

3-1-2016

The Opposite of Anarchy and the Transmission of Faith: The Freedom to Teach after Smith, Hosanna-Tabor, Obergefell, and the Ascendancy of Sexual Expressionism

Helen M. Alvaré

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>

 Part of the [First Amendment Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Helen M. Alvaré, *The Opposite of Anarchy and the Transmission of Faith: The Freedom to Teach after Smith, Hosanna-Tabor, Obergefell, and the Ascendancy of Sexual Expressionism*, 53 SAN DIEGO L. REV. 1 (2016).

Available at: <https://digital.sandiego.edu/sdlr/vol53/iss1/2>

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

The Opposite of Anarchy and the Transmission of Faith: The Freedom to Teach after *Smith*, *Hosanna-Tabor*, *Obergefell*, and the Ascendancy of Sexual Expressionism

HELEN M. ALVARÉ*

I.	THE LINKS BETWEEN SEX, MARRIAGE, PARENTING, AND FAITH	5
II.	<i>SMITH</i> , <i>HOSANNA-TABOR</i> , <i>OBERGEFELL</i> , AND A RIGHT TO TEACH THE NEXT GENERATION	12
	A. Smith.....	14
	B. Hosanna-Tabor	20
	C. <i>Title VII and the Religious Freedom Restoration Act</i>	25
III.	CONCLUSION	28

Sex, marriage, and parenting are leading issues of our time for reasons that philosophers, theologians, and historians will be sorting through for centuries. Meanwhile, the law has to immediately confront the consequences of their ascendancy; lawmakers are attaching an increasing variety of constitutional and statutory rights to sex, marriage, and parenting (hereafter

* © 2016 Helen M. Alvaré. Professor of Law, George Mason University School of Law. The author would like to thank Professor Steven D. Smith for organizing the symposium at which this paper was first presented and the comments of each of the professors there. I also thank the many professors at the George Mason School of Law Levy Forum for their helpful comments and research assistants Brian Miller and Lucy Meckley, as well as my family for their patience with my writing schedule.

SMP), which readily provoke contests about the scope of the First Amendment's Free Exercise and Establishment clauses.

Invisible to most Americans is the fact that SMP beliefs and practices are foundational to Judeo-Christian cosmology and anthropology. That is, they are inextricably bound up with many religions' understandings of the identity of God, the meaning of life, and how human persons are to interact with God and one another.

The growing intensity of legal and cultural preferences for particular ethical views about SMP and their power to shape citizens is matched by religions' growing difficulties transmitting their SMP-related beliefs and practices to the next generation. Legislators and judges require religious actors to conform to new legal and social preferences on SMP using laws framed as nondiscrimination guarantees; these include bans on hiring discrimination based upon sex (including pregnancy), sexual orientation, choices regarding "reproductive rights,"¹ and marriage. With the recent Supreme Court decision declaring a constitutional right to same-sex marriage² marriage and sexual orientation nondiscrimination laws are more likely than ever to be deployed in the context of elementary and secondary religious schools' employment decisions.³

While a growing number of parents choose to homeschool their children as one possible solution to this dilemma,⁴ this is an impractical solution for most, given so many families' needs for two working parents and parents' varying commitments and abilities. There is also the question of whether regulators will eventually mandate in the homeschooling context the same SMP standards mandated in the typical school environment.

It seems persuasive on its face that the religion clauses of the First Amendment preserve a scope of freedom for religious schools that would include their authority to require their instructors to support their religious

1. Reproductive Health Non-Discrimination Amendment Act of 2014, Council of D.C. A20-593 (D.C. 2015), *disapproved by* H.R.J. Res. 43, 114th Cong. (as passed by H.R., Apr. 30, 2015).

2. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

3. See, e.g., Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N. Y. TIMES (June 27, 2015), <http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html> [<https://perma.cc/2D9A-3ADU>] (reporting claims that employers discriminate against persons in same-sex unions). I have chosen to focus upon elementary and secondary schools versus higher education, given that more employment controversies, as well as religions' fears about their ability to transmit the faith, center upon the former schools.

4. THOMAS D. SNYDER & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STATISTICS, NCES 2015-011, DIGEST OF EDUCATION STATISTICS 2013, at 124 tbl.206.10 (2015), <http://nces.ed.gov/pubs2015/2015011.pdf> [<https://perma.cc/5NYG-YHXQ>] (growing from 2.2% of all U.S. students, or about one million children, in 2003 to 3.4%, or nearly two million children, in 2012).

mission in word and deed. Near the core of religious freedom, both historically and by current lights, is the government's duty to leave religious doctrine and teachers alone.⁵

On their face, however, leading Free Exercise cases and current statutory law do not make it readily apparent that the freedom to select teachers will be preserved. In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court provided only minimal rational basis protection for “neutral laws of general applicability,”⁶ a category into which employment nondiscrimination laws seem easily to fit. Furthermore, in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, the Court's holding might be interpreted to clearly stay governmental meddling in the decisions of religious employers only in the case of a narrowly defined category of “ministers”;⁷ it is not certain under this test that all teachers in religious schools will qualify. Title VII's—employment nondiscrimination law—exception for religious employers to make personnel decisions consonant with their religion⁸ is also insufficient in practice, given how judicial inquiries easily transgress the boundaries between law and religious doctrine, effectively imposing upon schools teachers whose choices contradict schools' religious missions.⁹ And the Religious Freedom Restoration Act (hereinafter RFRA),¹⁰ though not without teeth, is of uncertain use, given how the state can overcome even significant burdens on religious freedom by a demonstration of a “compelling state interest,” which appears to be an uncertain, often subjective determination.¹¹ A recent declaration by the ACLU—one of the groups that lobbied to pass RFRA—claims even that “any burden on the free exercise of religion imposed by an antidiscrimination statute is outweighed by the compelling state interest in eradicating discrimination and promoting

5. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702–05 (2012) (reciting the history of “[c]ontrovers[ies] between church and state over religious offices”).

6. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)), *as recognized in* *Holt v. Hobbs*, 135 S. Ct. 853, 859–60 (2015).

7. *Hosanna-Tabor*, 132 S. Ct. at 710.

8. 42 U.S.C. § 2000e-2(e) (2012).

9. See *infra*, Part IIC.

10. 42 U.S.C. §§ 2000bb to -4 (2012).

11. See *infra*, Part IIC.

equality.”¹² The ACLU has now officially withdrawn its support for RFRA.¹³

A closer look at both *Smith* and *Hosanna-Tabor* indicates, however, that both are amenable to protecting religious schools’ interests in determining their instructors. Neither case anticipated the laws and legal environment regarding SMP today, but both contain structural principles—*Smith*’s to avoid “anarchy” and *Hosanna-Tabor*’s to allow religions to transmit their faith¹⁴—which are better satisfied when the religious schools’ freedom to determine their faculty is preserved. Interestingly, Justice Kennedy’s majority opinion in *Obergefell v. Hodges*, while incorrectly reciting the full scope of the First Amendment’s Free Exercise guarantee, axiomatically recognized the rights of “religious organizations and persons” to “advocate” and “teach” “the principles that are so fulfilling and so central to their lives and faiths and to their own deep aspirations to continue the family structure they have long revered.”¹⁵ Even though Justice Kennedy’s very brief attention to First Amendment rights left out most of its contents, he grasped that part of its core consists of religious actors’ right to teach.

There are several avenues available for protecting religious schools’ freedom but none involving rote application of the summary holdings of *Smith* or *Hosanna-Tabor*. This shouldn’t surprise; little is simple where the religion clauses are concerned. Nevertheless, to provide free exercise and nonestablishment “on the ground” and to allow core tenets of Judeo-Christian traditions a genuine, not just theoretical, chance of reaching the next generation, the Supreme Court needs to find a way within the labyrinth of its current First Amendment jurisprudence to allow religious schools and parents the freedom to teach.

This Article will treat this question as follows. Part I will briefly consider the relationship between SMP issues and fundamental Judeo-Christian doctrines concerning God and the world. It will also treat difficulties today facing the task of conveying faith to the next generation without the

12. Brief for ACLU as Amicus Curiae Supporting Plaintiffs at 13, *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, No. 1:12-CV-122-RLM-RBC (N.D. Ind. Sept. 17, 2012) (“[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . [which] outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.” (second alteration in original) (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983))).

13. Louise Melling, Opinion, *ACLU: Why We Can No Longer Support the Federal “Religious Freedom” Law*, WASH. POST (June 25, 2015), http://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html [<https://perma.cc/SRC2-VWLL>].

14. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 698 (2012); *Emp’t Div. v. Smith*, 494 U.S. 872, 888 (1990), *superseded by statute*, RFRA, 42 U.S.C. §§ 2000bb to -4.

15. 135 S. Ct. 2584, 2607 (2015).

assistance of an integrated religious education. Part II will consider various interpretations of the leading cases and statutes governing religious freedom respecting employment and conclude that there are available interpretations which would allow religious schools authority over their own staff. The Conclusion frames the concrete solutions that these interpretations suggest.

I. THE LINKS BETWEEN SEX, MARRIAGE, PARENTING, AND FAITH

Most observers likely believe that Judeo-Christian teachings on SMP are only a matter of “rulemaking” about licit sexual behavior. The reality is quite different. Jewish and Christian scriptures instead teach that human sexual relations, procreation, and marriage are reflections of deeper, higher, and ultimate truths about the most central matters of each faith: the identity of God, God’s way of loving us, and God’s intentions for human love. I have treated this matter at much greater length elsewhere,¹⁶ but offer a brief summary here, in order simply to establish the religious quality of religious schools’ employment policies touching upon SMP. I will also consider here the difficulty of parents’ and religions’ passing on their faith in a culture and legal system increasingly teaching children that sexual expression is a human right, unrelated both to children and to marriage.

There is a great deal of religious scholarship on the links between human practices respecting SMP and divine realities. A new volume collecting the teachings of a dozen religious traditions, including Catholicism, Protestantism, and Judaism, makes the point succinctly and will be relied upon here: *Not Just Good, but Beautiful: The Complementary Relationship Between Man and Woman*.¹⁷

For Catholics, the deeper realities represented by SMP are “at the center of” the faith.¹⁸ In the spring of 2015, for example, reflecting *Genesis*

16. Helen M. Alvaré, *Religious Freedom Versus Sexual Expression: A Guide*, 30 J.L. & RELIG. (forthcoming 2015).

17. NOT JUST GOOD, BUT BEAUTIFUL: THE COMPLEMENTARY RELATIONSHIP BETWEEN MAN AND WOMAN (Steven Lopes & Helen Alvaré eds., 2015).

18. Maike Hickson, *Cardinal Rebukes Head of German Bishops: We Can’t Ignore Christ’s Teaching on Marriage*, LIFESITE, (Mar. 11, 2015, 11:38 AM), <https://www.life-sitenews.com/news/cardinal-rebuked-head-of-german-bishops-we-cant-ignore-christs-teaching-on> [https://perma.cc/9AG3-WPEJ].

language about the “image of God”¹⁹ being manifested in the “alliance of the man and woman,” Pope Francis observed that modern human beings’ failure to grasp the unique importance of the one-flesh human marriage between a man and a woman is mirrored in their difficulties understanding and loving God.²⁰ They will struggle especially to grasp that God is “three in one,” a Trinity of three persons in an eternal loving communion, like the mother, the father, and the child.²¹

It is also a core element of Catholic doctrine on marriage, from the time of St. Paul to today, that marriage between a man and a woman, open to children, is an irreplaceable way of understanding how God loves the human person and how we are to love one another.²² In his most current and environmental encyclical—*Laudato Si*²³—Pope Francis confirmed the relationship between Christian anthropology and cosmology and the importance to Christian belief of a proper understanding of both sexes, interrelated and welcoming children, “based on the fact that ‘[m]an too has a nature that he must respect and that he cannot manipulate at will.’”²⁴

Pope Francis’ more recent expressions of these ideas are brief but useful summaries of extraordinarily lengthy and theologically rich materials written by Saint John Paul II, not only before he became pontiff,²⁵ but also in hundreds of papal “audience” presentations, pastoral letters, speeches, and encyclicals.²⁶ Never before in the history of the Catholic church has

19. *Genesis* 1:27.

20. Pope Francis, Address to the General Audience at St. Peter’s Square: The Family-10. Male and Female (I) (Apr. 15, 2015) (transcript available at https://w2.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco_20150415_udienza-generale.html [<https://perma.cc/F3W8-JMHN>]) (“I wonder if the crisis of collective trust in God, which does us so much harm, and makes us pale with resignation, incredulity and cynicism, is not also connected to the crisis of the alliance between man and woman.”).

21. Pope Saint John Paul II, Apostolic Exhortation at St. Peter’s: *Familiaris Consortio* (On the Role of the Christian Family in the Modern World) paras. 19, 21 (Nov. 22, 1981) (transcript available at http://w2.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html [<https://perma.cc/B26E-9NP9>]).

22. *Ephesians* 5:31–32 (New American Standard) (“For this reason a man shall leave his father and mother and shall be joined to his wife, and the two shall become one flesh. This mystery is great, but I am speaking with reference to Christ and the church.”).

23. A letter addressed to the entire world on a matter of contemporary urgency—in the case of *Laudato Si*, regarding the natural and social environment of human beings.

24. Pope Francis, Encyclical Letter *Laudato Si*’ (On Care for Our Common Home) para. 155 (May 24, 2015) (quoting Pope Benedict XVI, Address to the German Bundestag, Berlin: The Listening Heart: Reflections on the Foundations of Law (Sept. 22, 2011) (transcript available at https://w2.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html [<https://perma.cc/5TLK-J7Y2>])).

25. See KAROL WOJTYLA, LOVE AND RESPONSIBILITY (Harry T. Willetts trans., Farrar, Straus and Giroux, Inc., 1981) (1960).

26. See Alvaré, *supra* note 16.

the relationship between human SMP choices and Catholic life and doctrine been so thoroughly explored.

Speaking from a Protestant perspective, perhaps the leading Scripture scholar of the contemporary era, Reverend N.T. Wright, has written that the *Genesis* account of the “man and the woman together [is] a symbol of something which is profoundly true of creation as a whole.”²⁷ He elaborates:

[This account is] itself a signpost pointing to that great complementarity of God’s whole creation, of heaven and earth together. . . . [T]he new Jerusalem is coming down from heaven like a bride adorned for her husband, [which is] the symbolism of marriage, of male and female coming together (only now it is the church which is the new Jerusalem, coming together with Christ as the bridegroom)[.]

Now it’s important to begin with that big picture. Because if we don’t, we can very easily imagine that what the Bible has to say about men and women, about marriage, about all that follows from and surrounds that complicated and rich and exciting topic, is simply a set of *rules*. And part of the problem of what we’ve done in the Western church for so long is that we have imagined that we are supposed to leave earth and go to heaven and that how we behave at the moment is simply in accordance with a bunch of rules that God happens to have given us. They might’ve been different; they happen to be like this. And according to how we measure up to them, or not, we may or may not get to heaven.

Now that isn’t just a parody [of the truth]. That’s actually a radical distortion of what the Bible is all about. As humans we are called to live as symbols of the creation, which was given at the beginning and which is to be consummated, as in *Revelation*, at the end.

. . . At the end of the great chapter we call *Romans* 8, one of the finest, most extraordinary passages in the whole of the New Testament, we find Paul expounding with delight and almost glee the sense that the whole creation is on tiptoe with expectation because it is going to be set free from its bondage of decay to share the liberty of the glory of the children of God. And what he’s talking about there is the imagery of birth, of new birth, which, of course, goes very closely with the imagery of marriage. These are signposts; they are pointers to the fact that this is what the whole creation was made for.

. . . [T]he vocation . . . of husbands and wives is not identical with, but is modeled on, and symbolizes, the relationship between Christ and the church[.]

. . . Every time I, as a priest, celebrate the marriage of a couple, I remind myself, and I frequently remind [the couple], that what we are doing is setting up a signpost. . . . [T]hat signpost [is pointing] to the fulfillment of God’s good

27. Humanum, *N.T. Wright*, YOUTUBE.COM (Nov. 18, 2014), <https://www.youtube.com/watch?v=AsB-JDsOTwE>.

purposes for creation, the coming together of all things in heaven and on earth in Christ.²⁸

Jewish theology is also grounded in its scriptures about SMP. In the words of one of the leading rabbis in the Western hemisphere, Rabbi Lord Jonathan Sacks:

[R]egardless of how we read the story of Adam and Eve—and there are differences between Jewish and Christian readings—the norm presupposed by that story is: one woman, one man. Or as the Bible itself says: “That is why a man leaves his father and mother and is united to his wife, and they become one flesh.

....

... What covenant did, and we see this in almost all the prophets, was to understand the relationship between us and God in terms of the relationship between bride and groom, wife and husband. Love thus became not only the basis of morality but also of theology. In Judaism faith is a marriage.

....

So that is one way of telling the story, a Jewish way, [including] . . . the way marriage shaped our vision of the moral and religious life as based on love and covenant and faithfulness, even to the point of thinking of truth as a conversation between lover and beloved. Marriage and the family are where faith finds its home and where the Divine Presence lives in the love between husband and wife, parent and child.

....

... [W]hen a man and woman turn to one another in a bond of faithfulness, God robes them in garments of light, and we come as close as we will ever get to God himself, bringing new life into being, turning the prose of biology into the poetry of the human spirit, redeeming the darkness of the world by the radiance of love.²⁹

In short, matters of the relationship between the man and the woman are unquestionably near the heart of the faith of several religious traditions very prominent in the United States. Yet in the United States today, notions about SMP entirely opposite to these religious traditions are increasingly proposed as somewhere near the core of freedom and happiness, and saturate the “messaging” reaching children and adolescents via news media, entertainment, advertising, and even law. In the accurate summary of First Amendment scholar Steven D. Smith, there has been an “impressive advance of a formidable political and cultural movement that marches under the banner of ‘equality’ and that bids to become a new

28. *Id.*

29. Jonathan Sacks, *Seven Key Moments in History: A Jewish Perspective*, in NOT JUST GOOD, BUT BEAUTIFUL *supra* note 17, at 20, 23, 25, 28, 32.

national orthodoxy with features reminiscent of those that characterized state-supported orthodoxies during the centuries of Christendom.”³⁰

There is a great deal of data supporting this conclusion, but several references can accurately sketch the situation. Perhaps the nation’s most prominent organization addressing the SMP beliefs and practices of young people, the National Campaign to Prevent Teen and Unplanned Pregnancy, issued a landmark report on the relationship between media consumption—Internet, TV, movies, advertisements, and magazines—and children’s and teens’ beliefs and practices concerning SMP. Its topline conclusions were broad: “Media is the air our teens breathe.”³¹ One study concluded that “less than one half of 1% of the [media young adolescents use frequently] included information about or depictions of sexually healthy behavior.”³² Children and youth “spend more time using media than they do engaged in any other activity.” Sexual content there “is prevalent and easy to access . . . even at very young ages.” “[Y]oung people can obtain sexual images, narratives, and information more easily than ever before [and] . . . can access more explicit pornography . . . than most of their parents have seen in their lifetimes.” “[S]exual portrayals in media are increasingly frequent and explicit.”³³ On the four major networks, 71% of programs exhibit sexual content in a given year, featuring 6.1 sex scenes per hour.³⁴ The presence of gay and lesbian characters is increasing.³⁵ In the top fifty grossing films even twenty years ago, there were thirty sex scenes.³⁶ The leading adolescent magazine doubled its sexual content

30. Steven D. Smith, *The Last Chapter?* 41 PEPP. L. REV. 903, 906 (2014).

31. MICHAEL RICH ET AL., NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, *MANAGING THE MEDIA MONSTER: THE INFLUENCE OF MEDIA (FROM TELEVISION TO TEXT MESSAGES) ON TEEN SEXUAL BEHAVIOR AND ATTITUDES* 5 (Jane D. Brown ed., 2008), https://thenationalcampaign.org/sites/default/files/resource-primary-download/media_monster.pdf [<https://perma.cc/NP7Y-HXLZ>].

32. Stacey J.T. Hust et al., *Boys Will Be Boys and Girls Better Be Prepared: An Analysis of the Rare Sexual Health Messages in Young Adolescents’ Media*, 11 MASS COMM. & SOC’Y 3, 4 (2008), *cited in id.* at 7 n.4.

33. RICH ET AL., *supra* note 31, at 30.

34. *Id.* at 23 n.43 (citing Kirstie M. Farrar et al., *Sexual Messages During Prime-Time Programming*, SEXUALITY & CULTURE, Summer 2003, at 7, 16).

35. Thirty-two primetime scripted series in 2014 featured gay and lesbian characters, up 20% from the prior year, according to GLAAD, 2014 WHERE WE ARE ON TV, at 4 (2014), <http://www.glaad.org/files/GLAAD-2014-WWAT.pdf> [<https://perma.cc/D3RP-BAUX>].

36. RICH ET AL., *supra* note 31, at 23 n.47 (citing Jana Bufkin & Sarah Eschholz, *Images of Sex and Rape: A Content Analysis of Popular Film*, 6 VIOLENCE AGAINST WOMEN 1317, 1329–30 (2000)).

between 1974 and 1994.³⁷ And in advertising directed to magazines with youth readership, there is a far greater likelihood of showing couples involved in sexual activity.³⁸

Pornography is also a growing factor. A great deal of children's exposure to pornography is uninvited. By 2005, among youths ten to seventeen years old, 42% had been exposed to online pornography, two-thirds of which was uninvited.³⁹

Studies consistently show that getting sexual information from the media is associated with "beliefs that increase the likelihood of having sexual intercourse" among adolescents.⁴⁰ "The kinds of media young people . . . use every day typically portray early, unprotected sexual behavior as normative, glamorous, and risk-free."⁴¹

While there is not agreement about the "pathways," such as cultivation, disinhibition, overwhelming real-life information, "superpeer" effect, and role modeling, linking exposure to sexualized media, to attitudes and behaviors regarding nonmarital sex, there is agreement that the influence is real.⁴² One should add to the column of media influence, frequent news reports claiming that religious believers regularly fail to observe their own religious teachings respecting SMP, on the grounds that they are irrational or even impossible.⁴³

Increasingly, governments endorse notions about SMP which directly contradict religions' respect for the categories of male and female, for the importance of the sex/procreation link, and for the unique importance of the male/female alliance. Moving away from prior values and positions

37. *Id.* at 22 n.35 (citing Laura M. Carpenter, *From Girls into Women: Scripts for Sexuality and Romance in Seventeen Magazine, 1974–1994*, 35 J. SEX RES. 158, 162 (1998)).

38. *Id.* at 22 n.39 (citing Tom Reichert, *The Prevalence of Sexual Imagery in Ads Targeted to Young Adults*, 37 J. CONSUMER AFF. 403, 408 (2003)).

39. *Id.* at 25 n.67 (citing Janis Wolak et al., *Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users*, 119 PEDIATRICS 247, 247 (2007)).

40. Amy Bleakley et al., *How Sources of Sexual Information Relate to Adolescents' Beliefs About Sex*, 33 AM. J. HEALTH BEHAV. 37, 47 (2009).

41. RICH ET AL., *supra* note 31, at 7 n.3 (citing Susannah Stern & Jane D. Brown, *From Twin Beds to Sex at Your Fingertips: Teen Sexuality in Movies, Music, Television, and the Internet*, in CHANGING PORTRAYAL OF ADOLESCENTS IN THE MEDIA, 1950 TO 2005, at 313, 335–38 (Patrick Jamieson & Daniel Romer eds., 2008)).

42. See Amy Bleakley et al., *Impact of Music, Music Lyrics, and Music Videos on Children and Youth*, 124 PEDIATRICS 1488, 1491 (2009); see also RICH ET AL., *supra* note 31, at 20, 22, 23 (summarizing studies showing exposure to sexual material through media increases adolescent sexual behavior).

43. See, e.g., Frank Bruni, Opinion, *Be Fruitful, Not Bananas: Pope Francis, Birth Control and American Catholics*, N.Y. TIMES (Jan. 24, 2015), http://www.nytimes.com/2015/01/25/opinion/sunday/frank-bruni-pope-francis-birth-control-and-american-catholics.html?_r=0 [https://perma.cc/H2DS-S9XR].

at great speed, governments and important private institutions are instead promoting and funding technological reproduction,⁴⁴ legal abortion and transgender surgeries,⁴⁵ celebrating nonmarital sex,⁴⁶ and supporting state recognition for same-sex unions as marriage. It is not clear how religious leaders and families would pass on their faith in this milieu, without consistent and persistent teaching in word but also in deed. This is part of the reason why religions found schools.

A typical Catholic school mission statement begins:

Catholic Schools form Catholic students to be full and practicing members of the Church, are centers of evangelization that call all to live fully the message of Jesus Christ, and are centers of academic excellence that rigorously prepare students to be life-long learners and contributing members of the global community.⁴⁷

Catholic schools are also increasingly likely to be sensitive to the difficulty of communicating about hot-button issues. The above mission statement continues: “Advances in technology . . . and the contradictions in societal values make the availability of a vibrant, relevant, rigorous Catholic education more important than ever. We must provide our young people with the tools and direction they need to function amid these challenges[.]”⁴⁸

This is also an important element in religious parents’ turning to religious schools. For example, one Catholic mother wrote:

We know we can’t do it alone. I’d like to believe that John and I can ensure that our children want to have a personal relationship with their Lord and Savior, that they’ll grow to value the Catholic faith, and that they’ll learn to treasure our Church. But I don’t consider that a given. Of course, John and I will do all we can, but I also know how children learn from others who are not their

44. Katie Falloon & Phillip M. Rosoff, *Who Pays? Mandated Insurance Coverage for Assisted Reproductive Technology*, 16 AM. MED. ASS’N J. ETHICS 63, 64–65 (2014), <http://journalofethics.ama-assn.org/2014/01/pdf/msoc1-1401.pdf> [<https://perma.cc/SA5Y-SFQ5>].

45. Katie J.M. Baker, *More Elite Colleges Are Covering Sex-Change Surgery and Other Transgender Student Needs*, JEZEBEL (Feb. 13, 2013, 10:50 AM), <http://jezebel.com/5983915/more-elite-colleges-are-covering-sex-change-surgery-and-other-transgender-student-needs> [<https://perma.cc/U74B-29CJ>].

46. Kurtis Lee, *Pro-Obamacare Ads Targeting Millennials Stir Controversy in Colorado*, DENVER POST (Nov. 12, 2013, 5:48 PM), http://www.denverpost.com/politics/ci_24509632/pro-obamacare-ads-targeting-millennials-stir-controversy-colorado [<https://perma.cc/5JP9-85RT>].

47. *Mission, Vision, Belief Statements*, ARCHDIOCESE OF PHILA., <https://web.archive.org/web/20141129130913/http://www.catholicschools-phl.org/about-oc/mission-vision-belief-statements> [<https://perma.cc/G28J-L6JF>] (last visited Feb. 5, 2015).

48. *Id.*

parents. Especially in today's world, we can use all the help we can get. And we are so grateful to be able to turn to Catholic schools.⁴⁹

It is obviously true that children will be more inclined to believe what their faith teaches and that it is “doable” in their lives if they have before them the example of teachers faithfully living out their religious beliefs with peace and integrity. This needs to be acknowledged as a matter of common sense: the person of the teacher importantly influences the student.⁵⁰ As a matter of long personal experience with the small community that is a religious school, I can report that teachers’ personal examples—exemplary or problematic—are a regular subject of conversations among parents and parishioners, focused on the question of their influence on impressionable children. In fact, the Supreme Court has regularly in the past acknowledged this dynamic as an element of its reluctance to permit states to provide funds directly to religious schools. In *Lemon v. Kurtzman*, for example, after describing the standards for teachers applicable in the Catholic schools at issue—requiring them to undertake “religious formation,” which is not “restricted to a single subject area,” and recognizing that the teachers are the “prime factor” for the schools’ success in transmitting the Catholic faith—the Court observed, “Given the mission of the church school, these instructions are consistent and logical.”⁵¹

The next Part turns to questions about whether the First Amendment religion clauses protect religions’ and parents’ rights to determine the character of their faculty.

II. SMITH, HOSANNA-TABOR, OBERGEFELL, AND A RIGHT TO TEACH THE NEXT GENERATION

There is something immediately persuasive about the proposition that the state should not determine the instructors or instruction at religious elementary and secondary schools. But, of course, few things in life are perfectly straightforward, especially those intersecting the First Amendment’s religion clauses. Where some would see such state action as an intrusion into internal religious affairs, others would see anarchy and scandal in

49. Rita Buettner, *10 Reasons We’re Choosing Catholic Schools for our Children*, CATHOLIC REV. (Jan. 30, 2013, 8:32 PM), <http://catholicreview.org/blogs/open-window/2013/01/30/10-reasons-were-choosing-catholic-schools-for-our-children#sthash.ZrjotXan.dpuf> [<https://perma.cc/V426-A684>] (emphasis removed).

50. See e.g., Alix Spiegel, *Teachers’ Expectations Can Influence How Students Perform*, NPR: MORNING EDITION (Sept. 17, 2012, 3:36 AM), <http://www.npr.org/sections/health-shots/2012/09/18/161159263/teachers-expectations-can-influence-how-students-perform> [<https://perma.cc/2S2Y-JSHV>].

51. 403 U.S. 602, 618 (1971) (citing *Handbook of School Regulations for the Diocese of Providence*).

allowing institutions that educate and employ citizens to ignore what they characterize as human rights of women or same-sex-attracted citizens. They would characterize a religious exemption as licensing religion to deny some citizens' dignity. They would find this particularly egregious in the sphere of education involving the formation of impressionable children.

These types of beliefs are already being brought to bear on religious schools' personnel and teachings via laws banning "discrimination" on the basis of sex or sexual orientation and "reproductive choices."⁵² Now that the Supreme Court has introduced same-sex marriage into the fifty states as a constitutional right,⁵³ schools can expect additional lawsuits on the grounds of marital or sexual orientation discrimination in connection with their refusals to hire or retain a person who enters into a same-sex union recognized by the state as a marriage.

Opponents of constitutional exemptions for religious schools believe that they have important Supreme Court precedents on the side of applying employment nondiscrimination laws to religious schools' teachers. They conclude that these are "neutral laws of general applicability" under *Smith*, such that the state can burden religion upon demonstrating that the law bears a mere "rational relationship" to a "legitimate state interest."⁵⁴ They also feel confident that most or all teachers in religious schools are not included within the ministerial exemption articulated by *Hobby Lobby* due to factors such as their titles or their formal job descriptions.⁵⁵

Yet their confidence feels misplaced. The prospect of the state imposing particular instructors into religious schools is historically suspect and clearly intrusive. It gives off more than a whiff of both Free Exercise and Establishment violations. It feels opposed to parents' rights to determine the education of their children and to citizens' right of association; as Justice Alito noted in his *Hosanna-Tabor* concurrence: "Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified

52. See Reproductive Health Non-Discrimination Amendment Act of 2014, Council of D.C. A20-953 (D.C. 2015), *disapproved by* H.R.J. Res. 43, 114th Cong. (as passed by H.R., Apr. 30, 2015).

53. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

54. See *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990), *superseded by statute*, RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)).

55. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2763 (2014).

to serve as a voice for their faith.”⁵⁶ At the same time, despite the intuition that government’s choosing the faculty of religious schools seems constitutionally problematic, the language of *Smith* and of *Hosanna-Tabor* does not give sure comfort to religious freedom claimants, as already noted above.

There is a great deal of scholarship already discussing potential limits to *Smith*,⁵⁷ the borders between *Smith*- and *Hosanna-Tabor*-type cases,⁵⁸ and the scope of *Hosanna-Tabor*’s ministerial exemption.⁵⁹ This essay will consider rather how these prior cases failed to anticipate current laws imposing a new set of SPM ethics on religious educational institutions. Due to the particular questions before them, while these cases’ summary holdings appear to spell trouble for religious schools, their animating principles provide hope. Such principles include *Smith*’s overriding concern to avoid anarchy and *Hosanna Tabor*’s apprehension to allow religions effectively to pass their faith on to the next generation.

A. *Smith*

It would appear from a summary of the Supreme Court’s decision in *Smith* that religious schools enjoy little constitutional protection from laws affecting their rights to employ teachers who believe in and live the schools’ SMP mores. The *Smith* majority stated: “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁶⁰ Following *Smith*, in *Lukumi Babalu Aye v. Hialeah* the Court held that laws are not neutral and generally applicable if they have a facially apparent intent to target religion or contain exemptions for

56. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring).

57. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

58. See, e.g., Rosalie Berger Levinson, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment After Hosanna-Tabor*, 11 STAN. J. C.R. & C.L. 89, 106–09 (2015); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1233 (2014).

59. See, e.g., Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J. L. & PUB. POL’Y 839 (2012); Katherine Hinkle, Note, *What’s in a Name? The Definition of “Minister” in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 34 BERKELEY J. EMP. & LAB. L. 283, 336–38 (2013).

60. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)), *superseded by statute*, RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2012)).

others which indicate a preference for nonreligion over religion.⁶¹ Employment nondiscrimination laws do not appear to have *Lukumi*-type flaws. It would seem, therefore, that they may burden religion unless they fail a “rational basis” standard, which they are highly unlikely to do.

But *Smith*’s holding rests upon a rationale that does not easily apply to employment laws affecting SPM. First, the *Smith* majority feared that if the prior free-exercise-protective standard—the “compelling state interest” or *Sherbert v. Verner*⁶² test—was applied to all facially neutral laws, “anarchy” would ensue.⁶³ Plumbing this concern as it was further explicated in *Smith*, it appears that the Court was referring to criminal behavior, or, at the very least, to behavior easily agreed to be socially problematic.⁶⁴ The SPM behavior at issue in the religious schools context, however, is quite different. It involves behavior widely documented to be socially useful. In fact, there is nearly a consensus in the social science research today, that the behaviors embraced by most religious traditions—and their associated family forms—produce the best emotional and educational results for children, as well as less crime and lower social costs generally.⁶⁵ The SMP teachings and behaviors promoted by religious schools, in fact, were cherished and promoted nearly universally by both private and state actors until quite recently. They include sexual abstinence outside of marriage between a man and a woman and respect for the rights of children to be born of the relationship between their married parents so that they have the best possibility of knowing and being reared by both of their parents.⁶⁶

Second, religious schools would be seeking an exemption respecting only persons who voluntarily seek employment with the religious institution, who, in turn, will influence children whose parents who have voluntarily entrusted them to the religious institution, knowing about and even seeking the message of sexual integrity in word and deed that the school can provide.

61. 508 U.S. 520, 542, 545–46 (1993).

62. 374 U.S. 398, 406 (1963).

63. *Smith*, 494 U.S. at 888.

64. *See id.*

65. MARY PARKE, CTR. FOR L. & SOC. POL’Y, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? 1, 8 (2003), <http://www.clasp.org/resources-and-publications/states/0086.pdf> [<https://perma.cc/4U3X-QW9G>].

66. *See discussion supra*, Part I.

Let us consider the argument that the *Smith* decision was driven by a fear of anarchy with elements quite inapposite to the situation of a religious school choosing personnel according to their mission.

Preliminarily, it is important to note that *Smith* acknowledged that its ungenerous reading of the First Amendment was only a *permissible*, not a *required* reading.⁶⁷ The Court therefore *invited* the questions of what

67. Regarding the fact that *Smith*'s reading was not the only permissible one, the Court's treatment of First Amendment in that case says only:

[Plaintiffs] assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). *As a textual matter, we do not think the words must be given that meaning.* It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. *It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.*

Smith, 494 U.S. at 878 (emphasis added) (comparing *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139 (1969) (upholding application of antitrust laws to press), with *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250–51 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level)). Justice O'Connor's *Smith* concurrence agrees that the majority's new rule is not required by the text of the First Amendment, observing the following:

[This amendment] does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice.

Id. at 894 (O'Connor, J., concurring). First Amendment scholar Michael McConnell confirms that the *Smith* majority stated at *most* that its reading of the language of the Free Exercise Clause was only a "permissible," not a conclusive, reading:

The Court does not deny that the broader reading, which would require exemptions, is likewise a "permissible" reading. Indeed, the Court does not even deny that it is the *more obvious and literal* meaning. It is sufficient, according to the Court, that the words are not ironclad. Having determined that the words are not dispositive, the opinion then turns to the Court's precedents and the text plays no further role in the decision.

See McConnell, *supra* note 57, at 1115. Further buttressing the conclusion that its reading of the First Amendment was not the only one and that something else drove the Court to its conclusion is the fact that the *Smith* rule is not commanded by prior decisions. The *Smith* majority even acknowledged that prior decisions employed a strict scrutiny analysis to evaluate neutral laws of general applicability that burdened religion. See *Smith*, 494 U.S. at 884. Justice O'Connor's *Smith* dissent offered substantial detail: the Court had "disregarded" a prior and lengthy set of cases in which the Court had "requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Id.* at

drove its conclusion—especially given its acknowledgement that it had previously applied a more free-exercise-protective rule⁶⁸—and of what protection is due religious freedom when anarchy is *not* the likely result of granting a religious exemption.

That it was the fear of anarchy that drove *Smith*'s conclusion seems clear on the face of the opinion. As constitutional scholar Michael McConnell has written:

The deepest and most important theme of the *Smith* opinion is its perception of a conflict between free exercise exemptions and the rule of law. . . . [*Smith*] states that to apply the compelling interest test rigorously “would be courting anarchy” and warns against making “each conscience . . . a law unto itself.”⁶⁹

There is also a great deal of language in *Smith* anguishing over the potential for anarchy were religious freedom given generous play. At the end and rhetorical climax of *Smith*, the Court stated:

We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable. . . . The government's ability to enforce generally applicable prohibitions of *socially harmful conduct*, like its ability to carry out other aspects of public policy,

894–95 (O'Connor, J., dissenting) (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136, 141 (1987); *United States v. Lee*, 455 U.S. 252, 257–58 (1982); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *McDaniel v. Paty*, 435 U.S. 618, 626–29 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Gillette v. United States*, 401 U.S. 437, 462 (1971); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Bowen v. Roy*, 476 U.S. 693, 732 (1986) (O'Connor, J., concurring in part and dissenting in part); *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 639 (1943)).

As Professor McConnell points out:

Justice Scalia, fourteen months before writing the *Smith* opinion, stated in a dissenting opinion in an Establishment Clause case that the Court had “held that the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws,” listing four illustrative cases, including *Yoder*. Three of the five Justices in the *Smith* majority signed their names to this statement.

McConnell, *supra* note 57, at 1121 (citing *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting)).

68. *Smith*, 494 U.S. at 884.

69. McConnell, *supra* note 57, at 1149 (quoting *Smith*, 494 U.S. at 888, 890). McConnell further observes that this “rationale” is illogical because it would undercut the Court's simultaneous approval of legislative exemptions; neglects to credit government's continuing role in policing the boundary between acceptable and unacceptable exemptions, via the compelling state interest and least restrictive means analyses; and fails to credit or understand the historical documents and rationales grounding the First Amendment. *Id.* at 1148–52.

“cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” . . . *To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling”—permitting him, by virtue of his beliefs, “to become a law unto himself,” . . . contradicts both constitutional tradition and common sense.*

. . . But using [the compelling state interest requirement] as the standard that must be met before the government may accord different treatment on the basis of race, . . . or before the government may regulate the content of *speech*, . . . is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; *what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.*⁷⁰

The Court continued, spelling out a parade of horrors that might be unleashed were strict scrutiny adopted as the constitutional test:

Moreover, if “compelling interest” really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. *Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.* Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of **conduct** that does not protect an interest of the highest order. *The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service [Gillette v. United States] . . . to the payment of taxes [United States v. Lee]; . . . to health and safety regulation such as manslaughter and child neglect laws [Funkhouser v. State], . . . compulsory vaccination laws [Cude v. State], . . . drug laws [Olsen v. Drug Enforcement Administration], . . . and traffic laws [Cox v. New Hampshire]; to social welfare legislation such as minimum wage laws [Tony and Susan Alamo Foundation v. Secretary of Labor], . . . child labor laws [Prince v. Massachusetts], . . . animal cruelty laws [Church of the Lukumi Babalu Aye Inc. v. City of Hialeah and State v. Massey] . . . environmental protection laws [United States v. Little], . . . and laws providing for equality of opportunity for the races [Bob Jones University v. United States]. . . . The First Amendment’s protection of religious liberty does not require this.*⁷¹

70. *Smith*, 494 U.S. at 884–86 (emphasis added) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988); *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

71. *Id.* at 888–89 (emphasis added) (citing *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

It should also be noted that other strong candidates for the role of “*Smith*’s controlling rationale” are absent, as several scholars have noted:⁷² the *Smith* Court, for example, chose only a possible—but-permissible reading of the First Amendment; the Court acknowledged that it had previously applied the stronger strict scrutiny analysis to neutral laws of general applicability burdening religion; and the opinion exhibited a lack of convincing prior First Amendment precedents.⁷³

Drawing upon the above excerpts, therefore, we can see also that the *Smith* majority concluded that narrow religious freedom protection was warranted and anarchy more likely, when a religious actor seeks an exemption from a criminal law, or at least a law banning readily recognizable *harmful* behavior, unleashed upon the public.

The *Smith* opinion highlighted the character of the law before it as “criminal” or “socially harmful” several times.⁷⁴ It stated that respondents were “contend[ing] that their religious motivation for using peyote places them beyond the reach of a *criminal* law.”⁷⁵ It observed that “[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable *criminal* law.”⁷⁶ And regarding its prior First Amendment cases, it stated: “[w]hether or not the decisions are that limited, they at least have nothing to do with an *across-the-board criminal prohibition on a particular form of conduct*.”⁷⁷

The majority also characterized the law from which religious actors sought exemption as banning “socially harmful conduct,” saying:

The government’s ability to enforce generally applicable prohibitions of *socially harmful conduct*, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” . . . To make an individual’s obligation to obey *such a law* contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling”—permitting him, by virtue of

72. See also McConnell, *supra* note 57, at 1149 (concluding that the Court’s concern with anarchy and its own disinclination to adjudicate the balance between religious freedom and states’ interests were the centerpiece of the majority’s reasoning in *Smith*).

73. *Smith*, 494 U.S. at 893–96 (O’Connor, J., concurring).

74. *Id.* at 884–85.

75. *Id.* at 878.

76. *Id.* at 884 (emphasis added).

77. *Id.* (emphasis added).

his beliefs, “to become a law unto himself,” . . . contradicts both constitutional tradition and common sense.⁷⁸

Justice O’Connor’s *Smith* dissent also highlighted the significance of there being a criminal law at the heart of the case. She acknowledged the majority’s hesitation to apply a compelling state interest analysis⁷⁹ to an “across-the-board criminal prohibition on a particular form of conduct” and emphasized that Oregon’s law was intended for the “prevention of harm” to citizens, saying, “Oregon’s criminal prohibition represents that State’s judgment that the possession and use of controlled substances, even by only one person, is *inherently harmful and dangerous*.”⁸⁰ Finally, she characterized *Smith*’s holding as follows: “where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply.”⁸¹

The *Smith* majority’s above-quoted list of “horribles” that religious exemptions could allow also supports the conclusion that for the most part, although not exclusively, the Court was concerned about opening the door to long-agreed intrinsically and socially disapproved behaviors, unleashed upon a wider public. The majority cited the ability to *avoid* military service, minimum wage, vaccines and the payment of taxes, and the ability to *commit* manslaughter, animal cruelty, child neglect, child labor, drug and traffic offenses, environmental pollution, and racial discrimination.⁸²

Of course, it has never been held that the *Smith* rule is inapplicable to any but a criminal law or a law banning only certain types of social harm. But this is language repeated often enough in the *Smith* opinion and tied logically enough to its fear of anarchy that it merits consideration in connection with any inquiry about the scope of *Smith*—particularly the line between the externally harmful acts with which it was concerned and the internally directed acts which remain the province of religions, according to the next major First Amendment decision, *Hosanna-Tabor*.

B. Hosanna-Tabor

In *Hosanna-Tabor*, a unanimous Court held that the Constitution required, as a matter of both the Free Exercise and Establishment clauses, a “ministerial exception” forbidding the state even from adjudicating an

78. *Id.* at 885 (emphasis added) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988); *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

79. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (applying a compelling state interest analysis).

80. *Smith*, 494 U.S. at 892, 905 (O’Connor, J., concurring) (emphasis added); *see id.* at 872 (majority opinion).

81. *Id.* at 892 (citation omitted).

82. *Id.* at 888–89 (citations omitted).

Americans with Disabilities Act (ADA) claim by a former employee teacher at a religious school.⁸³ The Supreme Court acknowledged in *Hosanna-Tabor* that the ADA was a neutral law of general applicability—the types of laws ordinarily subject to a *Smith* analysis—but distinguished the case from *Smith*:

It is true that the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote use, is a valid and neutral law of general applicability. But a church’s selection of its ministers is unlike an individual’s ingestion of peyote. *Smith* involved government regulation of *only outward physical acts*. The present case, in contrast, concerns government interference with an *internal church decision that affects the faith and mission of the church itself*. See [*Smith*] (distinguishing the government’s regulation of “physical acts” from its “lend[ing] its power to one or the other side in controversies over religious authority or dogma”). The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.⁸⁴

Discussions of *Hosanna-Tabor* regularly focus upon the scope of its ministerial exception.⁸⁵ A complete analysis of the opinion, however, indicates that the Court’s overriding concern was to preserve religion’s ability to pass the faith on to future generations. This theme not only emerges generally from the Court’s unanimous opinion but also best accounts for the distinction it drew between the *Smith* scenario and the situation before the *Hosanna-Tabor* Court.

Undoubtedly, the *Hosanna-Tabor* opinion regularly made observations directed narrowly to the impermissibility of state interference in the choice of ministers. It stated that: “Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”⁸⁶ It added that the “Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”⁸⁷ Referring to an early controversy over the state’s power to incorporate a church in Virginia, the Court referred to Madison’s veto statement about the state eschewing involvement “*comprehending even*

83. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012).

84. *Id.* at 707 (emphasis added) (citing *Smith*, 494 U.S. at 877).

85. See discussion, *supra* note 59.

86. *Hosanna-Tabor*, 132 S. Ct. at 702.

87. *Id.* at 703.

the election and removal of the Minister of the same.”⁸⁸ Reflecting on church property precedents, it observed that “[o]ur decisions in that area confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”⁸⁹ It summarized the problem before it as the “freedom of a religious organization to select its ministers”⁹⁰ and concluded its application of the law to the facts with the following: “Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit. . . . By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church’s freedom under the Religion Clauses to select its own ministers.”⁹¹

But many statements in the opinion are also concerned with the broader freedom of religions to control not only “religious offices”⁹² and the “selection of ecclesiastical individuals”⁹³ more generally, but also with their control over the means of preserving and passing on the religion to the next generation. These statements reference in an overlapping fashion the right to determine both personnel and doctrine. As noted above, the Supreme Court has regularly in the past acknowledged this overlap as an element of its reluctance to permit states to provide funds directly to religious schools. The Court feared that funding teachers constitutes funding doctrine. In *Lemon v. Kurtzman*, for example, after describing the standards for teachers applied to the Catholic schools at issue—requiring them to undertake “religious formation” upon students, which is not “restricted to a single subject area,” and recognizing that the teachers are the “prime factor” for the schools’ success in transmitting the Catholic faith—the *Lemon* Court observed: “Given the mission of the church school, these instructions are consistent and logical.”⁹⁴

The marriage of doctrine and personnel is still a very prominent feature of religious schools. A very recent report, for example, describes policies in one hundred twenty-five U.S. Catholic dioceses insisting upon every teacher’s subscribing to Catholic beliefs and practices as a prerequisite for

88. *Id.* at 703–04 (quoting 22 ANNALS OF CONG. 983 (1811), <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=022/llac022.db&recNum=489> [<https://perma.cc/4TQT-THMA>]).

89. *Id.* at 704.

90. *Id.* at 705.

91. *Id.* at 709.

92. *Id.* at 702.

93. *Id.* at 703 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), in 20 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY OF PHILADELPHIA 63, 63–64 (1909)).

94. 403 U.S. 602, 618 (1971).

employment.⁹⁵ That it is “lay” teachers who carry this out can hardly be doubted. Among all U.S. Catholic schools today, for example, only 2.8% among approximately 151,000 teachers are clergy or avowed religious.⁹⁶ Catholic educational authorities both at the Vatican and in the United States recognize that the primary source for passing on the faith in Catholic schools is the teacher.⁹⁷

Hosanna-Tabor also cites *Watson v. Jones*, in which the Supreme Court held that religious freedom requires noninterference in matters of Church “discipline, or of faith, or ecclesiastical rule, custom, or law.”⁹⁸ *Hosanna-Tabor* reiterated an earlier opinion’s characterization of *Watson* as radiating “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”⁹⁹ It recalled another case in which “this Court explained that the First Amendment ‘permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.’”¹⁰⁰

95. DENISE DONOHUE & DAN GUERNSEY, CARDINAL NEWMAN SOC’Y, FAITH AND MORALS LANGUAGE IN CATHOLIC SCHOOL TEACHER EMPLOYMENT DOCUMENTS: A COMPILATION FROM DIOCESAN STATEMENTS, HANDBOOKS AND CONTRACTS 1 (2015), <http://www.cardinalnewmansociety.org/Portals/0/K12%20Pages/Resources/Faith%20%20Morals%20Compilation%20Donohue%20Guernsey%20062015.pdf> [https://perma.cc/R4WD-RYLY].

96. NAT’L CATHOLIC EDUC. ASS’N., U.S. CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS 2014–2015: THE ANNUAL STATISTICAL REPORT ON SCHOOLS, ENROLLMENT AND STAFFING 23 (2015), <https://www.ncea.org/data-information/catholic-school-data> [https://perma.cc/JJU9-D7PX].

97. JAMIE F. ARTHUR, CARDINAL NEWMAN SOC’Y, THE CALL TO TEACH: EXPECTATIONS FOR THE CATHOLIC EDUCATOR IN MAGISTERIAL TEACHING 2 (2015), <http://www.cardinalnewmansociety.org/Portals/0/K12%20Pages/Resources/The%20Call%20to%20Teach%20by%20Jamie%20Arthur%20June%202015.pdf> [https://perma.cc/B3TQ-6QZW]; *The Religious Dimension of Education in a Catholic School*, THE HOLY SEE (Apr. 7, 1988), http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19880407_catholic-school_en.html [https://perma.cc/E9PS-Z87E].

98. 80 U.S. 679, 727 (1871), *quoted in Hosanna-Tabor*, 132 S. Ct. at 704.

99. *Hosanna-Tabor*, 132 S. Ct. at 704 (citing *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952)).

100. *Id.* at 705 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976)).

Most importantly, the Court explicitly tied its recognition of a ministerial exemption to a religion's ability to teach its faith, to pass it on. Its most complete explication of this conclusion is as follows:

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, *depriving the church of control over the selection of those who will personify its beliefs*. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's *right to shape its own faith and mission through its appointments*. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits *government involvement in such ecclesiastical decisions*.¹⁰¹

The Court's application of the ministerial exemption to the plaintiff at issue in *Hosanna-Tabor* also foregrounded that it was the *teaching of the faith* that was the essential religious task with which the state should not interfere. Said the Court: the plaintiff had a "role in conveying the Church's message and carrying out its mission";¹⁰² she "transmit[ed] the Lutheran faith to the next generation."¹⁰³ When characterizing the interests on both sides of the debate—employment discrimination and religious freedom—the Court summarized religious groups' interests as determining "who will preach their beliefs, teach their faith, and carry out their mission. . . . The church must be free to choose those who will guide it on its way."¹⁰⁴ Finally, *Hosanna-Tabor* most effectively expressed its overarching interest in leaving religions alone to pass on their faith in the part of the opinion where the Court relied upon the Establishment Clause while distinguishing the instant case from *Smith*:

Smith involved government regulation of *only outward physical acts*. The present case, in contrast, concerns government interference with an *internal church decision that affects the faith and mission of the church itself*.¹⁰⁵

According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.¹⁰⁶

By relying upon the Establishment Clause, the *Hosanna-Tabor* Court underscored its conviction that religious institutions' personnel choices are internal policy; questions concerning links between government and internal

101. *Id.* at 706 (emphasis added).

102. *Id.* at 708.

103. *Id.*

104. *Id.* at 710.

105. *Id.* at 707.

106. *Id.* at 706.

religious operations are the type of First Amendment questions that nonestablishment principles adjudicate. The concurrence of Justices Alito and Kagan strongly emphasized this theme. In describing what they intended by supporting a “functional” notion of ministry, these Justices again and again underscored the function of passing on the faith, identifying as within the ministerial exemption personnel who engage in the “critical process of communicating the faith,” who “serv[e] as a messenger or teacher of its faith,” and who are “entrusted with teaching and conveying the tenets of the faith to the next generation.”¹⁰⁷ Whether or not they bear the title of minister is deemed irrelevant.¹⁰⁸

Obviously, the dichotomy expressed in *Hosanna-Tabor*—between outward physical acts and internal church decisions affecting the faith and mission of the church itself—is not always crystal clear. For example, the use of the illegal drug at issue in *Smith* might have both external effects and internal (sacramental) repercussions. At the same time, it is also easy to observe that the choice of religious schools’ instructors relevant to SMP is quite easily understood as “internal.” It does not affect citizens at large, but only citizens who have voluntarily requested employment at a religious school, and who regularly sign contracts containing morality or integrity clauses, as well as the children of adults who have also voluntarily selected a religious school.

C. Title VII and the Religious Freedom Restoration Act

There are two additional avenues for granting religious freedom protection to religious educational institutions: Title VII’s religious employer exception and various states’ Religious Freedom Restoration Acts, or state constitutions preserving a more religion-protective view. Neither is fully sufficient, considering what is at stake for religions and for parents.

Title VII bans employment discrimination on the basis of race, sex, religion, color, and national origin.¹⁰⁹ Religious employers have an exception permitting them to make employment decisions based upon religion.¹¹⁰ But several courts have rendered Title VII’s exemption weak by holding that—even in cases where it is indisputable that a particular teacher’s behavior violates the school’s religion *and* the agreement the teacher

107. *Id.* at 712 (Alito, J., concurring).

108. *See id.* at 713.

109. 42 U.S.C. § 2000e-2 (2012).

110. 42 U.S.C. § 2000e-2(e) (2012).

signed with the school—a court could determine that sex or pregnancy discrimination instead governed the personnel decision. In this way, a teacher who had contractually agreed to observe particular religious principles could win the legal right to be reinstated at a religious school.

Furthermore, courts have reached the conclusion that something other than a religious disagreement was the governing factor in a teacher's dismissal, by comparing a school's response to several employees' varying violations of religious principle, and evaluating whether these responses exhibit differential treatment by sex. In *Herx v. Diocese of Fort Wayne, Indiana*, for example, the court engaged in theological speculation about whether an employee's repeated use of an artificial reproductive technology was morally equivalent in the Catholic faith to another employee's being taken to a strip club for a pre-wedding party or equivalent to a hypothetical encounter in which a priest discovered that a male employee was using birth control.¹¹¹ Evaluating the similarities and differences between differing violations of a particular religion's moral code and a religion's response to each, however, is a strictly theological inquiry and thus outside of judicial competence. That Title VII is being interpreted to allow this type of inquiry renders Title VII an insufficient tool for safeguarding religions' need to appoint their own teachers.

RFRA is another possible solution for religious schools. RFRA requires even a neutral, generally applicable law that burdens religion to demonstrate a "compelling state interest" carried out by the "least restrictive means."¹¹² On its face, such a test should provide more religious freedom protection to schools than a "rational basis test." Yet even the "compelling state interest" test on its face can be applied arbitrarily,¹¹³ and there is no guarantee that the religious objection will survive; this is especially so considering the modern zeitgeist regarding same-sex marriage and contraception.

111. No. 1:12-CV-122 RLM, 2015 WL 1013783, at *1–*4 (N.D. Ind. Mar. 19, 2015).

112. 42 U.S.C. § 2000bb-1.

113. See Steven D. Smith, *Playing Around with Religion's Constitutional Joins*, 157 U. PA. L. REV. PENNUMBRA 123, 124 (2008).

In this diffuse discursive economy, rhetorical resources are available to support professionally *respectable* arguments for virtually any reasonably sane conclusion—and *compelling* arguments for none. . . . Still, at the end of the day, there just is not much to say—no sufficiently definite standards or authorities to appeal to—that could or should convince anybody who is not independently inclined toward a particular advocate's point of view.

. . . .
. . . Under the current conditions of religion-clause discourse, 'respectable but unconvincing' is probably as much any such normative argument can realistically aspire to be: an argument can fall short of that mark but cannot readily surpass it.

Id. at 124, 125, 132–33.

Schools *should* be able to survive a compelling state interest analysis, given how small is the state’s interest in vindicating same-sex marriage or other sexual expression rights within voluntary communities of faith where believers don’t create social scandal by refusing to accept such sexual ethics. It is rather widely understood and expected that they will not. And in fact, the behavior of students who obtain their sexual information from religious sources is not only healthier for them, but also for their communities.¹¹⁴ But Justice Kennedy’s soaring and highly emotional language in *Obergefell* about how the “dignity” and “self-definition” of LGBT persons is inextricably tied up with a marriage entitlement¹¹⁵ and the federal government’s recent equating of child-free sexual expression with women’s social equality¹¹⁶ make a “compelling state interest” contest more than a little uncertain. Not to mention that prior champions of RFRA are withdrawing their support,¹¹⁷ and more and more politicians and interest groups are consigning it a place with Jim Crow, while LGBT activists threaten to “firebomb” small businesses that won’t cooperate with same-sex weddings.¹¹⁸

There is also evidence that the Supreme Court might not engage in too searching an inquiry regarding “compelling state interests” when sexual expression is on the table. In *Burwell v. Hobby Lobby*, for example, the Court held that the government had not satisfied the “least restrictive means” prong of RFRA.¹¹⁹ However, it seemed willing in dicta to believe the federal government’s very generally expressed “compelling interest” in forcing a few religious objectors to provide free contraception on the grounds that U.S. women’s social and economic equality would otherwise be threatened,¹²⁰ even in the face of evidence that contraception use is

114. Bleakley, *supra* note 40, at 37 (“[L]earning about sex from . . . religious leaders was associated with beliefs likely to delay sex.”).

115. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–2607 (2015).

116. See Brief for Petitioners at 46, 49, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486, at *46, *49.

117. See Melling, *supra* note 13.

118. Shekhar Bhatia, ‘If a Child of Mine Was Gay I Would Love Them, But I Still Wouldn’t Go to the Wedding,’ DAILY MAIL (Apr. 7, 2015, 2:08 PM), <http://www.dailymail.co.uk/news/article-3028925/If-child-gay-love-wouldn-t-wedding-Defiant-Indiana-pizza-parlor-owners-won-t-cater-gay-reception-REOPEN-store-today-buoyed-donations-842-000.html> [<https://perma.cc/YU5N-78MB>].

119. *Burwell*, 134 S. Ct. at 2780.

120. *Id.* at 2779–80.

nearly ubiquitous already, and historically coincident with a dramatic rise in rates of single-mothering and women's poverty.¹²¹

III. CONCLUSION

It is difficult to locate simple and firm constitutional or statutory grounds for leaving religious schools free to determine the faculty who will transmit the faith to the next generation in an effective way. Considering, however, the important role that teachers play in the task of faith transmission, it is important to review potential grounds.

The campaigns by governments and interest groups to shift social mores concerning SMP reached their logical conclusions in record time. While just “yesterday” civil law and most religions agreed on the importance of linking sex with marriage with parenting, now the law insists instead that to honor these links is to disrespect women as well as citizens who identify as LGBT. The value of sexual expressionism—consensual sex unlinked to marriage and children—is ascendant. Religions offering education to a wide swath of citizens as a matter of service are now instructed to conform to the new ethic, even while many of its consequences have proved disastrous to the least-privileged Americans who have most adopted it.¹²²

As discussed at length above, it is incorrect to conclude that the *Smith* Court would disparage religious schools' claims to religious freedom respecting personnel, or immediately see the “compelling” quality of a governmental interest in forcing religious schools to obey nondiscrimination laws grounded in a new state-approved sexual ethic, parts of which are untested and parts of which can safely be classified as harmful. It is incorrect to conclude that *Hosanna-Tabor* is more interested in an employee's ordination than in his or her role passing on the faith. Still, extant RFRA and Title VII law has not reflected these interpretations of the leading modern religion cases. In order to protect the integrity and freedom of religious teaching, the Court should consider more specific solutions than it has offered in the past.

A few possibilities are as follows: the most efficient option may be a blend of Justice Thomas's recommendation in his *Hosanna-Tabor*

121. Helen M. Alvaré, *No Compelling Interest: The “Birth Control” Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 398-405, 408-11, 426 n.238 (2013) (citing statistic from Jo Jones et al., *Current Contraceptive Use in the United States, 2006–2010, and Changes in Patterns of Use Since 1995*, NAT'L HEALTH STAT. REP., Oct. 18, 2012, at 16 tbl.3, <http://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf> [<https://perma.cc/7P27-ML8G>]).

122. CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA 1960–2010*, at 149–67 (2012).

concurrence- to rely upon the religion's own designation¹²³—with my recommendation to interpret that case as upholding religions' right to pass on the faith. To limit the Court's exemption to a more narrowly defined category of ministers or to overlook the very real role that teachers play in transmitting the faith, effectively closes off one of the few avenues that religions and parents realistically possess against the overwhelming influence of media and government.

A second possibility: perhaps the Court will have to enter into the dreaded “hybrid rights” territory so barely sketched out in *Smith*. There the Court acknowledged that it could not ignore the strong religious freedom protection given to the Amish parents in *Wisconsin v. Yoder*.¹²⁴ Perhaps simply to preserve *Yoder*, the *Smith* majority announced a category of “hybrid” rights cases in which the presence of two constitutional rights together—as distinguished from religious freedom alone—merited “compelling state interest” analysis.¹²⁵ While the hybrid-rights category has been regularly disparaged as unclear or even intellectually impossible, it has not been explicitly overruled.¹²⁶

Perhaps religious schools' situation today respecting SMP is close enough to *Yoder*—where both religious freedom and parents' rights to educate their children are at stake—that the category could be used again. *Smith* said the following:

[T]he First Amendment [has barred] application of a neutral, generally applicable law to religiously motivated action . . . involv[ing] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, . . . *Pierce v. Society of Sisters* . . . [the right of parents] to direct the education of their children, [and] *Wisconsin v. Yoder*, . . . (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).¹²⁷

123. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710–11 (2012).

124. 406 U.S. 205 (1972).

125. See *Emp't Div. v. Smith*, 494 U.S. 872, 881–82 (1990), *superseded by statute*, RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 200bb to -4 (2012)).

126. Steven H. Aden & Lee J. Strang, *When a “Rule” Doesn't Rule: The Failure of the Oregon Employment Division v. Smith “Hybrid Rights Exception,”* 108 PENN. ST. L. REV. 573, 605 (2003).

127. *Smith*, 494 U.S. at 881 (citing *Yoder*, 406 U.S. 205; *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

The *Yoder* opinion indicates that the Court accepted the proposition that to fail to allow parents the religious freedom they sought would be tantamount to allowing the state to “influence, if not determine, the religious future of the child.”¹²⁸ A similar claim might be made here by religious schools, particularly regarding the state’s new SMP ethics, which intersect quite foundational and wide-ranging aspects of Judeo-Christian religions.

128. *Yoder*, 406 U.S. at 232.