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## Some Thoughts on Religion, Abstinence-Only, and Sex Education in the Public Schools

by Frank S. Ravitch\*

### I. Introduction

As the title suggests, this article reflects my recent thoughts regarding abstinence-only and sex education programs under the religion clauses. The article, which is based on a presentation given at the 2006 AALS Annual Meeting during the aptly named panel: Clash of the Titans: Sex, Religion and Morality in America's Schools, addresses two primary issues. First, whether abstinence-only programs in the public schools violate the Establishment Clause. Second, whether parents or students have a right to opt-out of sex education courses under the Free Exercise Clause. The following discussion is essentially a modified excerpt from a forthcoming book titled: MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES. Specifically, the material is taken from the chapter addressing the definition of religion under the religion clauses. As will soon become clear, the Establishment Clause question, at least, is heavily intertwined with how the courts view the nature of religion.

Part II. 1. of this article will address the question of abstinence-only programs under the Establishment Clause and suggest that some, but not all, of these programs violate the Establishment Clause both under the Court's current tests and the facilitation test I have proposed elsewhere.<sup>2</sup> Part II. 2. will discuss the question of exemptions from general sex education programs under the Free Exercise Clause. The greatest potential for exemptions arises from the concept of "hybrid rights" or under state Religious Freedom Restoration Acts or state constitutional provisions. This Part will address when, why, and how such exemptions might be granted. Part III will provide a brief conclusion.

### II. Teaching Morality and Sex Education in Public Schools

The issue of teaching morality and sex education in public schools involves both

Establishment Clause and Free Exercise Clause concerns. The free exercise concerns arise when parents seek exemptions to sex education instruction or other similar programs, or even removal of such programs from the general curriculum.3 The establishment issues arise when schools teach abstinence-only programs that have an uncanny resemblance to the religious views of certain groups; sometimes, a direct connection to religious entities which developed the curricula.4 Another area where establishment issues arise is when schools seek to teach morality directly through the curriculum or school-sponsored programs.<sup>5</sup> Most broad morality programs are secularly based and don't run afoul of the Establishment Clause, but some either have a theological connection to a given religion or religions, or use clergy in a manner that gives rise to Establishment Clause concerns.<sup>6</sup> The meaning of religion should be at the core of Establishment Clause analysis in sex education cases. The next section will focus heavily on the establishment issues. Free exercise issues raise the "religion" question in a more traditional way and thus will be addressed after discussing the establishment questions.

#### 1. The Establishment Clause

Abstinence-only programs present a number of interesting questions. For instance, few of these programs advertise themselves as religious, but are they "religion" for purposes of the Establishment Clause? Some scholars have certainly argued that they are. The reasoning behind this school of thought is that while most sex education programs teach abstinence in addition to other forms of protection, some abstinence-only programs ignore or misstate information on contraception that would help prevent unwanted teenage pregnancies and the spread of sexually transmitted diseases ("STDs").8 Thus, the argument goes, such programs cannot serve the goal of promoting children's health and welfare; some argue that in fact, such programs may promote even greater spread of STDs.9 Moreover, some of

these programs openly demean homosexuality or discuss it only in the context of AIDS or other STDs.<sup>10</sup> This can have a negative impact on the mental health of gay youth and on the perceptions of their classmates.<sup>11</sup> However, while these may be powerful arguments for the shortsightedness and perhaps naiveté of most abstinence-only programs, these arguments do not necessarily support the argument, without more evidence, that such programs are in fact religious.

The "more" comes in the form of the organizations and interests that promote abstinence-only programs and, sometimes, the statements of school boards that adopt them and school officials that execute them. 12 In some cases, the programs' treatment of homosexuality and other sexual issues seem to directly reflect conservative Christian theology. 13 The problem with defining "religion" in this context is that despite the evidence that some, if not most of these programs are religiously motivated, religious motivation does not necessarily make a given program religious. If every policy that had some religious motivation were an establishment of religion, religious motivation would render everything that stems from it religion.<sup>14</sup> The Court, wisely, has treaded carefully on this issue, distinguishing situations where religious purpose was obvious from those where religion may have been just one of a number of motivating factors. 15 Under this method of comparison, the abstinence-only programs that are easily connected to religion would be unconstitutional (even though in actuality, religious purpose becomes a substitute for "religion" in such cases). 16 For the remainder of the programs, however, the underlying question of whether such programs constitute "religion" remains unanswered.

Perhaps the best analogy to this situation comes from Justice Stevens' opinion concurring in part and dissenting in part in Webster v. Reproductive Health Services.<sup>17</sup> In the opinion he discusses the nature of the preamble to a Missouri statute regulating abortion, which stated that life begins at conception and that conception occurs at fertilization.<sup>18</sup> Stevens' discussion focuses on the purpose of this preamble and thus is consistent with a long

line of legislative purpose analysis in the Establishment Clause context. Justice Stevens ultimately concludes that even without evidence of legislative purpose, the correlation between the legislative statement in the preamble and the tenets of certain religious doctrines, and the lack of any other plausible secular basis for the statement, is enough to render the preamble unconstitutional under the Establishment Clause; 19 i.e., he implies that the preamble's assertion is religious despite the lack of any express citation to religious sources. The definition of religion set forth in this support Justice article would Stevens' conclusion and suggest that some of the abstinence-only programs are also inherently religious, even though they may not clearly explain why. The natural question is how these things constitute "religion" for Establishment Clause purposes, and how the definition of religion is affected by secular purpose analysis. The latter question can be easily answered: while there may be some factual, or even conceptual, overlap in the definition of religion and secular purpose analysis, the recognition that something constitutes religion is not based on secular purpose analysis. This will become clearer through the following example.

Assume that the public schools in a small town dominated by conservative Christian values teaches a form of abstinence sex education that favors abstinence over the alternatives, but also teaches about contraception and abortion because of fear that lack of such teaching might lead to STDs or unwanted pregnancies among those who stray from "community values." Moreover, homosexuality is barely mentioned in the program, but homosexuals are not disparaged. Community members and school board members discussed the form of the program in open meetings. Many expressed a preference for a religiously based abstinence-only program, and all expressed their support for community religious values. In the end, however, the voices favoring a broader abstinence program including the abovementioned factors won out. There would seem to be a religious purpose on the part of the schools for choosing even the broader abstinence program over general sex education curricula, and a court might

conclude there was no secular purpose (although a court might also conclude that religion was just one factor and that concern for the health and safety of the students was an overriding factor given the end result of the community discussion).

Before reaching the purpose question, however, one would need to determine whether the program could even be considered religion or religious. If not, there is no Establishment Clause issue in the first place. The program does seem to have some theological connection to the dominant faith community in the area given its focus on abstinence, but at the same time it teaches material that would seem to go against that same theology. Is some theological connection enough to make this program subject to Establishment Clause scrutiny? Keep in mind that the answer to this question is simply a gatekeeping answer, because even if the program were considered within the realm of religion for Establishment Clause purposes, it may yet be found constitutional. The problem in the abstinence-only context is that finding the program to be religiously affected may influence the Establishment Clause analysis in a way that a similar finding may not in other contexts. The example above is a close call, but the fact that the program has some connection to core theology is not enough to make it "religion" given the other factors. Yet, most abstinence-only programs do not share mitigating factors with the hypothetical and thus many abstinence programs could be subject to Establishment Clause scrutiny. There may be a "chicken and the egg" element here, because the hypothetical situation would probably survive Establishment Clause scrutiny under the facilitation test discussed later in this article (and under the Court's current tests). Conversely, many abstinence-only programs would fail the facilitation test because they have too close a theological connection and facilitate certain religious views at the expense of student health interests.

In the end, the question of whether abstinence-only programs violate the Establishment Clause cannot sensibly be answered without addressing the question of what constitutes "religion" under that clause. The

substitute question used by the courts—whether there is a secular purpose for the program—may lead to results that are both under-inclusive and over-inclusive unless the "religion" question is addressed first. Once that question is addressed (assuming the answer is that the program could constitute religion) we can move on to the Establishment Clause inquiry relating to secular purpose—a question that may have already been partially answered in the analysis of whether the program is itself religion or religious.

One might view this issue as implicating the debate over "PARs" or publicly accessible reasons.<sup>20</sup> The PAR debate is longstanding and far beyond the scope of this article. In short, the debate involves the question as to whether government action that is religiously motivated should have a publicly accessible reason or reasons that nonbelievers might accept as a valid basis for the law.21 There are many sophisticated arguments from all sides in the debate. Some argue that publicly accessible reasons are unnecessary because religious motivation should not condemn a law that has secular benefits.<sup>22</sup> Others argue that such reasons are necessary because when the government acts based on religious beliefs (or other comprehensive belief systems) political discourse becomes inaccessible to those who do not subscribe to the comprehensive belief system or systems (and some may understand all too well the reasons for the law and thus be made to feel like outsiders in the political discourse).<sup>23</sup> Still others argue that such reasons—if used to cover over religious reasons—are problematic because they allow government to establish religious tenets without providing those who may challenge those tenets with the means to ascertain the government actors' "real" reasons.24 Finally, some argue that the whole debate is somewhat moot because at least when dealing with legislative action, there may be no way to glean the various motivations of government actors or purposes for given actions (and of course, even an individual legislator may be motivated by more than one factor, so PARs could exist for almost any government action depending on how it is viewed).

Thus, the search for PARs or religious motivation is a search into a tangled web of motivation that may be supported by little proof. This, of course, is a vast oversimplification of the many sophisticated positions in the debate, but for present purposes it will do because the abstinence-only question exists in a realm where in many cases there will be ostensible PARs, but at the same time many will reject that these reasons are publicly accessible because they make no sense in the "real world" and thus must be motivated by religion. In other words, the very question of whether there are PARs in this context is so highly contestable by both sides of the debate that one need not take a position in the broader PAR debate to address this issue.

Moreover, given the facilitation test's primary focus on the effects of government action, a law that was supported by PARs may still be religious and may still violate the Establishment Clause. It is conceivable, but less likely, that a law with no PARs may still be found constitutional given the way it actually functions. Still, if someone views abstinenceonly programs as irrational and naive responses to current trends among teens, it may be impossible to convince that person there is any plausible PAR for such a policy, especially in light of the demographics of those who usually support such programs. At the same time, if someone views abstinence as the only and best option for preventing teenage pregnancy and the spread of STDs, it would be hard to convince such a person—even if she were motivated by religious concerns—that there are no PARs for such a policy. So, for now, we will leave the PAR debate aside and focus on the basic question of whether abstinence-only programs violate the Establishment Clause.

In the Establishment Clause arena, the definition of religion is affected by the context of the given case. Thus, the meaning of religion in the context of a religious symbolism case may be different than in a government aid case. The one thing that the definition should include in all Establishment Clause cases is some core of theological principles or beliefs. These principles or beliefs do not necessarily need to be deity-related, but they should relate to questions that may best be expressed as

ultimate truths or goals. The abstinence-only context is a particularly tough one to address because of the variety of programs and circumstances underlying them, the seemingly obvious connection to religious beliefs, groups and values, and the reality that this connection may not always be easy to prove even where it exists. It is no secret that the biggest proponents of abstinence-only programs are certain faith groups.<sup>25</sup> It is also no secret that some of these groups have had a role in funding or developing some abstinence-only curricula and in lobbying the federal and state governments to support such programs.<sup>26</sup> Moreover, abstinence-only programs reflect the theological and social views of these groups regarding sex and sexual activity.27 The problem is that such programs may also be supported by people or groups with no religious affiliation or those who support such programs based on reasons other than their faith. This means that for such programs to qualify as religion under the Establishment Clause, there must be some more direct link to religious theology or religious entities.

This link can take several forms. One form might be programs that define life as beginning at conception or make other primarily theological claims regarding sexuality. Similar to Justice Stevens' argument in Webster, there is no serious secular reason to make the claim that life begins at conception or to disparage homosexuality in order to teach an abstinenceonly program.<sup>28</sup> Another form might include programs or curricula developed by a religious entity or by an individual with close connections to a religious entity or entities, which connections might include substantial funding. A third form would include programs that include direct religious references in the materials. A fourth might include programs enacted or administered against a background or context where it is apparent religion is being taught or favored (this analysis may cross over heavily with secular purpose and effects

If any or all of these links exist it is likely that the program will be "religious" and thus subject to challenge under the Establishment Clause. This is because these factors all point to a theologically or otherwise religiously

infused curriculum. Whether any one of these factors is met would be a question of fact and, for some factors, a question of degree. Of course, even if a program is religious for purposes of the Establishment Clause, it must still be analyzed under that clause to determine whether it violates the Constitution.

Under the Court's traditional tests, programs that involve primarily theological claims regarding sexuality, include direct religious references, or are created or adminstered against a background where religion is being taught or favored, would most likely be found unconstitutional under an endorsement or *Lemon* analysis because direct religious references or making theologically charged claims about sexuality will have a primary effect that advances religion, especially if the program could be run without those connections.<sup>29</sup> Depending on the facts, such a program may also lack a secular purpose.

Programs enacted or administered against a background or context where it is apparent religion is being taught or favored would most likely violate the secular purpose prong of Lemon.<sup>30</sup> Such a program may also violate the effects prong of Lemon. Significantly, recent decisions by the Court suggest that outside of the aid context, divisiveness-traditionally an element of the entanglement prong of Lemon remains a factor in some cases.<sup>31</sup> Thus, these programs may also involve entanglement based on divisiveness as well as institutional entanglement depending on how they are structured and administered. Programs that were developed or funded by a religious entity or those with close institutional connections to a religious entity or entities may be found unconstitutional under the secular purpose or entanglement prongs, but this would be a particularly fact sensitive analysis. Moreover, if a program developed or funded by a religious entity has religious content it would most likely violate one of the other factors. If not, the program is more likely to be constitutional.

Endorsement analysis would likely lead to similar conclusions because a reasonable observer would most likely view any of the above links as favoring the religious sect or sects that support the program and treating as outsiders those who do not share the

"community values" reflected in the program.<sup>32</sup> Thus, the purpose and/or effect of such programs would be to endorse religion.<sup>33</sup> This is, of course, a highly fact-sensitive analysis and some programs with similar content to constitutional programs may be found unconstitutional depending on the differences the programs and the surrounding the creation, institution, and administration of the programs.

Interestingly, under a coercion analysis the fact that a given program constitutes "religion" and that these classes are generally mandatory may support a claim for coercion. The classes would in essence be a formal religious exercise (or event) that dissenting students would in a real sense feel compelled (or literally be compelled) to attend.<sup>34</sup> It is possible that an opt-out option would save some programs under a coercion analysis, because students would not feel compelled to attend, but even with such a provision students may feel coerced to attend due to peer pressure.35 Thus, the specific facts of a given case and the court interpreting those facts would have a major impact on the coercion analysis where an opt out provision exists. Still, the fact that the program would likely violate the Lemon and endorsement tests would ordinarily be enough to deem it unconstitutional.36

The facilitation test I have proposed elsewhere would suggest that many, but not all, of these programs are unconstitutional. The details of the test are spelled out in greater detail in MASTERS OF ILLUSION.37 For now it is enough to note that a program that takes a theological position, is developed by a religious entity, includes religious content and/or was enacted, or administered under created. circumstances favoring religion or specific religions, would substantially facilitate religion. Such a program would be using the public schools to promote a religiously based ideology, while at the same time denying students information that may help protect them from STDs or unwanted pregnancies because of that ideology.<sup>38</sup> Certainly, abstinence-only programs will involve the abovementioned factors. Those programs that do not substantially facilitate religion may be unwise and naive, but they would not be

unconstitutional. The effects of the program would be essential to this analysis, but the nature and creation of the program would also be relevant.

### 2. The Free Exercise Clause

The question that arises under the Free Exercise Clause is whether religious parents or students can demand an exemption to all or part of a general sex education curriculum based on religious objections to the content of these programs. This is often referred to as the ability to "opt-out" of the programs.<sup>39</sup> Schools, of course, have the ability to grant opt-out exemptions to religious students if they choose to do so,40 but the harder question is whether the Free Exercise Clause mandates such exemptions. Given the Court's decision in Employment Division v. Smith, 41 many have assumed that opt-out exemptions are not mandated by the Free Exercise Clause. The Smith Court held that when the government enacts and applies a law of general applicability (a school curriculum would be considered generally applicable) there is no duty to provide an exemption to that law under the Free Exercise Clause even if the failure to exempt places a substantial burden on the complaining party.<sup>42</sup>

However, the Smith Court created the concept of hybrid rights; situations where the free exercise right combines with other fundamental rights such as free speech or parental rights to mandate an exemption unless the government meets a higher burden (most likely a compelling government interest and narrow tailoring).43 Many scholars, including this author, believe that the hybrid rights idea was a means for the Smith Court to get around inconvenient precedent, namely Wisconsin v. Yoder<sup>44</sup> and West Virginia Board of Education v. Barnette.45 The hybrid rights concept is odd because the Court seems to be saying an otherwise inadequate free exercise claim can become adequate if mixed with another fundamental right, but this leaves two options. First, the independent fundamental right is also inadequate by itself to support relief in which case it is hard to understand how two inadequate constitutional claims can render each other adequate. Second, the hybrid right

is itself adequate to grant relief in which case the free exercise claim is unnecessary. 46 The *Smith* analysis is itself problematic and the hybrid rights concept seems to be an attempt by conservative judicial activists to cover their activist tracks just as an earlier liberal activist Court attempted to do in *Sherbert v. Verner* when it failed to adequately address *Braunfeld v. Brown*. 47 Whatever its purpose, the hybrids rights concept has been used inconsistently by lower courts. 48

The hybrid rights concept may have significant import in the context of requests for opt-out exemptions from sex education curricula. This question is still an open one, and the suggestions herein are simply that, suggestions as to how such a scenario might play out. Simply put, in some cases schools will have a duty to provide exemptions to allow students to opt out of sex education courses or portions of those courses. The basis for this assertion is the hybrid rights concept (as well as state Religious Freedom Restoration Acts ("RFRAs") and state constitutional provisions).

The question of defining religion arising in these cases is whether the asserted religious concern is "religious" or simply social. In most cases, the answer will be obvious (and will be religious or both religious and social); and in cases where it is less clear, courts have generally given great deference to complainants' assertions that a given concern is religious. I assert in MASTERS OF ILLUSION that such deference is appropriate in the Free Exercise Clause context where the definition of religion should be broader. There is at least a plausible free exercise concern in most cases involving a denial of an opt-out exemption to a sex education curriculum.

The quintessential hybrid rights in *Smith* were freedom of expression, and more relevant here, parental rights.<sup>49</sup> As mentioned above, the hybrid rights concept was used as a means by the *Smith* Court to distinguish *Yoder*, which itself involved a parental rights element;<sup>50</sup> although the *Smith* Court greatly overstated the relevance of that element to the outcome in *Yoder*.<sup>51</sup> Thus, if a parent asserts the right to direct the upbringing of his or her child combined with a free exercise right, courts may find a hybrid right exists and require the

application of a higher burden on the government such as the compelling interest test.<sup>52</sup> Of course, from a children's rights perspective such a recognition of parental will is not necessarily a good social outcome, but that question is beyond the scope of this article. In fact, even if a student sought the exemption on behalf of herself there is a plausible hybrid rights claim based on freedom of expression and/or association (although absent a free exercise claim such claims will generally fail in the public school context).<sup>53</sup> If a hybrid right is found, courts may apply the compelling interest test as developed in Sherbert v. Verner and its progeny.54 Thus, courts will look to see whether the failure to provide an exemption places a burden on the religious practices/faith of the complainant, whether the government has a compelling interest for denying the exemption, and whether the denial is narrowly tailored to meet that interest.55

Courts tend to be deferential complainants' claims that their religious beliefs or practices are burdened by a given governmental action.<sup>56</sup> In the case of opt-out exemptions, the parents could assert that sex education curricula undermine the religious values regarding family life, sex, and sexuality required by their faith and central to their family life, and that exposure to sex education might cause the child to act against his or her faith or question the values taught at home and by the faith.<sup>57</sup> This is a tricky argument because it may be hard to distinguish sex education from other portions of the secular curriculum here and courts may fear a slippery slope.<sup>58</sup> Still, other than perhaps the teaching of evolution, sex education is the only area where there is likely to be a viable claim that the lessons so directly conflict with family values and religious beliefs so as to burden religious freedom.

Next, the government would need to demonstrate a compelling interest for denying the exemption. The government obviously has a compelling interest in teaching sex education—i.e., the health and safety of students—but does that interest translate into one supporting the denial of an exemption? As in *Yoder*, this may be harder to show—especially if the parents or student can show that the religious

values relating to such issues are inculcated at home and that at the very least the student is being taught about abstinence. The state's burden would be harder still if the family can show that the rate of STD transmission and unwanted pregnancies are significantly lower in their faith community than among the general school population.<sup>59</sup> Still, the government could argue that exempting any child from sex education potentially exposes that child to health risks that could be passed to other children and that portions of the curriculum are not likely to be objectionable to the family.60 This will be a difficult decision for a court, but if the family can show (as did the families in Yoder) that the risk is minimal in their faith community and that alternative approaches are being taught at home, the school may lose on this element.61

Assuming the school does have a compelling interest in denying an exemption, the question remains whether denying the exemption is narrowly tailored to meet that interest.<sup>62</sup> It is possible that the student might be exempted only from the objectionable portions of the course or that the school could require the family to demonstrate that alternative, but religiously acceptable, lessons are being given to the child such as training in the risks of STDs, perhaps in the context of abstinence. If the parents can demonstrate that the state's interest is not served by denying the exemption to their child because of the low risk that the child would be involved in the types of activities the school is concerned about, the school would likely lose the narrow tailoring argument. In sum, there are many ways for parents to win under the compelling interest test and fewer ways for the school to win. Schools may want to consider simply exempting students to avoid a protracted legal battle. Of course, a strong argument for schools that do enter the legal fray is that there is no hybrid right involved under the facts of the given case.63

Hybrid rights claims are not the only basis for reviewing the denial of an opt-out exemption under the compelling interest standard. Many states have RFRAs which require that the compelling interest test be applied in all cases involving the denial of an

exemption from a generally applicable state or local law.64 Still other states provide for such a requirement under their state constitutions.65 So there may be many circumstances where the compelling interest test could be applied to the opt-out exemption. of an facilitation test would require an exemption in most of these cases because a failure to provide substantially interfere would religion.66 The broader policy issue of whether parents should have the right to demand an opt-out for a child is irrelevant to the religion clause question under the facilitation test except where the student objects to the parents' choices, in which case a court would have to determine under state law who has the right to make curricular decisions for the student. Of course, arguments from outside the religion clauses might be made to dispute the parental rights in opt-out cases, but these are beyond the scope of this article.

### III. Conclusion

Abstinence-only programs pose serious questions regarding the meaning of religion under the Establishment Clause. Some of these programs are "religious" and violate the Clause, and others are not-so either the Clause does not apply to them, or they will survive scrutiny under the Clause. As with most Establishment Clause issues the inquiry is fact-sensitive. Similarly, based on a fact sensitive analysis, some parents and students may have a constitutional right to opt-out of general sex education programs based on hybrid rights analysis. Still, in some cases schools may be able to show no hybrid right exists under the facts or be able to meet the compelling interest test most likely triggered by a hybrid rights claim.67 In the end, abstinence-only and sex education programs raise cutting-edge issues under both of the religion clauses and observers can expect a mixed bag of outcomes in cases involving these programs.

### **Endnotes**

DeGroff, and the AALS Section on Education Law. This article is based on a talk given at the Section on Education Law panel at the 2006 AALS Annual Meeting. It is also based on a portion of a chapter from Frank S. Ravitch, Masters of Illusion: The Supreme Court and the Religion Clauses (NYU Press, in progress-expected 2007). It has, however, been substantially modified from that text. The author would also like to thank Elijah Milne for his able research assistance. Of course, any errors are mine alone.

- <sup>1</sup> Frank S. Ravitch, Masters of Illusion: The Supreme Court and the Religion Clauses (NYU Press, in progress–expected 2007) [hereinafter Ravitch, Masters Of Illusion].
- <sup>2</sup> Id. at Chapter Ten; Frank S. Ravitch, Religious Objects as Legal Subjects, 40 Wake Forest L. Rev. 1011, 1071–84 (2005); Frank S. Ravitch, A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause, 38 Ga. L. Rev. 489, 544–73 (2004) [hereinafter Ravitch, A Funny Thing].
- <sup>3</sup> Cf. Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 530 (1st Cir. 1995) (parents' challenge to children's compulsory attendance at a sexually charges AIDS awareness assembly under Free Exercise Clause and a number of other constitutional provisions unsuccessful primarily because the challenge was after the fact and in regard to a one time event).
- <sup>4</sup> Gary J. Simson & Erika A. Sussman, Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate, 9 S. Cal. Rev. of L. & Women's Studies 265, 283 (2000).
- <sup>5</sup> Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 464 (5th Cir. 2001) (en banc,) on remand, Oxford v. Beaumont Indep. Sch. Dist., 224 F.Supp.2d 1099, 1100 (E.D. Texas 2002).
  - <sup>6</sup> Beaumont, 240 F.3d at 465.
- <sup>7</sup> Simson & Sussman, *supra* note 4, at 283–97.
  - <sup>8</sup> *Id.* at 268–70, 283–91.
  - 9 Id. at 286-90.
  - 10 Id. at 290.
- <sup>11</sup> Patricia Illingworth & Timothy Murphy, In Our Best Interest: Meeting Moral Duties to Lesbian, Gay, and Bisexual Adolescent Students, 35 J. of Soc. Phil. 198 (2004).
- <sup>12</sup> Cf. Julie Jones, Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education,

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35 Creighton L. Rev. 1075, 1084, 1094-95, 1105 (2002) (addressing organizations and interests that promote abstinence-only education).

<sup>13</sup> See Simson & Sussman, supra note 4, at 283–91.

<sup>14</sup> Cf. John Copeland Nagle, *Playing Noah*, 82 Minn. L. Rev. 1171, 1242–43 (1998) (using the example of some legislators' reliance on the story of Noah to support an endangered species law to demonstrate that religious motivation does not inherently invalidate a law under the Establishment Clause). This is, of course, consistent with the long line of cases that suggest religion must be a primary motivation for a law in order to run afoul of the Establishment Clause based only on that motivation itself.

15 See generally McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (addressing secular purpose analysis in context of Ten Commandments display by county lacking a valid secular purpose); Bd. of Educ. v. Mergens, 496 U.S. 226, 248–49 (1990) (upholding Equal Access Act despite evidence that some legislators may have had religious motivations in supporting it).

<sup>16</sup> By focusing on the purpose of the government actions, courts focus on motivations of government actors and sometimes on the structure of the government action. This is often a step removed from exploration of the question whether the government action itself constitutes religion regardless of the motivation for the act (although such motivation may be useful in analyzing the government action it is not by itself determinative).

Webster v. Reproductive Health Serv., 492 U.S. 490, 560 (1989) (Stevens, J., concurring in part and dissenting in part).

<sup>18</sup> *Id.* at 562–63.

<sup>19</sup> *Id.* at 566–69.

<sup>20</sup> See e.g. Stephen L. Carter, The Culture of Disbelief (1993); Kent Greenawalt, Private Consciences and Public Reasons (1995); Michael J. Perry, Religion in Politics: Constitutional and Moral Perspectives (1997); John Rawls, Political Liberalism (1993); Ronald F. Thiemann, Religion in Public Life: A Dilemma for Democracy (1996); Robert Audi, The Place of Religious Argument in a Free and Democratic Society, 30 San Diego L. Rev. 677 (1993); Christopher L. Eisgruber, Madison's Wager: Religious Liberty in the Constitutional Order, 89 Nw. U. L. Rev. 347 (1995); Lawrence Solum,

Constructing and Ideal of Public Reason, 30 San Diego L. Rev. 729 (1993).

note 20; Rawls, supra note 20; Perry, supra note 20; Rawls, supra note 20; Thiemann, supra note 20; Audi, supra note 20; Eisgruber, supra note 20; Solum, supra note 20; see also James P. Madigan, The Idea of Public Reason Resuscitated, 10 Wm. & Mary Bill Rts. J. 719 (2002).

<sup>22</sup> See Carter, supra note 20.

<sup>23</sup> See Madigan, supra note 21.

<sup>24</sup> See Ravitch, Masters of Illusion, supra note 1, at Chapter Ten; Cf. Perry, supra note 20.

<sup>25</sup> See Simson & Sussman, supra note 4, at 284–91.

<sup>26</sup> Jones, *supra* note 12 at 1085, 1094–95.

<sup>27</sup> Simson & Sussman, *supra* note 4, at 284–91.

<sup>28</sup> See Webster v. Reproductive Health Servs., 490, 566–69 (1989) (Stevens, J., concurring in part and dissenting in part) (making similar arguments about preamble to Missouri Law involving reproductive rights).

<sup>29</sup> See Simson & Sussman, supra note 4, at 293–97.

<sup>30</sup> Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294–95 (2000).

<sup>31</sup> McCreary County v. ACLU, 125 S. Ct. 2722, 2724 (2005) (addressing divisiveness of Ten Commandments display among other issues).

<sup>32</sup> See Simson & Sussman, supra note 4, at 293–97.

 $^{33}$  Id.

<sup>34</sup> Lee v. Weisman, 505 U.S. 577, 583 (1992).

<sup>35</sup> *Id.* at 593–94.

<sup>36</sup> School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 221 (1963) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.").

<sup>37</sup> Ravitch, Masters of Illusion, *supra* note 1, at Chapter 10; Ravitch, *A Funny Thing*, *supra* note 2, at 544–73.

<sup>38</sup> See Simson & Sussman, supra note 4, at 283–97

<sup>39</sup> *Id.* at 271–73 (using term "opt-out," but concluding that such exemptions are not mandated by the Free Exercise Clause).

- <sup>40</sup> *Id.* at 273, Employment Div. Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 890 (1990).
  - <sup>41</sup> Smith, 494 U.S. at 872.
  - 42 Id. at 890.
  - 43 Id. at 881-82.
- <sup>44</sup> Wisconsin v. Yoder, 406 U.S. 205 (1972); see the *Smith* Court's treatment of *Yoder*. *Smith*, 494 U.S. at 881–82, 881 n.1.
- <sup>45</sup> West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943).
- <sup>46</sup> Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566–67 (1993) (Souter, J., concurring).
- <sup>47</sup> See discussion of Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion) in the various opinions in Sherbert v. Verner, 374 U.S. 398 (1963); See also Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1121–22 (1990); Joanne C. Brant, Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers, 56 Mont. L. Rev. 5, 30 (1995).
- <sup>48</sup> Cf. William L. Esser IV, Note, Religious Hybrids in the Lower Courts: Free Exercise plus or Constitutional Smoke Screen? 74 Notre Dame L. Rev. 211, 228–29 (1998).
  - 49 Smith, 494 U.S. at 881 n. 1.
- <sup>50</sup> Id.; Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1121–22 (1990).
  - <sup>51</sup> McConnell, supra note 50 at 1121–22.
  - <sup>52</sup> Smith, 494 U.S. at 881-82.
- <sup>53</sup> Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267, 270, 273 (1988).
- Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 693, 703 (9th Cir. 1999); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 933 (6th Cir. 1991); Hicks v. Halifax County Bd. of Educ., 93 F.Supp.2d 649, 662–63 (E.D. N.C. 1999); but see, Kissinger v. Bd. of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (refusing to apply strict scrutiny to a hybrid rights claim without further guidelines from the Supreme Court).
- <sup>55</sup> *Id.*, *Vandiver*, 925 F.2d at 933; *Hicks*, 93 F. Supp. 2d at 66263.
- <sup>56</sup> Frazee v. Illinois Dept. of Emp. Sec., 489 U.S. 829, 833 (1989) (Free Exercise Clause protects an employee who refused to work on Sunday based on his belief that it was the Lord's day, even though he did not belong to established sect or church).

- <sup>57</sup> Cf. Hicks, 93 F. Supp. 2d at 657–63 (Explaining that only credible hybrid claims should allow for hybrid rights analysis, but suggesting that core parental religious beliefs and values can support applying hybrid rights analysis).
- <sup>58</sup> See Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699, 700 (10th Cir. 1998) (stating that compelling interest test may apply to proper hybrid rights claims, but rejecting parental argument that parental right to have home schooled children enroll in public school classes part time despite state funding formula that would not compensate schools for part time attendance was adequate to support a hybrid rights claim).
- <sup>59</sup> These arguments would parallel the type of findings that the *Yoder* Court used to support its decision. Wisconsin v. Yoder, 406 U.S. 205, 223–26, 235–36 (1972).
- <sup>60</sup> Such a showing may be akin to the Amish showing in *Yoder* that their community has a high employment rate, strong work ethic, and low rates of various social problems. *Id*.
- <sup>61</sup> See Simson & Sussman, supra note 4, at 273–79 (suggesting that such arguments should be successful).
- 62 See cases cited supra note 54, and accompanying text.
  - 63 Swanson, 135 F.3d at 694, 699-700.
- <sup>64</sup> Thomas C. Berg, Religious Liberty in America at the End of the Century, 16 J.L. & Religion 187, 202-04 (2001).
  - 65 Id.
- <sup>66</sup> Ravitch, Masters of Illusion, *supra* note 1, at Chapter Ten.
- <sup>67</sup> See cases cited supra note 54, and accompanying text.