students attend sex education program without giving parent advance notice and an opportunity to opt out). *See also Fields*, 427 F.3d 1197 (9th Cir. 2005) (upholding the distribution of a sex survey to elementary school children, because the questionnaire furthered a legitimate government objective to expose early trauma and develop a program to reduce barriers to learning); *Leebaert ex rel. Leebaert v. Harrington*, 193 F. Supp. 2d 491, 497 (D. Conn. 2002), judgment aff’d, 332 F.3d 134 (2d Cir. 2003) (“courts have rejected parental demands to exempt children from mandatory health courses, which although somewhat value-laden are less so than sex education programs and closer to basic academic subjects”).
58. *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 395–96 (6th Cir. 2005) (emphasis in the original).

59. *Fields*, 427 F.3d at 1207. In ruling on the parents’ petition for rehearing, the court amended its ruling to delete any reference to the school door, and substituted the following sentence in its place: “In sum, we affirm that the Meyer–Pierce due process right of parents to make decisions regarding their children’s education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions, or to collect monetary damages based on the information the schools provide.” *Fields* (PSD), 447 F.3d 1187, 1190–91 (C.A.9 2006).
60. 406 U.S. at 234–35.
61. *E.g. Parker*, 474 F. Supp. 2d 261, 274–75 (D. Mass. 2007), *aff’d*, 514 F.3d 87 (1st Cir. 2008).
62. *Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995).
63. N.H. Rev. Stat. Ann. 186:11:

The state board of education shall, in addition to the duties assigned by RSA 21-N:11:

Require school districts to adopt a policy allowing an exception to specific course material based on a parent’s or legal guardian’s determination that the material is objectionable. Such policy shall include a provision requiring the parent or legal guardian to notify the school principal or designee in writing of the specific material to which they object and a provision requiring an alternative agreed upon by the school district and the parent, at the parent’s expense, sufficient to enable the child to meet state requirements for education in the particular subject area. The policy shall also require the school district or classroom teacher to provide parents and legal guardians not less than 2 weeks advance notice of curriculum course material used for instruction of human sexuality or human sexual education. The policy shall address the method of delivering notification to a parent or legal guardian. To the extent practicable, a school district shall make curriculum course materials available to parents or legal guardians for review upon request.

<http://www.gencourt.state.nh.us/rsa/html/xv/186/186-11.htm>.
64. SIECUS, <http://www.siecus.org/index.cfm?fuseaction=Feature.showFeature&featureID=2273>.
65. *But see* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).
66. Department of Education, National Center for Education Statistics, Private School Universe Survey (PSS), 1995–96 through 2013–14 (2015), Table 205.20, https://nces.ed.gov/programs/digest/d15/tables/dt15_205.20.asp.
67. Among elementary students the breakdown is: forty-three percent of all students are enrolled in Catholic schools; forty percent in other sectarian schools, and seventeen percent in non-sectarian schools. Richard Murnane & Sean Reardon, *Long Term*

Trends in Private School Enrollment by Family Income (July 2017) NBER Working Paper No. 23571 at 10–11 and tab., available at <http://www.nber.org/papers/w23571>.

68. Slightly more than one-third of the parents who enroll their children in private schools do so because they want their children to receive instruction in religion or a particular value system through the school. Murnane & Reardon, *Long Term Trends* at 4, available at <http://www.nber.org/papers/w23571>.
69. <https://www.privateschoolreview.com/tuition-stats/private-school-cost-by-state>. See also <https://www.privateschoolreview.com/tuition-stats/private-school-cost-by-state>.
70. Carol Ann MacGregor, *Why the Decline of Catholic Schools Matters*, Scholars Strategic Network (Mar. 2013) at <http://www.scholarsstrategynetwork.org/brief/why-decline-catholic-schools-matters>:

In 1970, nearly three-quarters of Catholic schools charged less than \$100 in tuition (the equivalent of roughly \$300 today), but by 2010 the average tuition was about \$4000 at a Catholic elementary school and around \$8000 for a high school. Including all the extras, costs per student at the elementary level have skyrocketed from roughly \$1,500 to about \$5,500 today. Not surprisingly, many parents cannot afford these higher prices and fewer are opting to send their children to Catholic schools.
71. Murnane & Reardon, *Long Term Trends* at 18, available at <http://www.nber.org/papers/w23571>.
72. *Pierce*, 268 U.S. 510, 535 (1925).
73. *Yoder*, 406 U.S. 205, 214 (1972).