THE OPPOSITE OF ANARCHY AND THE TRANSMISSION OF FAITH: THE FREEDOM TO TEACH AFTER SMITH, HOSANNA TABOR, OBERGEFELL AND THE ASCENDANCY OF SEXUAL EXPRESSIONISM

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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 confront immediately the consequences of their ascendency; lawmakers are attaching an increasing variety of constitutional and statutory rights to sex, marriage and parenting (hereafter “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 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 discrimination in hiring based upon sex (including pregnancy), sexual orientation, choices regarding “reproductive rights,” and marriage. With the recent Supreme Court decision declaring a constitutional right to same-sex marriage, 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.

1 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 of Brian Miller and Lucy Meckley, and my family for their patience with my writing schedule.


While a growing number of parents choose to homeschool their children as one possible solution to this dilemma, 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 about whether regulators will eventually mandate in the homeschooling context the same SMP standards mandated in the typical school environment.

It seem 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 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.

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, Dept. of Human Resources of Oregon v. Smith, the Supreme Court provided only minimal (“rational basis”) protection for “neutral laws of general applicability”, a category into which employment nondiscrimination laws seem easily to fit. Furthermore, in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, the Court’s holding might be interpreted to clearly stay governmental meddling into the decisions of religious employers only in the case of a narrowly defined category of “ministers”; 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 religion 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. And the Religious Freedom Restoration Act (hereafter “RFRA”) – though not without teeth - is of uncertain use given how

given that more employment controversies, as well as religions’ fears about their ability to transmit the faith, center upon the former schools.


9 Title VII 42 U.S. C § 2000e-1(a); 29 U.S. C. § 621 et seq.

10 See infra ___.

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.12 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 equality.”13
The ACLU has now officially withdrawn its support for RFRA.14

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 faith – which are better satisfied when the
religious schools’ freedom to determine their faculty is preserved. Interestingly,
Justice Kennedy’s opinion for the majority in Obergefell v. Hodges,15 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.”16 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 in 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; nothing is simple in the complex legal realities continually
swirling around the religion clauses. Nevertheless, to provide free exercise and
nonestablishment “on the ground”, and to allow core tenets of Judeo-Christian
traditions a genuine not just a theoretical chance of reaching the next generation,
the Supreme Court needs to find a way within the labyrinth of their 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

12 See infra ____.
13 Brief of Amicus Curiae American Civil Liberties Union in Herx v. Diocese of Fort Wayne, (1:12-CV-
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.”)
14 Louise Melling, ACLU, Why we can no longer support the federal “religious freedom” law, The
Washington Post, June 25, 2015, at http://www.washingtonpost.com/opinions/congress-should-
amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-
c75ae6ab94b5_story.html.
16 135 S. Ct. at 2607.
concerning God and the world. It will also treat difficulties today facing the task of conveying faith to the next generation without the 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.

**Part 1: 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, 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.*

For Catholics, the deeper realities represented by SMP are “at the center of the faith.” In the Spring of 2015, for example, reflecting upon Genesis’ language about the “image of God” reflected 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. They will struggle especially to grasp

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20 Pope Francis, General Audience, St. Peter’s Square, April 15, 2015, at https://w2.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco_20150415_udienza-generale.html (“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.”)
that God is “three in one,” a Trinity of three persons in an eternal loving communion, like the mother, the father and the child.  

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. In his most current and environmental encyclical – 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 man too has a nature that he must respect and that he cannot manipulate at will”. 

Pope Francis’ more recent expressions of these ideas are brief but very useful summaries of extraordinarily lengthy and theologically rich expositions of these Catholic teachings, as explicated by Saint Pope John Paul II, not only before he became pontiff, but also in hundreds of papal “audience” presentations, pastoral letters, speeches and encyclicals. Never before in the history of the Catholic church has 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 are a symbol of something which is profoundly true of creation as a whole.” He elaborates:

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

Now it’s important to begin with that big picture. If we don’t, we can easily imagine that what the Bible has to say about men and women, about

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22 Ephesians 5: 31-32 (“For this reason a man shall leave father and mother and be joined to his wife, and the two shall become one flesh. This is a great mystery, but I speak in 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, *Laudato Si’* (On Care for our Common Home) at 155, citing Pope Benedict XVI, Address to the German Bundestag, Berlin (22 September 2011).
marriage, about all that follows from and surrounds that complicated and rich and exciting topic, is simply a set of rules. ... So people then begin to say: Well, these ‘rules’ might have been different; we know much better now than people did a long time ago; anyway perhaps the rules were just made up by human teachers who wanted to stop people enjoying themselves . . . and so on.

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

At the end of the great chapter we call Romans 8, one of the 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 tip-toe 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. ... He is treating the picture of a woman giving birth as a signpost, a pointer, to the fact that this is what the whole creation was made for.

... The vocation of husbands and wives is not absolutely identical with this, but it is modeled on it. It symbolizes and points on to the deeper and richer 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. ... Marriage is a sign of all things in heaven and on earth coming together in Christ. That’s why it is a tough calling. But that is why, also, it is central and non-negotiable.27

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:

[Regardless 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

27 Not Just Good but Beautiful, supra note _ at 89-100.
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.

[When 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.28]

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 national orthodoxy with features reminiscent of those that characterized state-supported orthodoxies during the centuries of Christendom.” 29

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.”30 One study concluded that “less than 1% of media young adolescents use frequently is sexually healthy.”31 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

28 Not Just Good but Beautiful, supra note __ at 23, 25, 28, & 32.
30 Jane D. Brown, ed., Managing the Media Monster: The Influence of Media (From Television to Text Messages) on Teen Sexual Behavior and Attitudes (National Campaign to Prevent Teen and Unplanned Pregnancy, 2008), 5.
31 Id. at 7.
information more easily than ever before...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.” 32 On the four major networks, 71% of programs exhibit sexual content in a given year, featuring 6.1 sex scenes per hour. The presence of gay and lesbian characters is increasing.33 Of the top 50 grossing films even 20 years ago, 30 featured sex scenes. The leading adolescent magazine doubled its sexual content between 1974 and 1994. And in advertising directed to magazines with youth readership, there is a far greater likelihood of showing couples involved in sexual activity. 34

Pornography is also a growing factor. A great deal of children's exposure to pornography is uninvited. By 2005, among youths 10 to 17 years old, 42% had been exposed to online pornography, two-thirds of which was uninvited.35

Studies consistently show that getting sexual information from the media is associated with “beliefs that increase the likelihood of having sexual intercourse” among adolescents.36 “The kinds of media young people use every day typically portray early, unprotected sexual behavior as normative, glamorous, and risk free.”37

While there is not agreement about the pathways linking exposure to sexualized media to attitudes and behaviors regarding nonmarital sex (e.g. cultivation, disinhibition, overwhelming real-life information, “superpeer” effect, role modeling), there is agreement that the influence is real.38 Increasingly, governments too endorse notions about SMP directly opposing 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 at great speed, governments and important private institutions are promoting and funding technological reproduction,39 legal abortion and transgender surgeries,40 celebrating nonmarital sex,41 and supporting state

32 Id. at 39.
33 Thirty-two primetime scripted series in 2014 featured gay and lesbian characters, up 20% from the prior year, according to GLAAD, Where we are on TV, at http://www.glaad.org/whereweareontv14.
34 NCTUP, supra note ___ at 22
35 Id. at 25.
36 Amy Bleakley, et al., How Sources of Sexual Information Relate to Adolescents' Beliefs about Sex, 33 Am. J. Health Behav. 37 (2009).
37 NCTUP, supra note ___ at 7.
38 Amy Bleakley et al, Impact of Music, Music Lyrics, and Music Videos on Children and Youth, 123 Pediatrics 1488 (2009); See also NCTUP, supra note ____ at 20, 23.
recognition for same-sex unions as marriage. Add to this how media often opines—often triumphalistically—that believers regularly fail to observe their own religions, due to their doctrines’ irrationality or even impossibility.42

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.”43 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....”44

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 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.45

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.46 As a matter of long personal experience with

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44 Ibid.
45 http://catholicreview.org/blogs/open-window/2013/01/30/10-reasons-were-choosing-catholic-schools-for-our-children#sthash.ZrjotXan.dpuf
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 *Lemon* Court observed: “Given the mission of the church school, these instructions are consistent and logical.”

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.

**Part 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 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”. Now that the Supreme Court has introduced same-sex marriage into the 50 states as a constitutional right, 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.

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48 Id. at 618.
Opponents of constitutional exemptions for 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.”

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.

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 to serve as a voice for their faith.” 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*, the borders between *Smith*- and *Hosanna Tabor*-type cases, and the scope of *Hosanna-Tabor*’s ministerial exemption. This essay will rather consider how these prior cases failed to anticipate current laws imposing a new set of SMP ethics into 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. By these principles I am focusing on *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

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50 *Smith* at 879.
51 *Hosanna-Tabor* at 713 (Alito, J., concurring).
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 and live the schools’ SMP mores. The *Smith* majority stated: “the 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).’” 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 others which indicate a preference for nonreligion over religion. Employment nondiscrimination laws do not appear to have *Lukumi*-type flaws. They may burden religion, therefore unless they fail a “rational basis” standard, which they are highly unlikely to do.

But *Smith*’s holding rests upon a rationale which does not easily apply to employment laws affecting SPM. The *Smith* majority feared that if the prior free-exercise-protective standard (the “compelling state interest” or *Sherbert v. Verner*) was applied to all facially neutral laws, “anarchy” would ensue. 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, unleashed upon the public. The SPM behavior at issue in the religious schools context, however, could not be more opposite. It consists of mores nearly universally held (by both private and state actors) until quite recently, or even held still; these include mores regarding 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 have the best possibility of knowing and being reared by both of their parents.

There is a strong theme approaching a consensus in the social science research today, that these behaviors and family forms produces the best emotional and educational results for children, and less crime and lower social costs generally. While researchers are awaiting the passage of time to evaluate children reared same-sex households, at the very least it can be said that the loss of a second parent in every case, and the family instability present in the vast majority of these households (84% were conceived in a heterosexual relationship involving a one of the adults who is now in a same-sex relationship) has predicted for difficulties in every study thus far featuring a nationally representative sample. Furthermore,

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59 See D. Paul Sullins, Emotional Problems among Children with Same-Sex Parents: Difference by Definition, 7 Brit. J. of Ed., Soc. and Behavioural Sci. 99 (2015); Gary J. Gates, Family Formation and Raising Children Among Same-Sex Couples, Nat’l Council on Fam. Rel.: Family Focus, Winter 2011, at F1 (“[One research study] suggest[s] that offspring of lesbian and gay parents are more often the product of different-sex relationships that occur before individuals are open about their sexual
the “behavior” for which the schools are seeking an exemption is confined strictly to persons who voluntarily seek employment with the religious institution. In turn, they will influence the children of parents who have voluntarily sent their children to the religious institution knowing about and even seeking the message of sexual integrity in word and deed that the school can provide.

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. The

orientation.”); Gary J. Gates, Williams Inst., LGBT Parenting In The United States (2013) (providing a statistical summary of the demographics of lesbian, gay, bisexual, and transgender (LGBT) households); Ronald Bailey, “The Science on Same Sex Marriage,” The Reason Found (April 15, 2013), (“Nearly 20 percent of same-sex households . . . reported having children, and 84 percent contained children biologically related to one of the householders.”)

60 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. 494 U.S. at 878 (emphasis added).

Justice O’Connor’s Smith dissent agrees that the majority’s new rule is not required by the text of the First Amendment, observing that 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.” 494 U.S. 872, 894 (O’Connor, J., dissenting).

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 Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1115 (1990).

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
Court therefore invited the questions: what drove its conclusion - especially given its acknowledgement that it had previously applied a more free-exercise-protective rule; and 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.”

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, “cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.” Lyng, supra, 485 U.S., at 451, 108 S.Ct., at 1326. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious

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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." Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, supra note __ at 1121.

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61 Smith at 884.

62 Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, supra note __ at 1149.

63 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.
beliefs, except where the State’s interest is “compelling”—permitting him, by virtue of his beliefs, “to become a law unto himself,” Reynolds v. United States, 98 U.S., at 167—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, ...(citation omitted) or before the government may regulate the content of speech, see, (citation omitted) 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.64

The Court continued, spelling out a parade of horribles 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,” Braunfeld v. Brown, 366 U.S., at 606, 81 S.Ct., at 1147, 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 *889 compulsory military service, see, e.g., Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), to the payment of taxes, see, e.g., United States v. Lee, supra; to health and safety regulation such as manslaughter and child neglect laws, see, e.g., Funkhouser v. State, 763 P.2d 695 (Okla.Crim.App.1988), compulsory vaccination laws, see, e.g., Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964), drug laws, see, e.g., Olsen v. Drug Enforcement Administration, 279 U.S.App.D.C. 1, 878 F.2d 1458 (1989), and traffic laws, see Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); to social welfare legislation such as minimum wage laws, see Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985), child labor laws, see Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), animal cruelty laws, see, e.g., Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, 723 F.Supp. 1467 (SD Fla.1989), cf. State v. Massey, 229 N.C. 734, 51 S.E.2d 179, 64Smith, at 884-86 (emphasis added).

It should also be noted that other strong candidates for the role of “Smith’s controlling rationale” are absent, and have been noted in a significant body of First Amendment scholarship.66 In addition to its choosing only a possible but permissible reading of the First Amendment, the Court’s acknowledged that it had previously applied the stronger strict scrutiny analysis to neutral laws of general applicability burdening religion; others have noted how it also exhibited a lack of convincing prior First Amendment precedents.67

Drawing upon the above excerpts, therefore, we can see that the Smith majority concluded that narrow religious freedom protection was warranted (and anarchy more likely) when the following factors are present: 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. It stated that respondents were “contend[ing] that their religious motivation for using peyote places them beyond the reach of a criminal law”.68 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.”69 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.”70

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

65 Smith at 888-89 (emphasis added).
66 See also Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, supra note __ at 1149 (Professor McConnell also concludes that the Court’s concern with anarchy, as well as its own disinclination to adjudicate the balance between religious freedom and states’ interests, were the centerpiece of the majority’s reasoning in Smith).
67 Smith at 893-96 (O’Connor, J., dissenting).
68 Smith at 878.
69 Smith at 884.
70 Ibid.
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.71

Justice O’Connor’s Smith dissent also highlighted the significance of their being a criminal law at the heart of the case. She acknowledged the majority’s hesitation to apply a compelling state interest analysis -- to an “across-the-board criminal prohibition on a particular form of conduct” 73 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.”74 Finally, she characterizes Smith’s holding as follows: “where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply.”75

The Smith majority’s above-quoted list of “horribles” that religious exemptions could allow, also supports the conclusion that, for the most part though not exclusively, the Court was concerned about opening the door to long-agreed intrinsically and socially disapproved behaviors, unleashed upon a wider public. It 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.76

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 the 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 Americans with Disabilities Act (“ADA”) claim by a former employee teacher at a religious school.

71 Smith at 885 (citations omitted; emphasis added).
73 Smith at 892 (O’Connor, J., dissenting).
74 Smith at 905.
75 Id. at 892 (citation omitted).
76 Smith at 888-89 (citations omitted).
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 *id.*, ... 110 S. Ct. 1595(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.77

Discussions of *Hosanna Tabor* regularly focus upon the scope of its ministerial exception.78 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.”79 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.”80 Referring to an early controversy over the state’s power to incorporate a church in Virginia, it referred to Madison’s veto statement about the state eschewing involvement “comprehending even the election and removal of the Minister of the same.”81 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.” 82 It summarized the problem before it as the “freedom of a religious organization to select its ministers”83 and concluded its application of the law to the facts with: “Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit.... By

77 *Hosanna-Tabor* at 707.
78 See supra note ___.
79 *Hosanna-Tabor* at 702.
80 Id. at 703.
81 Id. at 703-04.
82 Id. at 704.
83 Id. at 705.
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.”84

But many statements in the opinion are also concerned with the broader freedom of religions to control not only “religious offices”85 and the “selection of ecclesiastical individuals”86 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. They feared that funding teachers equals funding doctrine. In Lemon v. Kurtzman,87 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.”88

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 and twenty-five U.S. Catholic dioceses, insisting upon every teacher’s subscribing to Catholic beliefs and practices as a prerequisite for employment.89 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 6500 teachers are clergy or vowed religious.90 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.91

84 Id. at 709.
85 Id. at 702.
86 Id. at 705.
87 401 U.S. 602 (1971).
88 Id. at 618.
Hosanna-Tabor also references 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”. 92 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.” 93 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.’” 94

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. It’s 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. 95

The Court’s application of the ministerial exemption to 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” 96; she “transmit[ed] the Lutheran faith to the next generation”. 97 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.” 98 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:

92 Hosanna-Tabor at 704.
93 Hosanna-Tabor at 704, citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952).
94 Id. at 705, citing Serbian Eastern Orthodox Diocese v. Miliojevich, 426 U.S. 696 (1976).
95 Id. at 706 (emphasis added).
96 Id. at 708.
97 Id. at 709.
98 Id. at 710.
*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.*

“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.”

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 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 “serve 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.” Whether or not they bear the title of minister is deemed irrelevant.

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 signed contracts containing morality/integrity clauses), as well as the children of adults who have also voluntarily selected into 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. Religious employers have an exception permitting them to

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99 *Hosanna-Tabor* at 706.
100 *Hosanna-Tabor* at 706.
102 Id. at 713.
103 Title VII 42 U.S. C § 2000e-1(a); 29 U.S. C. § 621 et seq.
make employment decisions based upon religion. 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 signed with the school – a court could determine that sex or pregnancy discrimination instead governed the personnel decision. The bottom line then becomes that teachers who have agreed to observe particular religious principles are imposed back into a religious school, disrupting its ability to demonstrate to children and adolescents that the religion’s SMP teachings are achievable or desirable.

Furthermore, Courts have reached the conclusion that something other than a religious disagreement was the governing factor, by compare a school’s response to different violations of the religion, and evaluating whether these responses to different theological matters, demonstrated different 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 about a priest discovering that a male employee was using birth control. 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” and “least restrictive means.” Though it would be better for schools to be subject to a pre-Smith/RFRA “compelling state interest” analysis than a “rational basis test,” even the former can be quite arbitrary; there is no guarantee that a religious school could survive such an analysis especially in light of the modern zeitgeist regarding same-sex marriage and contraception. Schools should be able to survive it given how little is the state’s interest in vindicating same-sex marriage or other sexual expression right within voluntary communities of faith

104 42 U.S. C § 2000e-2(e)2.


106 Steven D. Smith, Playing Around with Religion’s Constitutional Joints, 157 U. Pa. L. Rev. PENNumbra 123, 132-33 (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 *133 conditions of religion-clause discourse, “respectable but un compelling” 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.”)
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 for their communities. 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 entitlement, and the federal government’s recent equating of child-free sexual expression, with women’s social equality, make a “compelling state interest” contest more than a little uncertain. Not to mention that prior champions of RFRA are withdrawing their support and more and more politicians and interest groups are consigning it a place with Jim Crow, while LGBT activists threaten to “firebomb” small businesses who won’t cooperate with gay weddings.

There is also evidence that the Supreme Court may 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 – while the Court held that the government had not satisfied the “least restrictive means,” prong of RFRA, it seemed willing in dicta to go along easily with the federal government’s very generally expressed “compelling interest” in forcing a few religious objectors to provide free contraception in a nation where 89% all sexually active women have used it, most forms are very cheap, and the government had not even tried to link the mandate with its claim that women’s very social and economic equality were threatened if religious employers failed to provide free contraception.

Part 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 – which realistically requires integrity in both word and deed. Considering the important role that teaching plays in this quintessentially

107 Amy Bleakley, et al, How Sources of Sexual Information Relate to Adolescents’ Beliefs About Sex, 33 Am. J. Health Behav. 37, 37 (2009)( learning about sex from … religious leaders was associated with beliefs likely to delay sex”).
108 Obergefell, supra note __ at 10-27 (Slip. Op.).
110 See ACLU withdraws, supra note __.
111 Shekhar Batia, ’If a child of mine was gay I would love them, but I still wouldn’t go to the wedding.’ Defiant Indiana pizza parlor owners who won’t cater for gay receptions reopen store tomorrow, buoyed by donations of $842,000, Daily Mail (UK), April 7, 2015, at 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.
religious task, however, it is important to review potential grounds with the end in mind.

The campaigns by governments and interest groups to shift social mores concerning SMP reached their logical conclusions in record time. Where just “yesterday” the 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 and 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\(^\text{113}\)).

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 or “external harm” 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’ recommendation in his *Hosanna-Tabor* concurrence to rely upon the religion’s own designation\(^\text{114}\), with my recommendation to interpret that case as centering upon religions’ right to pass on their 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, is effectively to close off one of the few avenues that religions and parents still possess as 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*\(^\text{115}\), even as it denied its prior practice of granting such protection widely. Perhaps simply to preserve *Yoder*, the Smith majority announced a category of “hybrid” rights cases in which two constitutional rights together merited “compelling state interest” analysis, whereas religious freedom alone could

\[^{113}\text{Charles Murray, Coming Apart (2013).}\]
\[^{114}\text{*Hosanna-Tabor* at 710-11.}\]
\[^{115}\text{406 U.S. 205 (1972).}\]
not merit it. While the hybrid rights category has been regularly disparaged as unclear or even intellectually impossible, it has not been overruled.\textsuperscript{116}

Perhaps religious schools’ situation today respecting SMP is close enough to \textit{Yoder} – where both religious freedom and parents’ rights to educate their children are both at stake – that the category could be used again. \textit{Smith} said that the “First Amendment [has barred] application of a neutral, generally applicable law to religiously motivated action ... involving not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, citing \textit{"Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)\textit{(to direct the education of their children) and Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)( invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school.\textit{)\textsuperscript{117}}}}

The \textit{Yoder} opinion indicates that the Court accepted the proposition that to fail to allow the religious parents the religious freedom they sought would be tantamount to allowing the state to “influence, if not determine, the religious future of the child.”\textsuperscript{118} A similar claim might be made here by religious schools, particularly regarding the state’s new SMP ethics, which intersect foundational and wide-ranging aspects of Judeo-Christian religions.

\textsuperscript{117} \textit{Smith} at 881.
\textsuperscript{118} \textit{Wisconsin v. Yoder}, at 232.