

INCLUSION, ACCOMMODATION, AND RECOGNITION: ACCOUNTING FOR DIFFERENCES BASED ON RELIGION AND SEXUAL ORIENTATION

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This Article analyzes the rights claims and theoretical frameworks deployed by Christian Right and gay rights cause lawyers in the context of gay-inclusive school programming to show how two movements with conflicting normative positions are using similar representational and rhetorical strategies. Lawyers from both movements cast constituents as vulnerable minorities in a pluralistic society, yet they do so to harness the homogenizing power of curriculum and thereby entrench a particular normative view. Exploring how both sets of lawyers construct distinct and often incompatible models of pluralism as they attempt to influence schools' state-sponsored messages, this Article exposes the strengths as well as the limitations of both movements' strategies. Christian Right lawyers' free speech strategy—articulating religious freedom claims through the secular language of free speech doctrine—operates within an inclusion model of pluralism. This model stresses public participation and engagement with difference. After making significant advances over the past several years, lawyers have begun to employ the inclusion model with some success in the school programming domain, despite signifi-

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cant doctrinal and remedial limitations. At the same time, Christian Right lawyers assert parental rights and free exercise claims in curricular challenges. Such claims rely on an accommodation model of pluralism that permits selective withdrawal based on religious beliefs and thereby resists active engagement with difference. This strategy struggles in the face of a well-accepted view of civic education that values exposure to diversity—a view bound up with the success of the Christian Right’s inclusion model of pluralism. Gay rights lawyers respond to Christian Right claims by drawing on a left multicultural model of pluralism. This model conceptualizes lesbians and gay men as identity holders (rather than sex actors), and in doing so succeeds in justifying the inclusion of sexual orientation in programming that prioritizes diversity. The left multicultural claim stalls, however, when it demands the state’s affirmative cultivation of respect by asserting students’ rights to gay-inclusive instruction. In the end, both the Christian Right and gay rights movements make important advances yet face significant tensions as they craft doctrinal claims that operate within competing models of pluralism.

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INTRODUCTION

Gay rights advocates and religious conservatives seem to have little in common. They engage in bitter public disputes, adversarial litigation, and counterpunching media campaigns in what has come to be thought of as a “culture war.”¹ Yet a closer look reveals that commonalities emerge in the realm of representational strategies. Both sides believe in the potential of court-centered advocacy and in the power of minoritizing rights claims.² Both sides frame these rights claims in the language of pluralism. Both sides see schools as a compelling location to advance pluralist ideals. And both sides attempt to articulate brands of pluralism that accommodate more far-reaching normative agendas.

These commonalities have engaged both sides in a battle over what a pluralistic society, specifically with regard to sexual orientation and religion, ought to look like. How does a pluralistic society account for differences in sexual orientation? Do lesbians and gay men form a stable, identity-based group with collective claims? May parents shield their children from instruction that presents their orthodox religious beliefs as subjective? What if such parents (and their children) otherwise want to participate fully in soci-

¹ I use the singular “culture war,” since this term tracks the most common language used by both religious conservatives and scholars. See, e.g., Kevin den Dulk, *Purpose-Driven Lawyers: Evangelical Cause Lawyering and the Culture War*, in *THE CULTURAL LIVES OF CAUSE LAWYERS* 56 (Austin Sarat & Stuart Scheingold eds., 2008); Thomas More Law Center, Another Marine Officer Has Landed: Brandon Bolling Joins the Thomas More Law Center, Sept. 24, 2007, http://www.thomasmore.org/qry/page.taf?id=63&_function=detail&sbtblct_uid1=93 (announcing new attorney hire, Thomas More Law Center (“TMLC”) Chief Counsel, Richard Thompson, explained that lawyers with combat backgrounds “make great lawyers in the Culture War”). Even James Davison Hunter, whose foundational scholarly account on the topic appeals to “culture wars” in its title, repeatedly refers to the singular “culture war” throughout the text. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* xi, xii, 34, 43, 46, 48–51, 67 (1991). Indeed, Hunter situates the struggle over gay rights as a central issue in the “culture war.” See *id.* at 189 (“Both sides of the contemporary cultural divide understand the critical importance of homosexuality for the larger culture war.”).

² I use the term “minoritizing” throughout this Article to reflect a discursive and representational strategy in which advocates prioritize group-based difference to paint their constituents as an identifiable, vulnerable minority group and as like other minority groups, regardless of the descriptive accuracy of the claim. Janet Halley uses this term, which she borrows from Eve Sedgwick, when she discusses gay rights advocates’ “like race” arguments. Janet E. Halley, “*Like Race*” Arguments, in *WHAT’S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY* 40, 48 (Judith Butler, John Guillory, & Kendall Thomas eds., 2000). Halley explains that “often pro-gay advocates draw minoritizing models out of the legal representations of race groups, invoking a pictorial resemblance between racial minorities and gay men, lesbians, and bisexuals.” *Id.* at 49–50; see also EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 88 (1990) (associating a minoritizing view of sexual definition with “gay identity,” “essentialist,” and “civil rights models”). Hans Hacker uses a somewhat similar term—“minoritarian”—to describe the strategies of lawyers at Christian public interest law firms. He argues that these litigators “represent a minoritarian offshoot within the movement”: instead of “casting Christian’s [sic] claims as part of majoritarian politics . . . they provide courts with arguments presenting Christians as a protected minority” HANS J. HACKER, *THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION* 36–37 (2005).

ety? In contemplating these questions, the gay rights and Christian Right³ movements attempt to give content to ideas of pluralism, diversity, and tolerance.⁴ Drawing on doctrinally different yet rhetorically similar rights claims, these movements reveal a difficult tension over how, if at all, a society committed to pluralism and diversity can accommodate the sincere religious claims of conservative Christians and the legitimate equality claims of lesbians and gay men.⁵

Nowhere is the tension between religious objections and claims for gay inclusion more pronounced than in the school programming domain. At stake is not merely the state's facilitation of pluralism through inclusion, but

³ I use the label "Christian Right" throughout this Article because it is descriptively accurate and tracks the terminology most commonly used in the relevant scholarly literature. See MELISSA M. DECKMAN, *SCHOOL BOARD BATTLES: THE CHRISTIAN RIGHT IN LOCAL POLITICS*, at xii (2004); see also HACKER, *supra* note 2, at 1; James Davison Hunter, *The Enduring Culture War*, in JAMES DAVISON HUNTER & ALAN WOLFE, *IS THERE A CULTURE WAR? A DIALOGUE ON VALUES AND AMERICAN PUBLIC LIFE* 10, 24–25 (2006). The term connotes an identifiable, well-documented social movement and captures a range of social conservative Christian positions, including segments of fundamentalist Christianity, evangelical Christianity, and Catholicism. See STEVEN P. BROWN, *TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS* 2 (2002) ("Although evangelical Protestants serve as its primary base, the New Christian Right is also ecumenically fluid, drawing support from Roman Catholics . . . and others who, despite considerable theological differences with evangelicals, may at times sustain various aspects of the movement's conservative social and political agenda."). Indeed, this inter-denominational alliance reflects the embrace of religious pluralism in the United States. See Rhys H. Williams, *The Languages of the Public Sphere: Religious Pluralism, Institutional Logics, and Civil Society*, 612 *ANNALS AM. ACAD. POL. & SOC. SCI.* 42, 45–46 (2007). Most of the prominent social conservative public interest law firms discussed in this Article spring from the evangelical tradition. See, e.g., HACKER, *supra* note 2, at 22 (explaining that Jay Sekulow, general counsel of the American Center for Law and Justice ("ACLJ"), first started a public interest law firm named Christian Advocates Serving Evangelism). TMLC is an exception. It was founded by a prominent Catholic, but frames itself in general Christian terms. See Marci Elliott, *Ave Maria Founder Tom Monaghan is a Man of Faith, Plans and Action*, *NAPLES DAILY NEWS*, Apr. 13, 2003, at A1; Thomas More Law Center, History, <http://www.thomasmore.org/qry/page.taf?id=24> (last visited Mar. 14, 2009); Thomas More Law Center, About Us, <http://www.thomasmore.org/qry/page.taf?id=23> (last visited Mar. 14, 2009) [hereinafter Thomas More Law Center, About Us].

⁴ See WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 142–43 (1991) (arguing that within liberal thought, "[n]o political community can exist simply on the basis of diversity or of natural harmony; every community must rest on—indeed, is constituted by—some agreement on what is just"). Wendy Brown explores the resurgence of tolerance as a desirable value and its deployment across the political spectrum. See WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* 3 (2006) ("[T]olerance knows no political party: it is what liberals and leftists reproach a religious, xenophobic, and homophobic right for lacking, but also what evangelical Christians claim that secular liberals refuse them . . .").

⁵ My framing of two opposing groups—gay/progressive individuals and social conservative Christians—presents them as mutually exclusive and has an essentializing effect. While I recognize that the two may overlap in some ways, I use this rather strict distinction to track the oppositional narrative that characterizes both cultural and legal discourse. Furthermore, I realize that lively debate occurs within these movements, but I speak of each movement in a fairly cohesive way for the sake of clarity and convenience.

rather the state's endorsement of a particular vision through mandatory, state-run curriculum. Both gay rights and Christian Right cause lawyers⁶ craft rights claims that construct constituents, including parents and children, as vulnerable minorities whom the courts must protect to preserve their meaningful place in a diverse society. These claims allow lawyers to invoke pluralist ideals in an attempt to have schools' state-sponsored messages embody their broader worldview.

But when movement leaders operate in a "culture war" in which they seek to naturalize their own normative vision, often by discrediting the other movement's inclusion claims, are they in some ways failing to live up to the liberal ideals of tolerance and pluralism they celebrate?⁷ If both the Christian Right and gay rights movements invoke pluralism in the interest of imposing their worldviews on all children, are they actually anti-pluralist?⁸ Or are they instead embracing distinct notions of pluralism that align with their normative agendas and work with different doctrinal claims?⁹ When discussing the Christian Right and gay rights movements, might we be better off speaking of "pluralisms"?¹⁰

In this Article, I analyze the rights claims deployed by Christian Right and gay rights lawyers in the school programming domain to understand

⁶ As used in legal scholarship, "cause lawyering" connotes a form of lawyering "directed at altering some aspect of the social, economic, and political status quo." Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998). In this Article, I deal specifically with identity-based social movement lawyering, in which lawyers represent a fairly coherent and organized group seeking to change power distributions. See Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 2 (Austin Sarat & Stuart Scheingold eds., 2006) [hereinafter Sarat & Scheingold, *What Cause Lawyers Do*].

⁷ See Alan Wolfe, *A Response*, in HUNTER & WOLFE, *supra* note 3, at 97, 106–107. As "culture war" scholar James Davison Hunter argues, a pluralistic society inevitably yields cultural conflict because a diverse group of actors and institutions are competing for power and legitimacy. See Hunter, *supra* note 3, at 33. Interest groups struggle to create and shape meaning according to their respective worldviews, and as Hunter explains, the culture war involves "the power to project one's vision of the world as the dominant, if not the only legitimate, vision of the world, such that it becomes unquestioned." *Id.*

⁸ Cf. Martin E. Marty, *Pluralisms*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 17 (2007) (referring to Judge Roy Moore's attempt to post the Ten Commandments on a courthouse wall as part of an "antipluralist ethos").

⁹ Throughout this Article, I explicate different versions of pluralism that these movements, at various moments, embrace. While I set up these competing visions of pluralism throughout the piece, the most theoretically grounded discussion occurs *infra* Part IV.

¹⁰ See Marty, *supra* note 8. As more and more institutions and constituencies join American pluralist society and interpret pluralism in unique and competing ways, pluralism's very meaning becomes highly contested. See Wade Clark Roof, Introduction, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 9–10 (2007); see also DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION 77 (2001) ("Today, the United States is in the process of understanding and negotiating the meaning of its pluralism anew.").

how these claims draw on competing visions of a pluralistic society. Analyzing the broader theoretical frameworks on which movement advocates rely reveals how such frameworks influence the outcomes of doctrinal framings and suggests the limitations of representational strategies.

This Article takes as its starting point an acceptance of the fact of pluralism—the fact that American society features (and permits) diversity on a number of axes. William Galston, who conceptualizes pluralism within liberal theory, offers a productive baseline when he focuses on “individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value.”¹¹ This definition captures what John Rawls describes as a “diversity of reasonable comprehensive religious, philosophical, and moral doctrines.”¹² This baseline notion of pluralism, which I take as a starting point, resists a more normative component. For instance, I do not take as given, as Amy Gutmann does, that pluralism “enriches our lives by expanding our understanding of differing ways of life;”¹³ nor do I start from the premise, as Diana Eck does, that pluralism moves beyond mere diversity toward “the energetic engagement with diversity.”¹⁴ Rather, I begin with pluralism in a form that is relatively empty from a normative perspective.

It is Christian Right and gay rights advocates to whom I leave the work of expressing pluralism’s normative implications. That is, lawyers from both movements take the fact of pluralism as their starting point, but they then construct brands of pluralism that take distinct views on, among other things, whether pluralism implies an engagement with difference, whether and when pluralism allows the preservation of non-liberal doctrines, and whether and when pluralism requires state facilitation of respect. Accordingly, I do not endorse a model of pluralism. Instead, I show the way in which cause lawyers negotiate the terrain of pluralism to construct compelling theoretical frameworks and corresponding doctrinal claims that further their movement’s respective agendas. Pluralism functions as a representational tool with far-reaching strategic, doctrinal, and ideological implications.

This Article claims that Christian Right lawyers’ successful turn toward a free speech claim for religious freedom, which operates within what I term an inclusion model of pluralism, breaks down in the face of legitimate gay inclusion claims and state-sponsored messages which seek to cultivate tolerance. At the same time, Christian Right lawyers’ use of free speech claims makes their alternative appeal to more overtly religious claims, and what I label an accommodation model of pluralism, less persuasive. Here I am distinguishing between two models of pluralism. The inclusion model priori-

¹¹ WILLIAM A. GALSTON, *LIBERAL PLURALISM* 3 (2002).

¹² JOHN RAWLS, *POLITICAL LIBERALISM* 36 (1996). This is what Rawls terms “reasonable pluralism.” *Id.*

¹³ AMY GUTMANN, *DEMOCRATIC EDUCATION* 33 (1987).

¹⁴ Diana Eck, *The Pluralism Project, What is Pluralism?*, http://www.pluralism.org/pluralism/what_is_pluralism.php (last visited Mar. 14, 2009).

tizes participation and engagement with difference in a pluralistic society; in this model, Christian Right advocates seek to have their constituents' voices actively included in the public sphere. The accommodation model, on the other hand, emphasizes the preservation of distinctive religious value systems in a pluralistic society; in this model, advocates ask that their constituents be allowed to selectively withdraw from public life in order to adhere to their religious beliefs.¹⁵

Starting in the early 1980s, Christian Right lawyers made a concerted, instrumental turn toward free speech claims. By moving outside of more religiously grounded doctrine, movement advocates were able to use the free speech claim for religious freedom to frame religiously motivated claims in more liberal, secular, and pluralistic terms: Christians are to be included in a diverse society on equal terms, the state ought not discriminate against them based on their religion, and their religious expression must be treated in the same way that the state treats secular expression.¹⁶ Christian Right lawyers' shift toward this pluralistic vision partly represents a pragmatic rhetorical move, which worked with a novel and promising doctrinal framing, to deal with the movement's failed attempts to maintain the legally-sanctioned majoritarian dominance of Christianity. Dominant Christianity (or, more precisely, Protestantism) has been historically resistant to religious pluralism in America, and such resistance still manifests itself today in the image of America as a "Christian nation."¹⁷ The turn toward an inclusion model of pluralism, which recognizes the legitimacy of claims by other religions as well as those of non-believers, allowed advocates to translate religiously motivated demands into secular claims.¹⁸

The free speech claim for religious liberty has met with great success, especially in the public education arena. The Supreme Court accepted this

¹⁵ These models track the dichotomy Hans Hacker draws between the Christian Right's free expression argument and its selected attempts at accommodation. See HACKER, *supra* note 2, at 2-4.

¹⁶ *Id.* at 37 ("Equal access, then, means that contributions to discourse based on a religious worldview cannot be excluded from public life simply because of their religious content The arguments presented by the movement in court have integrated strains of liberalism and legal sophistication.").

¹⁷ See GUTMANN, *supra* note 13, at 31 (noting that in the mid-nineteenth century school context, Protestant resistance to an increasing Catholic presence manifested itself in an unwillingness to move away from the King James Bible); Marty, *supra* note 8, at 21 ("[M]ost Christians in power were dragged screaming into the era in which religious pluralism began to be sanctioned Christians regularly dissented against encroaching religious philosophies and polities"); Robert Wuthnow, *Religious Diversity in a "Christian Nation": American Identity and American Democracy*, in DEMOCRACY AND THE NEW RELIGIOUS PLURALISM 151, 164-165 (Thomas Banchoff ed., 2007) (discussing current Christian Right rhetoric that equates moral decay with religious pluralism and a turn away from America as a Christian nation).

¹⁸ See Ted. G. Jelen, *The Constitutional Basis of Religious Pluralism in the United States: Causes and Consequences*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 26, 37 (2007).

novel framing in a series of decisions in the 1980s and 1990s.¹⁹ Christian Right lawyers, however, are beginning to face the free speech strategy's limitations as they struggle to use this move (and its appeal to inclusion) to craft cognizable claims in new contexts.²⁰ Advocates have attempted to articulate free speech claims in the school programming domain, arguing that curriculum should include the Christian perspective if it also includes the perspectives of other groups, such as lesbians and gay men.²¹ Viewpoint discrimination principles, however, do not generally govern school programming, which is a form of government speech.²² Beyond its doctrinal limitations, the free speech strategy in the school programming domain suggests a "balanced" curriculum as a remedy. This remedy may undermine the preferences of Christian Right constituents, who may not want their children exposed to any instruction touching on sexual orientation. In fact, these constituents might prefer that school programming exclude sexual orientation altogether, further entrenching traditional (Christian) notions of family and sexuality.

Despite its doctrinal and remedial shortcomings, some courts have accepted the free speech claim in the school programming context.²³ As I will show, such decisions demonstrate the currency of the inclusion model of pluralism. Equipped with this model, courts may prioritize a proliferation of perspectives over notions of deference and local school control that traditionally govern such disputes.²⁴ And courts may find free speech claims more viable than the parental rights and free exercise claims that have historically captured school programming challenges.²⁵

Nonetheless, when tracking both doctrine and remedy, parental rights and free exercise claims may represent the more consistent claims of religious parents in the school programming context. In making such claims, Christian Right cause lawyers depart from their favored inclusion model of

¹⁹ See discussion of *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981), *infra* Part III.A.

²⁰ See discussion of *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993); *Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch.*, No. AW-05-1194, 2005 WL 1075634 (D. Md. May 5, 2005), *infra* Part III.A.

²¹ See discussion of *Citizens for a Responsible Curriculum*, 2005 WL 1075634, *infra* Part III.A.

²² See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (explaining that a public broadcasting station's content, like a public school curriculum, need not be viewpoint neutral); *Morrison v. Bd. of Educ.*, 419 F. Supp. 2d 937, 941 (E.D. Ky. 2006) ("As a general matter, government speech—speech by the school itself—too, is given a certain amount of latitude in that it need not be neutral, so long as the speech does not run afoul of the Establishment Clause or the Equal Protection Clause."), *aff'd on other grounds* by 521 F.3d 602 (6th Cir. 2008).

²³ See discussion of *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780 (E.D. Mich. 2003); *Citizens for a Responsible Curriculum*, 2005 WL 1075634, *infra* Part III.A.

²⁴ See discussion *infra* Part III.A.

²⁵ See discussion *infra* Part III.

pluralism and instead appeal to an accommodation model of pluralism that accounts for (religious) diversity by accommodating illiberal tendencies even within a liberal society. That is, lawyers still focus on pluralist values, but they emphasize guarding and preserving difference over meaningfully engaging with such difference. In doing so, lawyers turn the priorities of the inclusion model on its head. They present parental and free exercise rights as necessary to preserve distinctive religious value systems and to allow parents to pass those values onto their children, even if they resist liberal impulses toward tolerance and critical deliberation.²⁶ In this way, the religious pluralism to which advocates appeal departs from one that acknowledges the legitimacy of competing perspectives, instead allowing religious objectors to wall themselves off and to resist the tendency to consider competing truth claims.

But the Christian Right strategy stalls in this context for reasons related not only to doctrinal constraints, but also to the resonance and currency of the inclusion model. The Christian Right free speech strategy's success largely reflects courts' view of education in a liberal, democratic society. The pluralist ethic endorsed by the inclusion model resonates with a normative view of civic education in which exposure to competing value systems is not only acceptable, but desirable. By seizing on such priorities to further the Christian Right cause, lawyers for the movement are partly responsible for further cementing the inclusion model of pluralism that forecloses their parental rights and free exercise claims in the school programming domain. As I will show, courts resist the accommodation model to the extent that it stresses withdrawal over engagement.

Recognizing that parental rights and free exercise claims depart from entrenched notions of liberal pluralism, and therefore enjoy less currency with courts, Christian Right advocates appeal to the special status of sex even within a liberal, pluralistic society to carve out the issue of sexual orientation.²⁷ They present lesbians and gay men as a sex-based, rather than an identity-based, group, hopeful that a liberal, democratic theory of education can account for maintaining sex as a private, family matter.²⁸ This move locates issues of sexual orientation outside of school programming, allowing the continued exclusion of lesbians and gay men and the implicit endorsement of traditional values regarding sexuality.

In response, gay rights cause lawyers appeal to their own model of pluralism, which sounds in left multiculturalism.²⁹ This model evinces a dis-

²⁶ See discussion of parental rights and free exercise claims, *infra* Part III.B.

²⁷ See discussion of *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *infra* Part IV.C.

²⁸ See GUTMANN, *supra* note 13, at 5–6.

²⁹ I use the term left multiculturalism to connote the brand of multiculturalism deployed by gay rights advocates. Rather than focus on the group rights of cultural or religious sub-groups in a way that might recognize the claims of social conservative and potentially even non-liberal traditions, the left multicultural model concentrates on the claims of certain subordinated identity-based groups, including racial and ethnic minorities, women, and sexual minorities. As described by Mark Kelman and Gillian Lester,

inction between what I term weak and strong left multicultural claims. In its weak form, the left multicultural model justifies inclusion of lesbians and gay men by stressing their coherent, group-based identity in a diverse society.³⁰ Gay rights lawyers position lesbians and gay men as identity holders rather than sex actors, and thereby supplant religious notions of sex with left multicultural notions of identity. As courts and the public continue to ratify the concept of sexual orientation as a stable identity category, Christian Right lawyers find that their appeal to a sex-based concept fails to resonate. Instead, lesbians and gay men continue to cement their status as an identifiable minority group in a pluralistic society.

But just as Christian Right lawyers struggle to articulate a coherent model of pluralism that can also further the movement's broader normative agenda, gay rights lawyers run up against the limitations of left multiculturalism when they use problematic doctrinal claims to make strong mul-

"left multiculturalism makes an egalitarian descriptive claim: that members of dominant social groups (defined by race, gender, physical ability, and sexual preference) control social institutions and misjudge the relative . . . contributions of 'outsiders' and members of their own group." Mark Kelman & Gillian Lester, *Ideology and Entitlement*, in LEFT LEGALISM/LEFT CRITIQUE 134, 147 (Wendy Brown & Janet Halley eds., 2002). Moreover, a left multicultural model seeks the active participation of subordinated groups rather than focusing on rights to exemption or withdrawal based on cultural or religious difference. For instance, in the context of group-based claims by the learning disabled, Kelman and Lester focus on state intervention to remedy discrimination that prevents the group's full participation in the workplace and public education. *See id.* at 150–52. The group's claims function as rights-based entitlement claims rather than as claims to self-government or exemption. *Compare id.* at 150 (describing "'group entitlement' trumping claims"), with Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 7, 10–11 (Joshua Cohen, Matthew Howard, & Martha C. Nussbaum eds., 1999) (describing a multiculturalist model in which "special group rights or privileges" allow usually less liberal sub-groups, comprised of "indigenous native populations, minority ethnic or religious groups, and formerly colonized peoples," to claim "rights to govern themselves," "to be exempt from certain generally applicable laws," or "to be 'left alone'").

³⁰ *See* Cameron McCarthy, *After the Canon: Knowledge and Ideological Representation in the Multicultural Discourse on Curriculum Reform*, in RACE, IDENTITY, AND REPRESENTATION IN EDUCATION 289, 290 (Cameron McCarthy & Warren Crichlow eds., 1993) (advocating for a "critical multiculturalism" that moves beyond "the language of 'inclusivity'" characteristic of traditional articulations of multiculturalism in curriculum reform); Kirsten Matoy Carlson, *Premature Predictions [sic] of Multiculturalism?*, 100 MICH. L. REV. 1470, 1478 (2002) (explaining that the concept of "inclusiveness" is often key to definitions of multiculturalism); Jeffrey Ayala Milligan, *Gender and the Limits of Inclusion: Should Multiculturalism "Include" Fundamentalisms?*, 94 RELIGIOUS EDUC. 75, 76 (1999) (explaining that "inclusion" is a core concept of "a multicultural approach to education"). Of course, the claim for inclusion of lesbians and gay men depends on the left multicultural focus on group-based subordination, which distinguishes it from more centrist liberal priorities on the individual. *See* Kelman & Lester, *supra* note 29, at 136 (explaining that left multiculturalism limits its reach "to individuals falling within cognizable groups, rather than extending it to individuals lacking such affiliation"). Note also that the focus on inclusion in a left multicultural model contrasts with exemption or autonomy rights characteristic of models of multiculturalism often invoked by cultural and religious sub-groups. *See* Carlson, *supra*, at 1478 (pointing out the contested meaning of multiculturalism by exploring the tension between a model that prioritizes "inclusionary politics by the government" and one that values "autonomy from the state").

ticultural demands. In its strong form, the left multicultural model stresses the marginalization of lesbians and gay men in an effort to frame rights claims that seek affirmative state recognition.³¹ Advocates ask the state to cultivate respect for lesbians and gay men by educating citizens in such respect.³² By insisting on respect (rather than merely defending inclusion), this strong claim embraces a gay-affirmative component that neither allows for state-sanctioned messages that disapprove of homosexuality nor accounts for sincere religious objections. To make the strong left multicultural claim, advocates rely on a First Amendment right to receive information, asking courts to declare students' affirmative rights to gay-inclusive programming and to prohibit opt-out rights.³³ Courts, though, have resisted this demand and its homogenizing desire to ensure all children, especially those of religious objectors, receive gay-affirmative instruction.³⁴

As the foregoing summary demonstrates, this Article's analysis operates on three planes: strategy, theory, and doctrine. By situating doctrinal claims within broader, normative theoretical frameworks, I attempt to show the way in which cause lawyers' strategies cast movements and constituents in powerful ways that make possible new doctrinal framings at the same time that they render others more unthinkable. The comprehensive theoretical frameworks lawyers use to construct and advocate for constituents change the way decision makers, including courts, understand, contemplate, and adjudicate claims. While the two most powerful theoretical frameworks addressed in this Article—the inclusion and left multicultural models of pluralism—yield tremendous success for their respective advocates, they also have important limitations. My focus on the movement/countermovement relationship between the Christian Right and gay rights movements permits a deeper appreciation for lawyers' strategic choices at the same time that it reveals the limitations of such strategies. Indeed, as both movements deploy the language of pluralism to achieve comprehensive goals that move beyond mere inclusion, both run head-on into the theoretical and doctrinal

³¹ This move is consistent with Kelman and Lester's description of learning disability advocates' use of "the left multiculturalist rhetorical manipulation of the mainstream centrist conception of antidiscrimination law to 'legalize' their claims . . ." Kelman & Lester, *supra* note 29, at 159. Advocates for the learning disabled demand that the state intervene to end discrimination against this group. *See id.* at 161. They reframe questions of policy and resource allocation as questions of rights-based legal claims requiring state intervention. *See id.*

³² As Amy Gutmann explains, in a multicultural model, "[f]ull public recognition as equal citizens may require two forms of respect: (1) respect for the unique identities of each individual . . . and (2) respect for those activities, practices, and ways of viewing the world that are particularly valued by, or associated with, members of disadvantaged groups . . ." Amy Gutmann, *Introduction to MULTICULTURALISM* 3, 8 (Amy Gutmann ed., 1994). Charles Taylor explains how "the demands of multiculturalism build on the already established principles of the politics of equal respect." Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM*, *supra* at 25, 68.

³³ *See* discussion of Gay & Lesbian Advocates & Defenders ("GLAD") strategy in *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *infra* Part V.A.

³⁴ *See* discussion of *Parker*, 514 F.3d 87, *infra* Part V.A.

limitations of their strategic choices. These are the pressure points among strategy, theory, and doctrine that I seek to expose and explore.

This Article proceeds in five parts.³⁵ In Part I, I set up the court-centered strategies of the Christian Right and gay rights movements, explicating the way in which lawyers for both deploy a minoritizing rights discourse to portray constituents as vulnerable minorities in a pluralistic society.

In Part II, I situate each movement in the debate over public school curriculum, showing the way in which schools represent vital, highly contested domains for both the Christian Right and gay rights movements and allow for an appeal to a pluralist ethic in service of a broader normative view.

In Part III, I stake out the Christian Right's doctrinal claims in the school programming domain, map such claims onto inclusion and accommodation models of pluralism, and point to the tensions between these claims and their broader implications. First, I show how the free speech claim, which taps into an inclusion model of pluralism, evidences doctrinal shortcomings and suggests a "balanced" curriculum in a way that may run counter to the desired remedy. Next, I explain how parental rights and free exercise claims, which tap into an accommodation model of pluralism, suggest an exemption remedy that correlates with pluralist impulses at the same time that they strive for a more far-reaching result: no mention of sexual orientation.

In Part IV, I explore the normative strength of the Christian Right's doctrinal claims in light of the pluralist notions to which they attach. Liberal priorities on tolerance and autonomy present barriers to Christian Right lawyers' effort to revert to a pluralistic vision that accommodates illiberal desires. Christian Right lawyers' attempt to avoid this predicament by appealing to the sex in homosexuality largely has folded in the face of gay rights lawyers' left multicultural framing of lesbians and gay men as a stable, identity-based group.

Finally, in Part V, I show how gay rights advocates have stretched their left multicultural model of pluralism, and corresponding doctrinal framings, to seek state sponsorship of a gay-affirmative message, asking courts to declare students' affirmative rights to gay-inclusive programming and to mandate that programming for all students. But courts have resisted. Without

³⁵ In terms of methodology, my analysis draws on court decisions, legal briefs, demand letters, media accounts, public documents from community-based committees and boards of education, and organization literature, including press releases and legal memoranda. I have also conducted interviews of many individuals working on these issues, including individuals at the First Amendment Center, the American Civil Liberties Union ("ACLU") Lesbian, Gay, Bisexual, and Transgender ("LGBT") Project, GLAD, Lambda Legal, and Alliance Defense Fund ("ADF"). I also spoke with individuals on the ground in Montgomery County, Maryland, including lawyers, activists, and county government employees. Other organizations and individuals were unwilling to be interviewed; my requests for interviews with Christian Right law firms such as TMLC, ACLJ, and Liberty Counsel went unanswered.

court-ordered mandates, Christian Right advocates have seized on the potential chilling effect of litigation to gain a political route to programming that correlates with Christian Right beliefs.

Before proceeding, it is helpful to briefly situate this Article in relevant scholarship. First, I am drawing on legal scholarship and political theory on law and religion. My close reading of Christian Right claims relies on the work of legal scholars who have analyzed the way in which religious claims operate within competing political and philosophical traditions. Indeed, Nomi Stolzenberg's foundational work on the claims of fundamentalist Christian parents informs my own analysis of religiously motivated claims in the sexual orientation domain.³⁶ At the same time, in order to associate doctrinal claims with distinct brands of pluralism, I invoke the work of political theorists, including William Galston,³⁷ Stephen Macedo,³⁸ and Amy Gutmann.³⁹ In offering competing visions of liberalism, these scholars consider the political and moral grounds on which a society should accommodate illiberal religious traditions. Similarly, I draw on the work of religious studies scholars, such as Diana Eck⁴⁰ and James Davison Hunter,⁴¹ to position Christian Right claims and gay rights responses within discussions of pluralism.

In a related but distinct vein, I use the lens of multiculturalism to approach gay rights claims with the same political and ideological focus that I use to explore Christian Right claims. I situate gay rights representational strategies within the project of left multiculturalism: the gay rights appeal to a stable lesbian and gay identity relies on the left multicultural focus on coherent group-based difference in a pluralistic society. And the move from inclusion and tolerance toward recognition and respect tracks the trajectory of multicultural citizenship.⁴²

Next, I am building on the expanding field of sexuality and sexual orientation scholarship. Scholars addressing lesbian and gay youth have attempted to articulate wholesale theories that support a right to gay-positive

³⁶ See Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581 (1993).

³⁷ See GALSTON, *supra* note 11; GALSTON, *supra* note 4.

³⁸ See Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468 (1995).

³⁹ See GUTMANN, *supra* note 13; Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557 (1995).

⁴⁰ See ECK, *supra* note 10.

⁴¹ See HUNTER, *supra* note 1.

⁴² See WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 6 (1995) ("A comprehensive theory of justice in a multicultural state will include both universal rights, assigned to individuals regardless of group membership, and certain group-differentiated rights or 'special status' for minority cultures."). Of course, I recognize the way in which multiculturalism may be deployed in favor of illiberal religious and cultural groups. See *id.* at 163–70. Indeed, gay rights advocates must remain cognizant of the way in which some multicultural aims may run counter to the interests of lesbians and gay men. See generally Okin, *supra* note 29 (debating whether multicultural policies undermine the status of women by granting group rights to patriarchal and sexist cultural groups).

programming. Like the gay rights litigators discussed in this Article, these scholars dismiss the claims of objecting parents by arguing from the perspectives of students' rights and the norm-generating function of public education in a pluralistic society.⁴³ Rather than take an approach that sounds in advocacy or that aims for prescription, I consider oppositional claims leveled by the Christian Right to situate more carefully the issue of sexual orientation in schools. Beyond the issue of lesbian and gay youth and school programming, this Article opens up avenues for future work relating to gay-based representation (including a focus on movement/countermovement relationships) and points to the way in which the conflicts between religiously motivated claims and gay rights claims will continue to present some of the most challenging issues for those interested in both religion and sexuality.

Finally, I am undertaking a project on cause lawyering. Legal scholars are just beginning to pay attention to conservative cause lawyering as a location for inquiry.⁴⁴ While some cause lawyering scholars have recognized the

⁴³ See, e.g., Carlo A. Pedrioli, *Lifting the Pall of Orthodoxy: The Need for Hearing a Multitude of Tongues In and Beyond the Sexual Education Curricula at Public High Schools*, 13 UCLA WOMEN'S L.J. 209, 211–12 (2005) (“[T]he Article will offer suggestions on how public high schools can help sexual minority students deal with their sexualities, namely by: forming support groups for sexual minority youth, discussing a wide variety of sexual orientation perspectives when appropriate in classes, instituting diversity training for teachers, and implementing non-discrimination policies that address sexual orientation. In addition, this Article will demonstrate that the proposed approaches are constitutional under the First Amendment because they do not violate speech rights of public high schools or of students enrolled in such high schools. Finally, this Article will demonstrate that the proposed approaches are also constitutional under the Fourteenth Amendment because they do not violate the substantive due process liberty rights of the parents of public high school students, regardless of the sexual orientations of the students.”); Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915, 945 (2001) (“[S]tudents should have a First Amendment right not to be subjected to [anti-gay] viewpoints.”); Patrick Henigan, Note, *Is Parental Authority Absolute? Public High Schools which Provide Gay and Lesbian Youth Services Do Not Violate the Constitutional Childrearing Right of Parents*, 62 BROOK. L. REV. 1261, 1285–86, 1290 (1996) (“If a high school does not provide gay and lesbian support services to students because it chooses to suppress the message of tolerance and self-acceptance that accompanies the services, then the state is denying youth the right to receive accurate information.”).

⁴⁴ Ann Southworth initiated the turn to conservative cause lawyering in legal scholarship when she described the law-centered conservative movement, including its religious, business, and libertarian strands. See Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1245 (2005) [hereinafter Southworth, *Conservative Lawyers*]; see also John P. Heinz, Anthony Paik, & Ann Southworth, *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5, 6 (2003) (“Scholars have produced extensive research on lawyers who serve causes associated with America’s political left, but much less empirical work has focused on the characteristics of lawyers who serve conservative causes”); Anthony Paik, Ann Southworth, & John P. Heinz, *Lawyers of the Right: Networks and Organization*, 32 LAW & SOC. INQUIRY 883, 884 (2007) (“Conservative lawyers have created scores of organizations devoted to their causes, but relatively little scholarly attention has focused on the entrepreneurs who built these organizations or on the particular contributions of lawyers.”). Most recently, Southworth published a book on the topic. ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008) [hereinafter SOUTHWORTH, *LAWYERS OF THE RIGHT*].

way in which religious conservatives have turned to public interest law organizations modeled on those of the left, there is yet to be extensive analysis of the actual doctrinal and representational moves deployed by such cause lawyers.⁴⁵ Furthermore, legal scholarship has yet to explore the way in which the conservative religious movement coalesces with left/progressive movements in terms of representational strategies. More specifically, sustained attention to the court-centered movement/countermovement relationship between the gay rights and Christian Right movements is long overdue. Indeed, my project demonstrates the way in which attention to movement/countermovement dynamics helps us to better understand lawyers' strategic choices and to account for the currency of particular strategies.

This Article also seeks to expand the reach of cause lawyering research and methodology. Moving in a more theoretical direction by exploring the way in which doctrinal claims become embedded in the terrain of ideological conflict, this Article pushes beyond the sociological impulses of cause lawyering scholarship. For instance, I show that as Christian Right cause lawyers begin to face legitimate inclusion claims by minority interests, they must contemplate the limitations of the inclusion model of pluralism and the free speech claim.⁴⁶ Advocates face tough choices between inclusion and accommodation models of pluralism, and these choices involve not only doctrinal considerations, but also normative and strategic decisions regarding how to think about movement constituents. The connections I draw among strategic choices, doctrinal claims, and broader theoretical frameworks provide a richer account with which to analyze the currency of claims in new contexts and the limitations of strategic framings.

Many traditional cause lawyering questions are subsidiary to this project. That parents challenging school curriculum routinely lose their cases and yet continue to litigate begs questions regarding the strategic use of law, the mobilizing and fundraising potential of losing litigation, and the dynamics between constituents and movement leaders in formulating and articulating movement priorities. While I touch on these topics throughout, I leave a more comprehensive consideration of them for future work. In addition, rather than delve into conflicts among cause lawyers in framing the disputes

⁴⁵ While political science and sociology scholars, such as Kevin den Dulk, Hans Hacker, and Steven Brown (all of whose work is discussed throughout this Article), have explored the broad legal and political approaches of Christian Right advocates, there is yet to be a detailed law-centered account of the doctrinal and representational moves of the Christian Right.

⁴⁶ There are contexts other than schools that implicate LGBT individuals in which this phenomenon might occur, including state anti-discrimination laws that do not provide religious exemptions. *See, e.g.*, *N. Coast Women's Care Med. Group, Inc. v. Super. Ct.*, 189 P.3d 959, 962–63 (Cal. 2008) (denying a free exercise exemption from an anti-discrimination law for doctors who refused to provide a lesbian patient with infertility treatments). Returning to the school context, this issue might also crop up when minority religions make inclusion claims. For instance, Christian Right advocates attempt to block Islam-inclusive school programming. *See Eklund v. Byron Union Sch. Dist.*, No. 04-15032, 2005 WL 3086580, at *1 (9th Cir. Nov. 17, 2005).

set out in this Article, my analysis in some ways treats cause lawyers working for each movement as a monolith, glossing over internal disagreement. Instead of comprehensively addressing on-the-ground lawyer conflicts, I stake out a more theoretical approach to understand the operation of doctrinal claims and ideological stakes for both movements in the school programming context.

In explaining the importance of school issues to both the gay rights and Christian Right movements, and attaching those issues to broader litigation campaigns, this Article in some ways makes a positive claim about the significance of court-centered strategies to social movements. This proposition is controversial in an atmosphere in which many scholars have turned away from court-centered models of social movements. Scholars from Critical Legal Studies,⁴⁷ Feminist Legal Theory,⁴⁸ Critical Race Theory,⁴⁹ Queer Theory,⁵⁰ Cause Lawyering,⁵¹ and New Governance⁵² have offered pointed criti-

⁴⁷ See, e.g., Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE, *supra* note 29, at 178, 178–79; Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363–64 (1984).

⁴⁸ See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 658 (1983) (“Abstract rights will authorize the male experience of the world.”); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 391–92 (1984) (“Often . . . rights analysis is indeterminate and assertions of women’s rights do not achieve concrete advances in the status of women. For this reason, some feminists have stopped relying on rights claims and begun criticizing rights analysis.”).

⁴⁹ See, e.g., Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1468–69, 1518 (2000) (explaining how gay rights and black civil rights discourses, and antidiscrimination law more generally, fail to account for the intersection of race and sexual orientation); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (arguing that single-axis antidiscrimination categories obscure intersections of race and sex).

⁵⁰ See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 85 (1999) (“The campaign for marriage, never a broad-based movement among gay and lesbian activists, depended for its success on the courts. It was launched by a relatively small number of lawyers, not by a consensus among activists. It remains a project of litigation, though now with the support of the major lesbian and gay organizations. So far the campaign has come up dry.”).

⁵¹ See Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 6, at 302 (explaining that cause lawyering scholarship “largely calls into question the viability of legal rights strategies as a vehicle for social reform, emphasizing the demobilizing effect of law on political action”); Michael W. McCann, *How Does Law Matter for Social Movements?*, in HOW DOES LAW MATTER? 76, 77 (Bryant G. Garth & Austin Sarat eds., 1998) (pointing out cause lawyering scholarship’s focus on the limitations of lawyers’ attempts to litigate for social change). Within cause lawyering scholarship, I would include work on critical lawyering, community lawyering, poverty lawyering, and client-centered lawyering. See, e.g., Anthony V. Alfieri, *Faith in Community: Representing “Colored Town,”* 95 CAL. L. REV. 1829, 1830 (2007) (“This Article calls [on] progressive lawyers to step outside law and put their faith . . . in community.”); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994) (articulating the goal of client empowerment and self-elaboration over lawyer control); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on*

ques of rights discourse.⁵³ Rather than sweeping the relatively recent gay rights and Christian Right movements within the reach of such critiques, I seek to understand the cause lawyering models used by both movements in more contextual terms. This Article, however, should not be read as an unqualified endorsement of rights claims. Instead, my analysis reveals that the implications of each movement's current strategies are a mixed bag. Rather than make a normative claim about court-centered strategies, this Article explores where law works and where it fails, while simultaneously noticing where law functions as politics.

I. REPRESENTING CHRISTIAN RIGHT AND GAY RIGHTS MOVEMENTS

In significant ways, gay rights and Christian Right organizations both use rights-claiming, court-centered impact litigation. Of course, lawyers for both movements use non-litigation techniques, and both movements exert influence on electoral politics. Yet advocates from each movement have increasingly turned to litigation to frame their constituents, obtain material benefits, influence the public and elites, and advance an agenda.

This Part sets up the cause lawyering model of each movement. I situate the court-centered projects of both the Christian Right and gay rights movements, exploring their respective appeals to minoritizing rights claims to position constituents as discrete minorities needing judicial protection from majoritarian or elite decision making. This initial groundwork is necessary to demonstrate that both movements have moved toward prioritizing litigation-focused strategies. Only by exposing the underpinnings of such court-centered strategies can we see the way in which rights claims feed into an invocation of pluralism and diversity in American culture.

the Hearing of Mrs. G., 38 BUFF. L. REV. 1, 3–4 (1990) (arguing that legal institutions and legal discourse impede meaningful participation by individuals from subordinated groups).

⁵² New Governance scholars have turned toward flexible public-private partnerships, locating lawyers as problem solvers rather than as traditional advocates. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345–48 (2004). In a related project, I explore New Governance interventions in the public school governance context, looking specifically at the challenges faced when intervening in a domain characterized by identity-based social movements where cause lawyers have prominent litigation roles and movement/countermovement tensions run high. See Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. (forthcoming 2009) (on file with the Harvard Law School Library).

⁵³ These criticisms range from theoretical critiques, pointing out the essentializing and political nature of rights, to effectiveness critiques, contending that public interest lawyers seduced by the “myth of rights” might hinder social movement mobilization and place unreasonable faith in the power of courts to remedy inequalities. See Cummings, *supra* note 51, at 307.

A. *The Gay Rights Movement*

The gay rights movement largely centers itself around legal and legislative advocacy organizations. Some of the movement's most resource-rich organizations are independent public interest law firms that have long headed the movement, including Lambda Legal (founded in 1973), the National Center for Lesbian Rights ("NCLR") (1977), and Gay & Lesbian Advocates & Defenders ("GLAD") (1978).⁵⁴ These three groups, along with the American Civil Liberties Union ("ACLU") Lesbian, Gay, Bisexual, and Transgender ("LGBT") Project (1986), boast substantial budgets that dwarf those of many other LGBT organizations. For instance, in 2007, these four organizations enjoyed a combined budget of \$22.5 million, and Lambda Legal alone had a budget of \$11.4 million.⁵⁵ While Lambda Legal's budget is smaller than those of the three most prominent AIDS service organizations,⁵⁶ the L.A. Gay & Lesbian Center,⁵⁷ and advocacy giant Human Rights Campaign,⁵⁸ it bests those of prominent organizations like the Task Force, Parents, Families and Friends of Lesbians and Gays ("PFLAG"), the Gay, Lesbian and Straight Education Network ("GLSEN"), Freedom to Marry, and the Gay & Lesbian Alliance Against Defamation ("GLAAD").⁵⁹ This is particularly striking given that legal organizations use small numbers of attorneys to litigate significant cases rather than provide extensive legal services or other direct services to movement members, such as those provided by AIDS service organizations. While these law firms spend some portion of their budgets on educational and lobbying activities, they concentrate on litigation to yield far-reaching results and national publicity.

The gay rights movement hews closely to a traditional impact litigation model, steeped in the civil rights paradigm and characteristic of what William Simon has termed "Legal Liberalism."⁶⁰ Advocates formulate interests

⁵⁴ MOVEMENT ADVANCEMENT PROJECT, 2007 STANDARD ANNUAL REPORTING: A FINANCIAL AND OPERATING OVERVIEW OF THE LGBT MOVEMENT AND ITS LEADING ORGANIZATIONS 14 (2007) (on file with author) [hereinafter 2007 STANDARD ANNUAL REPORTING]. The criminalization of sodomy partly explains why the gay rights movement looked to legal activism early on in its history. GLAD, for instance, was founded to defend gay men arrested in a Boston sex sting. See Gay & Lesbian Advocates & Defenders, GLAD is Founded in 1978 in Response to a Sting Operation at the Boston Public Library, http://www.glad.org/30years/case_jan.html (last visited Mar. 14, 2009).

⁵⁵ 2007 STANDARD ANNUAL REPORTING, *supra* note 54, at 36.

⁵⁶ See *id.* at 20.

⁵⁷ See *id.* at 29.

⁵⁸ See *id.* at 16.

⁵⁹ See *id.* at 16, 32; see also Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 6, at 145, 146 (explaining that LGBT legal organizations possess a disproportionately large share of movement resources).

⁶⁰ See William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 130 (2004).

as rights, which have a trump-like quality.⁶¹ Courts become necessary to define and enforce rights, and the judiciary is trusted to safeguard individual interests.⁶² In line with this conceptualization, gay rights legal organizations construct a narrative that is court-centered, adversarial, and rights-based. Lambda Legal, for instance, looks to litigation as a vehicle for securing and safeguarding LGBT rights on a broad scale, explaining that it “select[s] the cases and issues that will have the greatest impact in protecting and advancing the rights of LGBT people”⁶³ GLAD positions itself as a determined force in an adversarial regime, declaring, “Civil rights have never been easy to win. Fighting for them takes passion, skill and an absolute determination to prevail. That’s what GLAD delivers every single day.”⁶⁴ Rights are clearly the dominant discursive tool for articulating interests, evidenced by the ACLU’s mission statement, which catalogs a list of rights before stating, “If the rights of society’s most vulnerable members are denied, everybody’s rights are imperiled.”⁶⁵

Gay rights legal organizations have appropriated the models of previous identity-based social movements.⁶⁶ They ask courts to declare rights grounded in equality and liberty for LGBT individuals, relying on minoritizing rights claims paradigmatic in civil rights litigation. Lawyers depict constituents as like other identity-based groups that have waged successful rights campaigns.⁶⁷ In this sense, they tap into a left multicultural discourse that situates lesbians and gay men as merely another discrete group in an

⁶¹ See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY*, at xi–xii (1977) (discussing rights as political trumps held by individuals).

⁶² See Simon, *supra* note 60, at 136 (explaining that we “find in Legal Liberalism a commitment to formulating certain fundamental norms as rights, and to insisting on the priority of these norms over other values”); *id.* at 137 (describing rights as “less susceptible to trade-offs and balancing” and pointing to “idealized portrayals of the judicial role”).

⁶³ See Lambda Legal, About Us, <http://www.lambdalegal.org/about-us/> (last visited Mar. 14, 2009).

⁶⁴ See GLAD, Mission Statement, <http://www.glad.org/about/mission> (last visited Mar. 20, 2009).

⁶⁵ See ACLU, About Us, <http://aclu.org/about/index.html> (last visited Mar. 14, 2009).

⁶⁶ For instance, the rights-centered, impact litigation strategy of the gay rights movement reflects the models developed by the NAACP Legal Defense and Educational Fund (“LDF”) and the ACLU. See Halley, *supra* note 2, at 40 (explaining that the gay rights movement has “national organizations, including NAACP-like national legal reform offices staffed with full-time lawyers”); Levitsky, *supra* note 59, at 145 (“The NAACP’s early successes with test case litigation created a model for using law as a social movement strategy that has since been replicated by advocates for such wide-ranging interest groups as consumers, environmentalists, gays and lesbians, economic libertarians, and the poor.”); see also Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 946 (2007) (“In the wake of the 1950s and 1960s, the energy of civil rights groups, particularly the [NAACP and LDF], increasingly encouraged other movements—including the women’s rights movement, the gay rights movement, and the disability rights movement—to adopt a legal reform strategy and to organize around similar patterns of identity rights and antidiscrimination claims.”)

⁶⁷ See, e.g., Halley, *supra* note 2, at 40. It is important to note that it is a collective, rather than an individual, identity to which advocates appeal. For a discussion of this

increasingly diverse society.⁶⁸ Lawyers invoke pluralist notions animating multiculturalism to recognize and protect this new constituency.⁶⁹

The most significant recent example of this identity-based strategy derives from the California marriage litigation. In striking down the state's marriage restriction, the California Supreme Court became the first court of last resort to apply strict scrutiny to classifications based on sexual orientation. The court made clear the connection between lesbians and gay men and other identity-based minority groups, declaring that "sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment"⁷⁰ Indeed, the court rejected the argument that the marriage restriction constituted sex discrimination, instead staking out sexual orientation as a distinct identity category.⁷¹

B. *The Christian Right Movement*

Unlike the gay rights movement, which was historically grounded in law-based activism, the Christian Right made a highly orchestrated turn toward litigation, partly attributable to limited progress on the explicitly political front. In the mid-1990s, with criticism of evangelical Christian advances running high, the president of Alliance Defense Fund ("ADF"), a Christian legal organization, declared that "[w]hile we can bring about quick fixes in the voting booth, it is in the courts that we will bring about the type of change that transcends all generations."⁷² He argued to the Christian Right membership that "national legal precedents we can achieve to protect religious freedom, the traditional family, and the sanctity of life are going to touch our lives much longer than any political candidate or officeholder can."⁷³ Along with ADF, numerous other public interest law firms sprung up to represent religious interests in the courts. In the past two decades, the number of Christian Right legal organizations has multiplied, with at least nine appearing in the 1990s alone.⁷⁴

distinction, see K. Anthony Appiah, *Identity, Authenticity, Survival*, in *MULTICULTURALISM*, *supra* note 32, at 149, 150–52.

⁶⁸ See Motion for Leave to File an Amicus Brief in Support of Defendants-Appellees by GLAD, Greater Boston PFLAG, GLSEN, HRC, & Women's Bar Ass'n at 5, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (No. 07-1528) (defending gay-inclusive curriculum by arguing that it "depicts a variety of family types to reflect the growing recognition that families today come in many forms") [hereinafter *Parker* GLAD Amicus Brief].

⁶⁹ See *id.* at 8 (arguing that in light of "demographic data" showing large numbers of families headed by same-sex couples, "it would be most appropriate for *any* school district—anywhere in the United States—to include information reflecting a broad variety of family types in its curricula").

⁷⁰ *In re Marriage Cases*, 183 P.3d 384, 444 (Cal. 2008).

⁷¹ See *id.* at 438.

⁷² Brown, *supra* note 3, at 5 (quoting Alliance Defense Fund, *Winning Precedent-Setting Cases for You and Your Family*, ADF BRIEFING, May 1996, at 4).

⁷³ BROWN, *supra* note 3, at 5.

⁷⁴ See Southworth, *Conservative Lawyers*, *supra* note 44, at 1245.

Many of the most prominent Christian Right legal organizations are connected to larger Christian Right organizations, showing that the turn to court-centered strategies is part of a broader movement strategy.⁷⁵ The American Center for Law and Justice (“ACLJ”) emerged from Pat Robertson’s Christian Broadcasting Network and has ties to Robertson’s Regent Law School.⁷⁶ Liberty Counsel is tied to Jerry Falwell’s Liberty University, including its law school.⁷⁷ Prominent non-lawyer Christian Right leaders, including James Dobson and Bill Bright, founded ADF to create a litigation-focused national organization (at first a steering and funding organization and now a litigation firm in its own right).⁷⁸ While Christian public interest law firms are important and at times central players in Christian Right advocacy, I do not want to overemphasize their role. Their ties to larger cultural, educational, religious, and media-based Christian Right conglomerates certainly suggest the vast institutional and monetary support to which some of these law firms have access and attest to their heightened stature. Yet such ties underscore their positions as parts of a broader political and cultural movement.

The Christian Right movement has successfully translated religious principles into legal action by constructing its own version of rights. Replicating successful public interest law models of the progressive groups of the 1960s and 1970s,⁷⁹ the Christian Right has formed well-funded national organizations that use highly-trained lawyers to advance the cause of religious constituents through rights-claiming advocacy.⁸⁰ Indeed, the name ACLJ is

⁷⁵ See SOUTHWORTH, *LAWYERS OF THE RIGHT*, *supra* note 44, at 38 (“Lawyers’ aggressive building of law-related institutions has placed them in the center of the conservative movement.”).

⁷⁶ See HACKER, *supra* note 2, at 22.

⁷⁷ See *id.* at 62–64.

⁷⁸ See BROWN, *supra* note 3, at 41; HACKER, *supra* note 2, at 188 n.42; Alliance Defense Fund, History, <http://www.alliancedefensefund.org/about/History/Default.aspx> (last visited Mar. 14, 2009). The ADF model evidences an attempt to coordinate strategy among Christian Right lawyers. See SOUTHWORTH, *LAWYERS OF THE RIGHT*, *supra* note 44, at 127, 145, 165 (discussing informal and formal coordination among social conservative lawyers, often facilitated by ADF).

⁷⁹ See HACKER, *supra* note 2, at 14 (explaining how “New Christian Right litigators” have used the impact litigation strategy developed by “[l]iberal groups, such as the NAACP and ACLU”); ALLEN D. HERTZKE, *REPRESENTING GOD IN WASHINGTON: THE ROLE OF RELIGIOUS LOBBIES IN THE AMERICAN POLITY* 195 (1988) (explaining the new-found emphasis by the Christian Right on “framing the issues in the language of rights”); Kevin R. den Dulk, *In Legal Culture, but Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS*, *supra* note 6, at 197, 197; Southworth, *Conservative Lawyers*, *supra* note 44, at 1251 (“By embracing the organizational form, purpose, and rhetoric of the public interest movement, conservative groups engaged in a form of ‘legitimacy politics’ with their liberal adversaries.”).

⁸⁰ See Southworth, *Conservative Lawyers*, *supra* note 44, at 1258–59 (explaining how a conservative public interest attorney “said that his organization’s practice . . . was ‘patterned after the NAACP Legal Defense Fund very, very consciously’”). The evangelical Christian movement has attempted to replicate the institutions upon which the liberal lawyering profession depends. For instance, when Jerry Falwell announced the opening of the law school at Liberty University, he declared that “we plan to turn out conservative

meant to recall "ACLU."⁸¹ As Christian Right leaders found less power in majoritarian politics and as courts disallowed favorable treatment of Christians based on Establishment Clause grounds, advocates rethought the way Christians should be understood in society.⁸² Rather than argue from dominant values and cast Christianity in majoritarian terms, Christian Right litigators began to track the rights discourse of the progressive paradigm, deploying classic minoritizing moves. While majoritarian claims may fit better with legislative activity, minoritizing claims resonate within a court-focused model.⁸³ In this court-centered mode, Christian Right cause lawyers shy away from explicitly invoking the normative status of their religion in America.⁸⁴ Instead, they position Christian claims as equality claims by casting Christians as a vulnerable group in an increasingly secular society, urging courts not to allow the state to discriminate against them.⁸⁵ As Rutherford Institute founder John Whitehead wrote, "When ACLU attorneys threaten or sue public school districts in the name of freedom to stop a child from voluntarily praying, they are not standing for freedom. The ACLU is repressing a whole segment of society—religious people—as if it were an appendage of the secular state."⁸⁶ In the new Christian Right framework, left/progressive organizations are married to the secular state, together constituting the majoritarian forces from which Christians seek protection. Accordingly, Christian Right advocates counter gay minoritizing moves by reconfiguring the operation of discrimination. The Family Research Coun-

lawyers the same way Harvard turns out liberals . . ." Allen Pusey, *Falwell has High Hopes as Law School Opens*, DALLAS MORNING NEWS, Aug. 25, 2004, at A11.

⁸¹ See HACKER, *supra* note 2, at 29.

⁸² See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987) (holding unconstitutional a statute that required teaching creationism in public schools); *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985) (holding unconstitutional a "moment of silence" statute intended to return prayer to schools); *Lemon v. Kurtzman*, 403 U.S. 602, 606, 625 (1971) (holding unconstitutional statutes authorizing state aid to church-related educational institutions); *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968) (holding unconstitutional a statute criminalizing teaching of evolution in public schools); *Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (holding school prayer unconstitutional); HERTZKE, *supra* note 79, at 166–67 (discussing defeat of legislative efforts to return school prayer to schools).

⁸³ See, e.g., HERTZKE, *supra* note 79, at 161 (drawing a distinction between "the 'minoritarian politics' of the courts [and] the majoritarian or consensus-seeking politics of the Congress").

⁸⁴ Religious pluralism scholar Diana Eck notes that some in the Christian Right operate under an assumption that "Christians are the majority and should have their way in setting the public spirit." See ECK, *supra* note 10, at 42.

⁸⁵ See SOUTHWORTH, *LAWYERS OF THE RIGHT*, *supra* note 44, at 72 (explaining that, in her survey work, "religious liberties advocates claimed that they were asserting the rights of religious people to express their views in an oppressively secular and morally corrupt public domain"); HACKER, *supra* note 2, at 9 (explaining how "conservative Christian litigating firms . . . have provided courts with arguments presenting Christians as a protected minority rather than a majority asserting its will"); see also Sarat & Scheingold, *What Cause Lawyers Do*, *supra* note 6, at 7 ("Today it has become clear that the right has taken its cues from the left—constructing its own cultures of victimization and resistance" and "recruit[ing] their own cadres of cause lawyers, who have crafted conservative versions of the politics of rights.").

⁸⁶ JOHN W. WHITEHEAD, *THE STEALING OF AMERICA* 126 (1983).

cil's Peter Sprigg explains: "[w]hile pro-homosexual activists are usually the first to complain about alleged instances of 'discrimination,' the truth is that in many cases, it is people who hold more traditional views about homosexuality who become victims of discrimination."⁸⁷

In line with this minoritizing shift, the most successful claim for the Christian Right has been one based on free speech.⁸⁸ Significant Supreme Court cases, discussed *infra* Part III.A., establish that the First Amendment guarantee of free speech protects religious expression just as it does other forms of speech. But, religious groups operate under a disability—the Establishment Clause.⁸⁹ The use of free speech claims to frame religious expression, as like secular forms of expression, attempts to skirt Establishment Clause considerations. Since conflicting free exercise and establishment principles are weighed against each other, free speech allows a way out of that balancing act and toward a doctrine less pressed by non-secular concerns.⁹⁰

In this sense, the free speech strategy in some ways represents a deliberate turn toward more promising law. Former ACLJ executive director Kevin Fournier explicitly invoked a strategy of "incremental pragmatism" grounded in the turn toward free speech as a doctrinal basis for Christians' religious liberty claims.⁹¹ But Christian Right litigators must remain alert to the potential for pragmatic, strategic considerations to jeopardize long-term doctrinal or ideological commitments.⁹² While the free speech claim has yielded great success,⁹³ some Christian Right cause lawyers realize that it

⁸⁷ PETER SPRIGG, *HOMOSEXUALITY IN YOUR CHILD'S SCHOOL* 12 (2006).

⁸⁸ See BROWN, *supra* note 3, at 10.

Perhaps surprisingly, New Christian Right lawyers neither boldly renounce the Supreme Court's establishment clause rulings of the past nor offer any new interpretation of the free exercise clause to protect religious expression. Instead, they turn to the free speech clause of the First Amendment [I]t is just this approach which, after years of frustrating losses in the courts, has provided the movement with a number of significant legal victories

Id.

⁸⁹ See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 11 (2000) ("Not only must religion be 'unimpaired,' but it must also be unsponsored, uncontrolled, and unpromoted. As a result, religion may not 'flourish,' but rather, wither away.").

⁹⁰ See *id.* at 40 (explaining that when religious speech is at issue, principles of viewpoint neutrality and equal access apply instead of free exercise and establishment considerations).

⁹¹ See BROWN, *supra* note 3, at 46–47.

⁹² In this way, these Christian Right lawyers fit Stuart Scheingold's description of the "innovative" lawyer-activist, who looks for pragmatic possibilities offered by rights discourse. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 181 (1974).

⁹³ See BROWN, *supra* note 3, at 63 ("The significance of *Rosenberger v. Rector and Visitors of the University of Virginia* lies not only in the Court's landmark decision in this case but also in the manner in which the ruling highlighted the presence and legal arguments of the New Christian Right. *Rosenberger* was but the latest in a remarkable string of religion cases in which the Supreme Court subordinated concerns about the wall of

taps into a discourse of pluralism not incompatible with that advanced by the gay rights movement.⁹⁴

Even as the free speech framing tends to secularize Christian Right claims, the movement maintains an overtly religious orientation. Indeed, the "culture war" serves as an important symbol in the Christian Right's court-centered discourse, painting a picture of embattled religious believers fending off powerful secular forces.⁹⁵ This symbol rallies constituents and justifies legal action. The "culture war" image, with its invocation of battle and highly important yet somewhat intangible stakes, ties neatly with an impact litigation model that emphasizes winner-takes-all, zero-sum contests.⁹⁶ For example, ACLJ's Keith Fournier "see[s] the litigation efforts of groups like the ACLJ as the sword. They help us fend off the social marauders, those who are stripping away the remnants of civilization, suppressing people of faith, and substituting a new culture in the United States."⁹⁷ Similarly, the Thomas More Law Center ("TMLC"), whose "ministry was inspired by the recognition that the issues of the *cultural war* being waged across America . . . are not being decided by elected legislatures, but by the courts," responds with an oppositional rights-claiming strategy, further entrenching the role of courts.⁹⁸ TMLC positions itself in opposition to left legal rights organizations, explaining that the court decisions it seeks to contest "have been inordinately influenced by legal advocacy groups such as the [ACLU]."⁹⁹

The "culture war" symbol also constructs the identity of Christian Right cause lawyers. Relying on ideas of symbolic politics pioneered by Murray Edelman¹⁰⁰ and translation of those ideas into the legal domain by

separation while affirming the free speech arguments made by New Christian Right attorneys."); HACKER, *supra* note 2, at xi (describing Christian Right lawyers' "remarkable set of victories" relating to "the expressive and participatory rights of the religious"); *id.* at 18 ("The ACLJ's central victories in court have involved recasting public schools as public forums for student expression of faith-based belief."); *id.* at 55 (describing "the free expression defense" as "the most significant legal contribution of the new breed [of] Christian litigators").

⁹⁴ See, e.g., HACKER, *supra* note 2, at 56 (explaining that Liberty Counsel attorney Matthew Staver's view of free expression in public schools includes gay-based advocacy).

⁹⁵ See Thomas More Law Center, About Us, *supra* note 3.

⁹⁶ See Hunter, *supra* note 3, at 30 (explaining how elites at national organizations use "culture war" symbolism "to frame issues in stark terms, to take uncompromising positions, and to delegitimize their opponents").

⁹⁷ KEITH A. FOURNIER WITH WILLIAM D. WATKINS, A HOUSE UNITED? 101 (1994).

⁹⁸ See Thomas More Law Center, About Us, *supra* note 3.

⁹⁹ *Id.*; see also HACKER, *supra* note 2, at 22 (explaining that Pat Robertson viewed ACLJ as a way "to create an organization that would counter the efforts of liberal public law firms, specifically the ACLU").

¹⁰⁰ See generally MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1964) (exploring how elites use politics symbolically to pacify the mass public and legitimate existing power relations despite vast inequalities); see also Patricia Ewick & Austin Sarat, *Hidden in Plain View: Murray Edelman in the Law and Society Tradition*, 29 LAW & SOC. INQUIRY 439, 440 (2004).

scholars such as Stuart Scheingold,¹⁰¹ Kevin den Dulk explores the symbolic power that the “culture war” has in evangelical cause lawyers’ construction of their roles.¹⁰² den Dulk shows that evangelical cause lawyers adopt a “warrior” role that relies on and perpetuates the “culture war” discourse.¹⁰³ He suggests that evangelical lawyers are cast as warrior-heroes precisely because they are venturing into enemy territory, using an otherwise suspect and dangerous tool—the politics of rights—for counter-mobilization.¹⁰⁴ The warrior-hero is often cast as victor, but in other instances he is portrayed as “the honorable, long-suffering loser (who will win in the end),”¹⁰⁵ heroic nonetheless for engaging the enemy on its own turf—the courts.¹⁰⁶

In sum, both gay rights and Christian Right cause lawyers deploy rights claims to construct constituents as minority groups meriting judicial protection. As I show in the next Part, these rights claims have begun to clash in tangible ways, and the public school system offers a particularly significant location for such clashes.

II. TURNING TO SCHOOLS

The NAACP Legal Defense and Educational Fund’s school desegregation campaign, which in many ways represents the origin of cause lawyering thought, located schools as central not only to doctrinal, but also to ideological claims. That two of the most prominent contemporary social movements find themselves fighting on the same terrain is in many ways unsurprising. This Part locates the Christian Right and gay rights movements in the public education domain. Both movements position schools as vital parts of their minoritizing, rights-claiming orientations, and in doing so, both locate schools as symbols of pluralism in a diverse society. At the same time, both movements acknowledge the universalizing potential of public education and attempt to use school programming as a way to further a particular nor-

¹⁰¹ SCHEINGOLD, *supra* note 92, at 205–09 (relying on Edelman’s work); *see also* Ewick & Sarat, *supra* note 100, at 444 (“Scheingold observed that law—particularly through the discourse of rights and legal procedures—furnishes politics with its most potent symbols of legitimacy.”).

¹⁰² *See* den Dulk, *supra* note 1, at 60–61. James Davison Hunter also discusses the symbolic nature of the “culture war.” *See* HUNTER, *supra* note 1, at 52–53.

¹⁰³ *See* den Dulk, *supra* note 1, at 75.

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 76.

¹⁰⁶ den Dulk explains that evangelical cause lawyers’ description of their Supreme Court appearances “leave[s] the impression of the lawyer heroically entering a lair of secularism, which is a useful impression whether the lawyer wins (‘I defeated the secular dragon!’) or loses (‘We are up against a powerful enemy!’).” den Dulk, *supra* note 1, at 76.

mative agenda.¹⁰⁷ In this sense, public schools represent a particularly fertile terrain for “culture war” contests.¹⁰⁸

Despite their general reluctance to involve themselves in local school disputes, courts are continually confronted with school issues and have developed a large body of law governing public schools at the K-12 level. The amount of education-related litigation has increased over the last several decades and continues to increase.¹⁰⁹ What might otherwise seem like minor school disputes feature as part of nationwide controversies.¹¹⁰ Not only do localized issues gain national media attention and publicity, but national non-governmental organizations (“NGOs”) converge on a given town or city, turning otherwise unknown school districts into battlegrounds for test case litigation.¹¹¹ Supported both financially and rhetorically by national organizations, parents, students, and community organizations conceptualize their disputes as part of a national battle.¹¹²

¹⁰⁷ See David W. Machacek, *The Problem of Pluralism*, 64 SOC. OF RELIGION 145, 154 (2003) (“Education, being compulsory, is more likely to feel the impact of pluralism, and indeed is already the scene of heated debates over the normative values and beliefs that are taught . . .”).

¹⁰⁸ For instance, situating itself as on the frontlines of a “culture war,” ACLJ explains that “[p]erhaps more than in any other arena, Christians find that their values and beliefs are under continual attack in the nation’s public schools.” ACLJ, Education, <http://www.aclj.org/Issues/Issue.aspx?ID=2> (last visited Mar. 14, 2009). For an in-depth analysis of ACLJ and its general counsel, Jay Sekulow, see HACKER, *supra* note 2, at 17–54. Notably, Hacker explains that ACLJ “has done battle with public schools.” *Id.* at 18.

¹⁰⁹ See, e.g., STUART BIEGEL, EDUCATION AND THE LAW 1 (2006) (noting the “ongoing increase in education-related litigation”).

¹¹⁰ James Davison Hunter notes the way in which a relatively minor local issue surrounding “outcomes-based education” in Gaston County, North Carolina turned into a heated “culture war” conflict as national organizations like Citizens for Excellence in Education and People for the American Way become involved. See Hunter, *supra* note 3, at 29; see also BIEGEL, *supra* note 109, at 2 (noting that controversies in education law today tend to “be much broader in scope, embodying the range of ‘front-burner’ disputes that are on the minds of many Americans on a day-to-day basis”). The nationalization of public school disputes might also relate to the increasing federalization of education policy. In the past decade, especially with the “No Child Left Behind” Act, education law and policy have become increasingly centralized and local educational agencies have become increasingly subject to federal regulation. See BIEGEL, *supra* note 109, at 2; see also James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 187 (2003) (noting “increased centralization, even nationalization, of the public school system”).

¹¹¹ Ann Southworth explains that ACLJ general counsel Jay Sekulow finds cases through call-ins to his radio and television programs. In response to callers, ACLJ sends what Sekulow calls “SWAT teams” of lawyers to the relevant community. See Southworth, *Conservative Lawyers*, *supra* note 44, at 1272. Hans Hacker’s collection of data shows that for ACLJ, the majority of its work constitutes a test case litigation strategy with an eye toward setting national precedent. See HACKER, *supra* note 2, at 144.

¹¹² See HACKER, *supra* note 2, at 40 (noting that when ACLJ sponsors a case, it serves as attorney of record and bears the especially high costs of litigation given ACLJ’s desire to take cases up the appellate chain); Mayer N. Zald, *The Future of Social Movements*, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY 319, 332 (Mayer N. Zald & John D. McCarthy eds., 1987) (“[S]ocial movements in the United States quickly learn how to link local and national venues.”); cf. JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE

Before the gay rights movement moved heavily into school-based advocacy, the Christian Right had centered its strategy on schools.¹¹³ While conservative Christians exert authority on a local level and do so through political channels, such as gaining election to local school boards, the most comprehensive study of local influence by the Christian Right suggests that this impact has been fairly limited. Melissa Deckman analyzed attempts by the Christian Right in the 1990s to elect conservative Christians to school boards and thereby turn “school districts into local battlefields.”¹¹⁴ She found, contrary to media commentary, that conservative Christians neither won election more than non-Christians nor drastically influenced school policy once elected.¹¹⁵

Deckman’s findings that the Christian Right has not achieved its goals in public schools through local political channels are consistent with cause lawyering scholarship focusing on the Christian Right’s turn toward litigation strategies in the public education domain. Well-funded Christian Right organizations spend large amounts of time and money on cases intended to influence school policy.¹¹⁶ For instance, between 1987 and 2004, more than twenty percent of ACLJ’s caseload dealt with religious issues in schools, and

LEGAL SYSTEM 17 (1978) (explaining that “McCarthy & Zald’s funded social movements are influential in getting programs on the national agenda and manipulating the media and elites”). For instance, in Montgomery County, Citizens for a Responsible Curriculum (“CRC”) urged parents to opt their children out of the additional lessons on sexual orientation, warning that “it won’t stop with just this curriculum—there are examples across the country of parental rights violations by the public school systems.” Citizens for a Responsible Curriculum, *Can I Opt-Out? What About Alternate Classes?*, <http://www.mcpscurriculum.com/opt-out.shtml> (last visited Mar. 14, 2009). As CRC sees it, each parent in Montgomery County is “in the middle of a national battle for the hearts and minds of our children—and the culture of our society.” *Id.*

¹¹³ See DECKMAN, *supra* note 3, at 3 (“[G]rassroots initiatives [of the 1960s and 1970s] alerted many conservative Christian leaders to problems in the public schools, and education became a major focus for the New Christian Right, led by the Reverend Jerry Falwell and others in the early 1980s.”).

¹¹⁴ See *id.* at 167.

¹¹⁵ Deckman’s research first concludes that there “is little evidence to suggest that Christian Right organizations are having a major impact on the school board candidacies of conservative Christians.” *Id.* at 110. Deckman next finds that conservative Christian school board candidates are no more likely to win election than other candidates, meaning that “[p]rogressive opponents and media critics of the Christian Right have it wrong—the likelihood of a Christian Right takeover of local school boards does not seem imminent.” *Id.* at 132–33. Finally, Deckman concludes that conservative Christian school board members have had only a limited influence on school policy. She argues that once conservative Christians gain a place within official school governing bodies, they often adopt more nuanced and moderate positions and make conventional priorities like sex education and evolution less central to their agendas. See *id.* at 140, 145, 149. In instances where conservative Christian board members maintain more “pure” ideological positions, they tend to be minority members; they can slow down progressive agendas by providing policy distractions but can rarely get their more conservative proposals passed. See *id.* at 135–36, 157.

¹¹⁶ See BROWN, *supra* note 3, at 37, 42, 123 (noting that by 2000 ACLJ boasted a \$9 million budget, 25 staff attorneys, and a network of 330 volunteer attorneys, and that by 1999 ADF’s budget had grown from \$400,000 to more than \$9 million in just six years of operation).

almost thirty percent of its Supreme Court activity during this period involved such cases.¹¹⁷ Similarly, more than thirty percent of Liberty Counsel's caseload between 1989 and 2004 consisted of school-based issues, and almost half of its Supreme Court activity during this time addressed such issues.¹¹⁸

Through its partial reconfiguration as a law-based movement, the Christian Right turned a campaign to bring religion (and religious values) back to public schools into a campaign to protect student rights through the courts and legislatures. Indeed, the pragmatic abandonment of the school prayer amendment and a turn instead toward the Equal Access Act ("EAA") exemplifies the Christian Right's shift.¹¹⁹ Some movement leaders justified the school prayer amendment on majoritarian grounds, basing the campaign on recognizing most students as religious and presumptively Christian. But attempts at school prayer have been turned down by the Supreme Court and were deemed politically unpopular in moderate legislatures.¹²⁰ On the other hand, the EAA, which represented a movement victory after the failure of the school prayer effort, turned toward claims that painted Christian students as a minority group and called for the inclusion of religious student groups on equal terms with non-religious groups.¹²¹ The EAA effort appealed to moderates by including all students and by placing religious expression on an equal footing with secular expression. At the same time, EAA principles derived from First Amendment free speech law and avoided Establishment Clause problems.

As the EAA campaign demonstrates, schools offer a fruitful location for framing Christian advocacy as a rights-based campaign in which politically powerless victims are at stake. Christian Right lawyers position children as vulnerable to the coercive methods of educators and portray school officials as secular elites attempting to indoctrinate children.¹²² Constituents see public schools as hostile to their religious and moral values, such that advocates are necessary to protect against schools' overreaching.¹²³

¹¹⁷ See HACKER, *supra* note 2, at 48, 50.

¹¹⁸ See *id.* at 84, 86.

¹¹⁹ For a discussion of this shift, see HERTZKE, *supra* note 79, at 161–98.

¹²⁰ See *Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963); HERTZKE, *supra* note 79, at 165–67.

¹²¹ See 20 U.S.C. § 4071(a) (2006).

¹²² See DECKMAN, *supra* note 3, at 17 (explaining that some "conservative Christians believe that their children are virtually 'abused' in the classroom"); *id.* ("Some Christian Right leaders allege that there is a widespread conspiracy by leaders in the 'liberal' education establishment to change the religious values of their children, through various curricula, teaching methods, and behavior-modification programs.").

¹²³ See *id.* at 43 ("[R]esearch shows that religiously conservative individuals are most likely to think that public schools are hostile to their moral and spiritual values.").

Children are particularly sensitive subjects, deemed either non-sexual or presumptively heterosexual.¹²⁴ In this sense, the same sensitivity that aids Christian Right advocates poses unique challenges for a movement centered on homosexuality.¹²⁵ But as young people come out earlier, partly in response to gay rights advances in other domains, gay rights organizations have had to confront schools as important venues. In fact, LGBT youth are now the beneficiaries of more grant funding than any other specific LGBT population.¹²⁶ Lawyers position LGBT children as vulnerable minorities whose safety is threatened and whose educational experience compromised.¹²⁷ Advocates cite high rates of harassment and violence against LGBT students and correlate such treatment with high drop-out rates as well as other signs of emotional, psychological, and educational harm.¹²⁸

While legal action recognizes the need to protect LGBT students and to remedy wrongs, it also yields opportunities to push proactively LGBT issues in public education, translating the vulnerability of LGBT students into calls for greater acceptance through diversity programming and comprehensive sex education.¹²⁹ In fact, litigation that seeks to redress harms suffered by LGBT students may result in school-wide diversity programming.¹³⁰ Such programming draws on a depiction of schools as state entities that must recognize and further an important pluralist ethic. For instance, in defending a gay-inclusive curriculum in Lexington, Massachusetts, GLAD appealed to increasing school safety while simultaneously focusing “on the crucial role of public schools in . . . the transmission of values that prepare students for participation in a pluralistic democracy”¹³¹

¹²⁴ See generally Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269 (1996) (explaining how society desexualizes adolescents and erases the existence of gay youth).

¹²⁵ See Kerry Robinson & Cristyn Davies, *Docile Bodies and Heteronormative Moral Subjects: Constructing the Child and Sexual Knowledge in Schooling*, 12 SEXUALITY & CULTURE 221, 223 (2008) (“The regulation of children’s knowledge of sexuality becomes even more restrictive and difficult when heteronormative boundaries of sexuality are transgressed.”).

¹²⁶ See 2007 STANDARD ANNUAL REPORTING, *supra* note 54, at 10 (reporting that between 2004 and 2006, \$19.7 million of the total \$119 million in grant funds for LGBT organizations went specifically to serve youth).

¹²⁷ See, e.g., *Parker* GLAD Amicus Brief, *supra* note 68, at 28–29 (“Several leading mental health organizations have identified [LGBT] students . . . as particularly vulnerable targets for bullying.”).

¹²⁸ See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1179 (9th Cir. 2006) (citing studies and advocacy pieces), *vacated on other grounds* by 549 U.S. 1262 (2007).

¹²⁹ See *Parker* GLAD Amicus Brief, *supra* note 68, at 28 (defending Lexington, Massachusetts’s gay-inclusive curriculum, GLAD argues that “[e]ducational programs for the youngest age groups that teach tolerance, respect for differences and effective problem-solving are widely regarded as key ingredients in a school’s anti-bullying curriculum”).

¹³⁰ That was the situation in the Boyd County litigation, discussed later in this Part and *infra* Part III.B.

¹³¹ *Parker* GLAD Amicus Brief, *supra* note 68, at 1.

GLAD's reasoning demonstrates the way in which advocates deploy minoritizing moves to endorse school programming that embraces the particular group's normative view. That is, not only do Christian Right and gay rights lawyers depict their constituents as vulnerable minorities in a pluralistic society, but they also seek to harness the universalizing potential of school policymaking.¹³² Both groups of lawyers seek to affect children at an early age, thereby influencing their worldviews.¹³³ As advocates from the Christian Right put it, "[i]ndoctrinating impressionable school children is an easier way of changing public attitudes toward homosexuality than persuading adults."¹³⁴ Advocates on the left explain that "once students are educated regarding diversity, they can be powerful agents of change for transforming their school environment, and, ultimately, society."¹³⁵

In a relatively short period of time, gay-inclusive school programming has become a key issue for both movements. In their study of sexual orientation issues in public schools in the late 1990s, political scientists James Button and Kenneth Wald, along with health education expert Barbara Rienzo, found that sexual orientation was "either omitted or only briefly

¹³² See HUNTER, *supra* note 1, at 37 ("Because skills, values, and habits of life are passed on to children in school, it was inevitable that the schools would be an arena of cultural conflict . . ."); see also Gutmann, *supra* note 32, at 11 ("Educational policy in America, far from requiring neutrality, encourages local communities to shape schools partly in their particular cultural image . . ."); cf. GUTMANN, *supra* note 13, at 14 (explaining that a "democratic theory of education focuses on what might be called 'conscious social reproduction'"); Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 61 (1983) ("The public curriculum is an embarrassment, for it stands the state at the heart of the paideic enterprise and creates a statist basis for the meaning as well as for the stipulations of law.").

¹³³ See HUNTER, *supra* note 1, at 174.

Together, the curriculum, the textbook literature, and even the social activities of the school convey powerful symbols about the meaning of American life—the character of its past, the challenges of the present, and its future agenda. In this way the institutions of mass education become decisive in socializing the young into the nation's public culture. Public education is especially significant territory in this regard, primarily because it reflects the will and power of the state vis-à-vis the nation's public culture.

Id.

¹³⁴ SPRIGG, *supra* note 87, at 1; see also *id.* at 22 ("What they seek to do is 'recruit children'—100% of our children, 'gay' or straight—as soldiers in their war against truth, common sense, and traditional moral values.").

¹³⁵ Motion for Leave to File Brief as Amicus Curiae by Anti-Defamation League at 4, *Parker v. Hurlley*, 514 F.3d 87 (1st Cir. 2008) (No. 07-1528) [hereinafter *Parker* Anti-Defamation League Amicus Brief]; see *id.* at 9 ("Using public schools to promote tolerance and understanding allows the state to combat the harms of . . . widespread prejudice from the ground up, by seeking to improve the cultural and civic values of its youngest citizens."); see also JAMES W. BUTTON, BARBARA A. RIENZO, & KENNETH D. WALD, *PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES* 167 (1997) ("Schools are the focus of contentious political battles over sexual orientation issues. Proponents of including sexual orientation in the school agenda assert that education is critical for social transformation and changes in attitudes toward lesbians and gay men. They maintain that this education needs to begin early and that schools provide the best environment for such activity because of their accessibility to youth.").

addressed in the classroom.”¹³⁶ Not only did students report that any such instruction tended “to be negative in tone,” but many teachers reported that they omitted discussion of HIV/AIDS to avoid “attitudes and beliefs about homosexuality.”¹³⁷ The few schools that included sexual orientation programming almost always recognized the concerns of religious parents by giving them the right to opt-out, even though such rights were rarely used.¹³⁸

But this picture from the 1990s looks quite unlike the current one. In the last decade, more attention has been paid to LGBT youth, the gay rights movement has claimed significant victories, and religious organizations have increasingly turned their attention to issues of sexual orientation. Accordingly, school controversies at the intersection of sexuality and religion have become much more common. While issues relating to gay-straight alliances and student rights (from speech to non-harassment and non-discrimination) are among the most common, curricular issues are beginning to crop up more frequently.

Given the relatively recent emergence of this issue and the lack of consensus among parents, students, and school officials, curricular issues relating to sexuality are highly contested. While states like Massachusetts promulgate regulatory guidance encouraging schools to implement inclusive curriculum in line with the state’s pro-gay legal norms, other states maintain statutes either mandating instruction that discusses homosexuality in a negative light or prohibiting instruction that mentions homosexuality in a positive way.¹³⁹ Most states, though, provide no explicit guidance and leave programming to local school decision makers such that sexuality and sexual orientation are treated in vastly different ways as one moves from one school district to the next. National advocacy groups, unsurprisingly, devote substantial resources to this area, which they see as both essential and up-for-

¹³⁶ See BUTTON, RIENZO, & WALD, *supra* note 135, at 141.

¹³⁷ *Id.*

¹³⁸ See *id.* at 159.

¹³⁹ Compare MASS. DEPT OF EDUC., MASS. COMPREHENSIVE HEALTH CURRICULUM FRAMEWORK 12, 31 (1999) (including a “guiding principle” that students learn to accept “the dignity and worth of all individuals regardless of . . . sexual orientation” and encouraging instruction such that by the end of fifth grade students can “define sexual orientation using the correct terminology”) with ALA. CODE § 16-40A-2(c)(8) (2008) (requiring sex education course materials to emphasize “in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.”), ARIZ. REV. STAT. ANN. § 15-716(c)(1) to (3) (2008) (prohibiting any course of study that (1) “[p]romotes a homosexual life-style,” (2) “[p]ortrays homosexuality as a positive alternative life-style,” or (3) “[s]uggests that some methods of sex are safe methods of homosexual sex”), S.C. CODE ANN. § 59-32-30(A)(5) (2008) (prohibiting health education programs from discussing “alternate sexual lifestyles from heterosexual relationships” except for purposes of instruction on sexually transmitted disease), and TEX. HEALTH & SAFETY CODE ANN. § 85.007 (Vernon 2008) (requiring educational programs for those eighteen and younger to state “that homosexual conduct is not an acceptable lifestyle and is a criminal offense”).

grabs. A turn to law correlates with each movement's struggle for a superior position in influencing schools' norm-generating functions.¹⁴⁰

It is useful to note the relationship to litigation that each movement demonstrates in the school programming domain—relationships that might seem unexpected. The gay rights movement, which has relied quite extensively on courtroom advocacy, uses more privatized policymaking, through NGOs like PFLAG and HRC, to convince schools to implement gay-inclusive curriculum.¹⁴¹ The turn to litigation most often occurs when the curriculum is challenged. The Christian Right, on the other hand, generally uses court-centered activism to challenge school programming that emerges from school decision-making channels.¹⁴² Rather than rely on insider status to achieve political gains, in this context Christian Right advocates use legal claims to publicize and challenge school decisions.

Two recent examples, which are central to this Article's analysis, provide illustrations. In Maryland, the Montgomery County School Board initiated a plan to add three lessons to its health and sex education curriculum for eighth and tenth graders. Eighth graders would consider how people respond to differences in sexual orientation and gender identity. Tenth graders would learn about laws their schools must follow to prevent harassment and discrimination based on sexual orientation and gender identity, and would receive a lesson on condom use and sexually transmitted disease.¹⁴³ Citizens for a Responsible Curriculum ("CRC") and Parents and Friends of Ex-Gays and Gays ("PFOX"), two groups representing Christian Right interests, challenged the curricular changes and sought to block their implementation.

CRC urged parents to exempt their children, warning: "[i]f you are morally opposed to this curriculum and let your child participate anyway, . . . you are doing a disservice not only to your child, but to parents and children across the nation."¹⁴⁴ At the same time, Teach the Facts, an organization supporting the school district's curriculum, proclaimed, "[a]cross the

¹⁴⁰ Scholars studying social movement lawyering have explained the power of legal reform even as they recognize the limitations of law-centered projects. *See, e.g.*, Sarat & Scheingold, *What Cause Lawyers Do*, *supra* note 6; HANDLER, *supra* note 112, at 22–25. Those studying the gay rights movement have noted law's ability to establish norms and shape behavior. *See* BUTTON, RIENZO, & WALD, *supra* note 135, at 10 ("[L]aw changes the values of society.").

¹⁴¹ The new "Welcoming Schools" curriculum being piloted in select communities across the country represents an effort by PFLAG and HRC, and both groups have been careful not to publicize the locations for the pilot programs. *See* Dana Rudolph, *Boston Leads the Way to Welcoming Schools*, BAY WINDOWS, Nov. 14, 2007, at 8, available at <http://www.baywindows.com/index.php?ch=columnists&sc=mombian&sc3=&id=52368>.

¹⁴² *See, e.g.*, *Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch.*, No. AW-05-1194, 2005 WL 1075634 (D. Md. May 5, 2005); *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780 (E.D. Mich. 2003).

¹⁴³ *Citizens for a Responsible Curriculum v. Montgomery County Bd. of Educ.*, No. 07-30 at 2 (Md. State Bd. of Educ. June 27, 2007).

¹⁴⁴ *Citizens for a Responsible Curriculum*, *supra* note 112.

nation and in our own back yard, religious extremists are attempting to impose their beliefs on all of our children.”¹⁴⁵

The curricular challenge played out in two separate rounds of litigation: CRC and PFOX challenged the initial curriculum in federal court and a revised curriculum in the state administrative system and state court.¹⁴⁶ TMLC and Liberty Counsel, both Christian public interest law firms, represented CRC and PFOX. Lambda Legal represented PFLAG, which intervened in the litigation in support of the school district.

While Christian Right lawyers asserted parental rights and religious free exercise claims, they quickly made the free speech claim central. Advocates argued that the programming included only one perspective—a gay-positive one—to the exclusion of other legitimate perspectives, and included variations in sexual orientation—gay, lesbian, and bisexual—without including ex-gays.¹⁴⁷ This framing plays into an inclusion model of pluralism that values a proliferation of voices and states neutrality with regard to competing truth claims. Such a framing deemphasizes the religious nature of Christian beliefs vis-à-vis the state, instead treating Christian perspectives like secular belief systems.

Meanwhile, in Lexington, Massachusetts, the public school district implemented a gay-inclusive curriculum at the elementary school level. Starting in kindergarten, students are exposed to books introducing families headed by same-sex couples. When parent David Parker learned that his son’s class would read *Who’s in a Family?*, he requested the opportunity to exempt his son from the reading. School officials denied his request, and Parker refused to leave the school until his demands were met. Eventually, he was arrested for trespassing and taken away in handcuffs.¹⁴⁸ While Parker hired a private Boston law firm to sue the school district, Christian Right organizations used the case as a centerpiece of their campaign and reportedly advised the lawyers overseeing the litigation.¹⁴⁹ On the left, GLAD, the ACLU, and the Anti-Defamation League (“ADL”) all filed briefs in the case

¹⁴⁵ Teach the Facts, Stand Up for What’s Right, <http://www.teachthefacts.org/index2.html> (last visited Mar. 15, 2009).

¹⁴⁶ See *Citizens for a Responsible Curriculum*, 2005 WL 1075634; *Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch.*, No. 284980 (Md. Cir. Ct. Jan. 31, 2008); *Citizens for a Responsible Curriculum* (Md. State Bd. of Educ. June 27, 2007).

¹⁴⁷ See, e.g., Petitioners’ Memorandum at 15, *Citizens for a Responsible Curriculum* (Md. Cir. Ct. Jan. 31, 2008). PFOX defines ex-gays as “men and women with unwanted same-sex attractions [who] make the personal decision to leave a gay identity via secular therapy [or] faith based ministries” PFOX, About Us, http://pfox.org/about_us.html (last visited Mar. 15, 2009).

¹⁴⁸ See Maria Cramer & Ralph Ranalli, *Arrested Father Had Point to Make*, BOSTON GLOBE, Apr. 29, 2005, at B1.

¹⁴⁹ See, e.g., SPRIGG, *supra* note 87, at 13–14.

in support of the school.¹⁵⁰ The *Parker v. Hurley* litigation resulted in published decisions from both the federal district court and the First Circuit.¹⁵¹

Unlike in the Montgomery County litigation, in *Parker*, lawyers representing the religious parents made parental rights and religious free exercise claims the centerpiece of their challenge, arguing that the school's curriculum impinged on the parents' right to raise their children as they see fit and to control the religious upbringing of those children.¹⁵² In doing so, lawyers appealed to an accommodation model of pluralism, framing the objecting parents as a minority group in need of judicially declared accommodation. The right to withdraw based on religious beliefs would serve pluralist ends by allowing distinctive religious cultures to survive rather than sacrificing such diversity to a homogenizing, assimilative state effort.

Gay rights advocates, and the school district itself, responded to the parents' claims by appealing to the virtues of tolerance, exposure to diversity, and critical deliberation, all priorities of a liberal, pluralistic society.¹⁵³ When pressed by the claim that children's "mere exposure" to sex and sexuality is harmful in itself, even within a liberal society, gay rights advocates asserted a left multicultural vision of pluralism that cast lesbians and gay men not as sex actors but as an identity-based minority group meriting recognition in a diverse society.¹⁵⁴

While the lawsuits emerging from Montgomery County and Lexington provide the most comprehensive examples of school programming litigation, a brief survey of additional cases further demonstrates the high level of involvement by both gay rights and Christian Right legal organizations in the fight over schools' value-inculcation function. Before its *Parker* work, GLAD represented the Chelmsford, Massachusetts school district against a parental challenge to an AIDS education program that included material on homosexuality, masturbation, and condom use.¹⁵⁵ In addition to its role in the *Parker* litigation, the ACLU represented a group of students in Boyd County, Kentucky, challenging the school district's refusal to allow a gay-straight alliance.¹⁵⁶ When that litigation ended with the school district agreeing to provide mandatory anti-harassment training to students, ADF sued the

¹⁵⁰ See *Parker* GLAD Amicus Brief, *supra* note 68; Brief of Amici Curiae American Civil Liberties Union, American Civil Liberties Union of Massachusetts, Lexington Community Action for Responsible Education and Safety, Lexington Education Ass'n, Massachusetts Teachers Ass'n, and Respecting Differences, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (No. 07-1528); *Parker* Anti-Defamation League Amicus Brief, *supra* note 135.

¹⁵¹ *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); *Parker v. Hurley*, 474 F. Supp. 2d 261 (D. Mass. 2007).

¹⁵² See *Parker*, 514 F.3d at 90.

¹⁵³ See *Parker* GLAD Amicus Brief, *supra* note 68; Brief of Defendant-Appellees at 8, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (No. 07-1528).

¹⁵⁴ See *Parker* GLAD Amicus Brief, *supra* note 68, at 8.

¹⁵⁵ *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 528-29 (1st Cir. 1995).

¹⁵⁶ *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 669 (E.D. Ky. 2003).

school district on behalf of parents and students, and the ACLU intervened in this second round of litigation.¹⁵⁷ These gay rights groups do not see themselves as merely defending school districts involved in local skirmishes with some local parents. Rather, they acknowledge how both sides in local conflicts tend to be supported financially and rhetorically by larger national movements. As one GLAD attorney put it to a local reporter, “these parents groups . . . are really fueled by a larger right-wing establishment.”¹⁵⁸

Progressive groups, it must be noted, are also willing to represent parents challenging a school district’s controversial curricular decisions. For instance, the ACLU represented a group of parents challenging a Bible course in the Ector County, Texas public schools as well as parents challenging intelligent design policies in Dover, Pennsylvania, and Cobb County, Georgia.¹⁵⁹

Christian Right legal organizations have initiated numerous court challenges to sex- and sexual orientation-related school programming. In addition to its Montgomery County work, TMLC represented a parent and student challenging gay-positive programming in an Ann Arbor, Michigan school.¹⁶⁰ Liberty Counsel not only represented CRC and PFOX in Montgomery County, but the firm also became lead counsel for parents in Palmdale, California, petitioning the Ninth Circuit to rehear en banc a case regarding a sex-related survey given to students without parental notification.¹⁶¹ ACLJ represented a parent challenging the health curriculum in Fairfield, Connecticut.¹⁶² In addition to its challenge to the Boyd County anti-harassment programming, ADF is currently working to stop implementation of a gay-inclusive curriculum at the elementary school level in Minneapolis.¹⁶³ ADF also represented PFOX in Montgomery County, urging the school district to end its alleged viewpoint discrimination with regard to

¹⁵⁷ *Morrison v. Bd. of Educ.*, 521 F.3d 602, 602, 605 (6th Cir. 2008).

¹⁵⁸ Ethan Jacobs, *GLAD Atty: Lexington Lawsuit Has Had Chilling Effect on Schools*, BAY WINDOWS, Sept. 27, 2007, at 28, available at <http://www.baywindows.com/index.php?ch=news&sc=gblt&sc3=&id=48743>.

¹⁵⁹ Stipulation of Voluntary Dismissal of Action Without Prejudice, *Moreno v. Ector County Indep. Sch. Dist.*, No. MO-07-CV-039 (W.D. Tex. Mar. 31, 2008) [hereinafter *Moreno Dismissal*]; see also *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1321 (11th Cir. 2006); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005); ACLU, *ACLU Successfully Helps Parents Challenge Bible Classes in Texas Public Schools*, <http://www.aclu.org/religion/schools/bibleinpublicschools.html> (last visited Mar. 15, 2009).

¹⁶⁰ *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 782 (E.D. Mich. 2003).

¹⁶¹ *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005); 447 F.3d 1187, 1188 (9th Cir. 2006) (denying petition for rehearing en banc).

¹⁶² *Leebaert v. Harrington*, 332 F.3d 134, 135 (2d Cir. 2003).

¹⁶³ See Memorandum from Brian W. Raum & Austin R. Nimocks, Senior Legal Counsel, Alliance Defense Fund, to Dr. William D. Green, Superintendent, Minneapolis Public Schools, Lydia Lee, Chair, Minneapolis Board of Education, Dorothy Washington, Principal, Park View Montessori Elementary School, Ray Aponte, Principal, Jefferson Community School, & Robert Z. Brancale, Principal, Hale Elementary School (Apr. 24, 2008), available at <http://www.telladf.org/UserDocs/MNPubSchoolsMemo.pdf>.

PFOX on school campuses.¹⁶⁴ Just as a GLAD attorney recognized the use of parents in local communities to advance a “right-wing” agenda, Richard Thompson, TMLC’s President and Chief Counsel, commented that the Montgomery County case is “another example of our public school system being used as an indoctrination arm of homosexual advocacy groups.”¹⁶⁵

Christian Right legal groups not only represent parents challenging school districts, but also school districts themselves. For instance, TMLC represented the Dover school district in its intelligent design dispute,¹⁶⁶ ADF came to the defense of the Cobb County public schools’ evolution policy,¹⁶⁷ and, most recently, the Liberty Legal Institute, an ADF “ally” organization, represented the Ector County school district against the ACLU’s challenge to a Bible course.¹⁶⁸

As this Part has made clear, both gay rights and Christian Right lawyers view schools as central sites in the “culture war.” Both see curriculum as a way to produce citizens who will take for granted the movement’s worldview. Both, therefore, devote substantial resources to litigation addressing the place of sexual orientation in school programming.

III. SITUATING DOCTRINAL CLAIMS WITHIN MODELS OF PLURALISM

School curriculum represents one of the most influential—and hence most contested—influences on a child’s development. As gay rights groups convince more schools to include sexual orientation programming, Christian Right organizations respond, often with litigation. This Part explores how Christian Right lawyers challenge school programming.

First, I set out the free speech claim, which maps onto an inclusion model of pluralism. I explain the free speech claim’s problematic doctrinal application in this domain and the “balanced” curriculum remedy it suggests. Nonetheless, some courts credit the free speech claim in a way that evidences the power of the Christian Right’s inclusion model of pluralism.

I then proceed to the Christian Right’s parental rights and free exercise claims, which work with an accommodation model of pluralism. These claims also attempt to capture a pluralist ethic, yet do so in a way that sug-

¹⁶⁴ See Letter from Jeremy D. Tedesco, Legal Counsel, Alliance Defense Fund, to Nancy Navarro, President, Montgomery County Board of Education (July 16, 2007), available at <http://www.telladf.org/UserDocs/MontgomeryCountyLetter.pdf>.

¹⁶⁵ Thomas More Law Center, Lessons on Homosexuals Being “Born That Way” and Erotic Sex Taught to 8th and 10th Graders Challenged by the Thomas More Law Center (Jan. 23, 2009), <http://familyactionorganization.wordpress.com/2008/01/23/lessons-on-homosexuals-being-%e2%80%98born-that-way%e2%80%99-and-erotic-sex-taught-to-8th-and-10th-graders-challenged-by-the-thomas-more-law-center/>.

¹⁶⁶ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 730, 753–54 (M.D. Pa. 2005).

¹⁶⁷ *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1321 (11th Cir. 2006).

¹⁶⁸ See *Moreno Dismissal*, *supra* note 159, at 2; Alliance Defense Fund, Legal Organizations, <http://www.alliancedefensefund.org/about/Allies/Legal.aspx> (last visited Mar. 15, 2009).

gests exemption, or a curriculum silent on sexual orientation, as the appropriate remedy. Courts have been uniformly unreceptive to these claims and the theoretical framework within which they operate.

Throughout this Part, I pay attention to Christian Right cause lawyers' focus on the Supreme Court, which has been more welcoming of their rights claims than lower courts. I contend that this Supreme Court focus helps to explain the Christian Right's aggressive litigation in the school programming context despite unfavorable law.

A. *Inclusion Based on Free Speech*

In asking for inclusion on equal terms, the free speech claim for religious liberty exemplifies the "place at the table" approach adopted by prominent Christian Right cause lawyers.¹⁶⁹ Sounding in a participatory pluralism, the free speech claim stresses the societal value of allowing all groups to have their voices heard.¹⁷⁰ Christians are seeking to engage with difference, maintaining a distinctive identity while also acknowledging the legitimate place of competing identities, both secular and religious. This Christian Right position constructs pluralism as an "engagement with, not abdication of, differences and particularities."¹⁷¹ As pluralism scholar David Machacek puts it, pluralism becomes "*meaningful diversity*."¹⁷²

By definition, the free speech strategy legitimizes, at least in part, the inclusion claims of other minority groups.¹⁷³ Michael McConnell, who was influential in formulating the free speech claim for religious liberty, argues

¹⁶⁹ See, e.g., HACKER, *supra* note 2, at 36–37, 45 (using the term "place at the table" to describe the Christian Right strategy based on equal access for all worldviews and forms of speech, regardless of religious content). Pluralism scholars often appeal to the "common table" as the location for engagement in a pluralistic society. See ECK, *supra* note 10, at 71 (discussing the work of John Courtney Murray, who "described America's civic pluralism as the vigorous engagement of people of different religious beliefs around the 'common table' of discussion and debate").

¹⁷⁰ See Roof, *supra* note 10, at 8; see also ECK, *supra* note 10, at 69 ("The language of pluralism is the language not just of difference but of engagement, involvement, and participation."). This brand of pluralism also resonates with the cultural pluralism that Diana Eck describes. Eck builds on the work of sociologist Horace Kallen, who pioneered the idea of pluralism by characterizing America's diversity as like a symphony, in which distinctive tones blend in harmony. See *id.* at 57. Eschewing the symphony image for one of jazz, Eck argues that this captures a society in which collaboration and invention are required as we "hear the musical lines of our neighbors." *Id.* at 58.

¹⁷¹ Eck, *supra* note 10, at 71.

¹⁷² Machacek, *supra* note 107, at 155; see also Marty, *supra* note 8, at 16 ("Speak of 'pluralism' and you venture to a terrain in which people have thought about what to do about diversity.").

¹⁷³ Jay Sekulow has commented that he is "not concerned about competing worldviews" since "[t]he danger is in keeping any of them out of the forum." HACKER, *supra* note 2, at 37. Indeed, some Christian Right lawyers have embraced an even-handed approach to the EAA such that it allows gay-straight alliances. See SOUTHWORTH, *supra* note 44, at 164–65 (relating a Christian Right lawyer's story of how he convinced his colleagues to adopt a balanced, doctrinally faithful approach to the EAA). Nonetheless, regardless of settled EAA principles, some Christian Right organizations oppose the

in the domain of public schools that “[t]he best we can do . . . is to foster pluralism and diversity—to encourage as wide a range of views to be presented and expounded as is practical, and to avoid when possible an authoritative position on issues known to be controversial.”¹⁷⁴ If the Christian voice is given a place not because of its dominance but because of its mere presence in a pluralistic society, the LGBT voice must also be included. Indeed, Liberty Counsel’s general counsel, Matthew Staver, has conceded as much.¹⁷⁵ Moreover, as an approach that simultaneously recognizes religious and secular/progressive interests, this framing has at times been embraced by progressive organizations like the ACLU.¹⁷⁶

In 1981, when the U.S. Supreme Court affirmed the Christian Right’s strategy in *Widmar v. Vincent*, Christian Right litigators began to establish First Amendment free speech protection as the strongest guarantee of religious liberty in the public education context.¹⁷⁷ In *Widmar*, the Court held that the University of Missouri at Kansas City policy prohibiting religious student groups from using university facilities while permitting non-religious groups to use them violated the students’ free speech rights, specifically finding that “religious worship and discussion . . . are forms of speech and association protected by the First Amendment.”¹⁷⁸

When the *Widmar* Court used language distinguishing the higher education context from the secondary education context, Christian Right organizations lobbied Congress to pass the EAA, which translated *Widmar*’s First Amendment principles into statutory principles governing secondary schools.¹⁷⁹ The Supreme Court later upheld the EAA against an Establishment Clause challenge and, in so doing, vindicated the rights of students to form a Christian club at a public high school.¹⁸⁰ Jay Sekulow, now head of ACLJ, represented the students before the Court.¹⁸¹

After successfully securing religious freedom rights under free speech principles for university and high school students, the Christian Right argued

rights of students to form gay-straight alliances. See, e.g., SPRIGG, *supra* note 87, at 16–17 (instructing parents on “Opposing ‘Gay-Straight Alliances’”).

¹⁷⁴ Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146, 165 (1986).

¹⁷⁵ In his case study of Liberty Counsel, Hans Hacker explains that Matthew Staver “has argued for free expression within public schools, including student advocacy of atheism, secular humanism, and gay marriage, as well as Christianity.” HACKER, *supra* note 2, at 56. Similarly, Hacker documents the “place at the table” approach advocated by ACLJ’s Jay Sekulow—an approach that “has led others to endorse attitudes more tolerant of diverse ideas and speech.” *Id.* at 36.

¹⁷⁶ See, e.g., Brief of ACLU of San Diego & Imperial Counties as Amicus Curiae at 1–2, *Harper v. Poway Unified Sch. Dist.*, 545 F. Supp. 2d 1072 (S.D. Cal. 2008) (No. 04-CV-1103) [hereinafter *Harper* ACLU Amicus Brief]; see also HACKER, *supra* note 2, at 56.

¹⁷⁷ 454 U.S. 263 (1981).

¹⁷⁸ *Id.* at 269, 277.

¹⁷⁹ 20 U.S.C. §§ 4071–4074 (2006). For a discussion of the lobbying efforts of the Christian Right in support of the EAA, see HERTZKE, *supra* note 79, at 162–72.

¹⁸⁰ See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990).

¹⁸¹ See *id.* at 230.

for the inclusion of non-student groups in the public school forum. In *Lamb's Chapel v. Center Moriches Union Free School District*, Sekulow represented a church that sought to use a school's facilities to screen a film series that dealt with family values and childrearing from a religious perspective.¹⁸² He successfully argued that a school's policy to prohibit use of its facilities by religious groups violated the First Amendment's free speech guarantee, and the Court held that allowing the church access to the school would not violate the Establishment Clause.¹⁸³

Finally, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court again extended its free speech jurisprudence in the religious freedom domain, holding that the University of Virginia engaged in unconstitutional viewpoint discrimination by denying funds for printing costs to a religious student publication.¹⁸⁴ With numerous victories based on the free speech claim, the adaptation of free speech to religious freedom represents a significant innovation of Christian Right lawyers that has changed the face of litigation involving religious liberty.¹⁸⁵

Significantly, these religious free speech principles emerged from Supreme Court decisions. Indeed, in *Rosenberger* and *Lamb's Chapel*, the Christian Right lost at *both* the district and appellate court levels.¹⁸⁶ The increasingly conservative Supreme Court has been particularly receptive to the Christian Right's claims in a way that lower federal courts have not, accommodating such claims within notions of liberal pluralism embodied by both public education and free speech doctrine.

Because the free speech approach is limited in significant ways to the public education domain,¹⁸⁷ it is unsurprising to see Christian Right lawyers attempt to extract additional gains from this strategy by situating school-based claims that are not amenable to free speech arguments within free speech doctrine. For instance, in *Berger v. Rensselaer Central School Corporation*, Sekulow defended a school's policy allowing religious organiza-

¹⁸² 508 U.S. 384, 385, 387–89 (1993).

¹⁸³ *See id.* at 394–95.

¹⁸⁴ 515 U.S. 819, 845–46 (1995).

¹⁸⁵ BROWN, *supra* note 3, at 73 (“The coupling of the free speech clause with religious expression, a jurisprudential concept successfully invoked with regularity after *Widmar*, has been the major contribution of the New Christian Right in the Supreme Court.”).

¹⁸⁶ *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 827–28 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 389–90 (1993).

¹⁸⁷ *See BROWN*, *supra* note 3, at 142.

New Christian Right public interest law firms have seen the free speech rationale stretched to include high school Bible clubs, religious literature distribution in elementary and junior high schools, student activity fees in college, and public access to school facilities. Outside the educational setting, however, the free speech argument has yielded little substantive success.

tions to distribute religious literature, including Bibles, in classrooms.¹⁸⁸ Rather than argue directly against Establishment Clause concerns, he asserted a free speech interest, namely the right of religious groups “to freely express themselves by handing out Bibles to schoolchildren.”¹⁸⁹ In striking down the school policy under the Establishment Clause, the Seventh Circuit criticized Sekulow for misapplying free speech principles, accusing him of “[a]ttempting a definitional coup.”¹⁹⁰ Nonetheless, Christian Right litigators demonstrated their willingness to make free speech claims in the public school domain, even when the doctrinal arguments are quite strained.

Christian Right lawyers eventually identified issues in the sexual orientation context conducive to free speech claims. They have aggressively litigated First Amendment claims on behalf of students expressing religious views critical of homosexuality. These claims present difficult issues, pitting the free speech rights of students against the rights of lesbian and gay students to be free from harassment. They incorporate an inclusion model of pluralism, positioning Christian speech as one voice among many, and positioning school officials (and gay rights advocates) as attempting to silence that voice in service of a singular, pro-gay normative vision. In fact, the Christian Right’s liberal, pluralistic free speech claims in these cases have prompted the ACLU to file briefs on the side of ADF.¹⁹¹ Such issues have produced a circuit split ripe for Supreme Court review. Whereas the Ninth Circuit affirmed a school’s ability to limit a student’s speech condemning homosexuality, the Seventh Circuit recently overturned a school’s decision to restrict such speech.¹⁹²

For the Christian Right movement, these student speech cases link to school programming issues. First, some programming cases explicitly feature facts that include student speech claims. In *Morrison v. Board of Education*, not only did parents and students challenge anti-harassment training, but they also challenged an anti-harassment policy that allegedly prohibited student speech critical of homosexuality.¹⁹³

More importantly, some cases present a blurry area between student and government speech. In *Hansen v. Ann Arbor Public Schools*, a student and her parent, represented by TMLC, successfully challenged a school’s refusal to allow her to speak, from a Catholic perspective, on the “Homosexuality and Religion” panel organized by the gay-straight alliance during the

¹⁸⁸ See 982 F.2d 1160, 1161–62 (7th Cir. 1993).

¹⁸⁹ *Id.* at 1165.

¹⁹⁰ See *id.* (explaining that the free speech claim “distorts the facts and misconstrues the law”).

¹⁹¹ See, e.g., *Harper* ACLU Amicus Brief, *supra* note 176, at 1–2.

¹⁹² Compare *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), with *Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668 (7th Cir. 2008). In both cases, ADF represented the students. See *Harper*, 445 F.3d at 1170; *Nuxoll*, 523 F.3d at 669.

¹⁹³ 521 F.3d 602, 605 (6th Cir. 2008).

school's diversity week.¹⁹⁴ Although the district court rejected the free exercise and parental rights claims, it found viable Establishment Clause, equal protection, and free speech claims. Adopting a "place at the table" approach, the court observed that the case presented "the ironic, and unfortunate, paradox of a public high school celebrating 'diversity' by refusing to permit the presentation to students of an 'unwelcomed' viewpoint on the topic of homosexuality and religion, while actively promoting the competing view."¹⁹⁵ The court, then, rejected the gay rights multicultural brand of pluralism, which calls for respect for lesbians and gay men, in favor of the Christian Right's brand of pluralism, which includes and gives voice to religious objections to homosexuality. Furthermore, the court's emphasis on capturing a range of perspectives relates to calls for "balance" in curricula relating to sexual orientation.¹⁹⁶ In this way, *Hansen* positions exclusively pro-gay views—when part of school-sponsored programming—as constitutionally suspect.

This view comports with the Christian Right free speech claim in *Citizens for a Responsible Curriculum v. Montgomery County Public Schools*.¹⁹⁷ Stretching the free speech principle from student-run panels into the classroom, the federal court in the first round of the Montgomery County litigation adopted Liberty Counsel's free speech position, in addition to its Establishment Clause argument. Granting a preliminary injunction against the gay-inclusive curriculum, the court found viewpoint discrimination likely since the school district "open[ed] up the classroom to the subject of homosexuality, and specifically, the moral rightness of the homosexual lifestyle," but "present[ed] only one view on the subject—that homosexuality is a natural and morally correct lifestyle—to the exclusion of other perspectives."¹⁹⁸ In this sense, a pluralism based on the inclusion of both positive and negative portrayals of homosexuality trumped a left multicultural one based on lesbian and gay equality and respect.

The court's treatment of viewpoint discrimination in the classroom setting, where government rather than student speech is implicated, is an outlier.¹⁹⁹ Curriculum is not subject to the "place at the table" approach that

¹⁹⁴ 293 F. Supp. 2d 780, 782, 803, 806–807, 809 (E.D. Mich. 2003). *Hansen* also featured an organization-versus-organization dynamic. The gay-straight alliance had contacted the ACLU for legal advice, and the ACLU advised that Hansen (and the Pioneers for Christ student club) could be denied representation on the panel. *See id.* at 790 n.13.

¹⁹⁵ *Id.* at 782–83.

¹⁹⁶ *Id.*

¹⁹⁷ AW-05-1194, 2005 WL 1075634, at *11–12 (D. Md. May 5, 2005). *See supra* Part II.

¹⁹⁸ *Id.* at *12.

¹⁹⁹ Justice Brennan's plurality opinion in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982), might give some hope to Christian Right advocates who seek to impose limits on the discretion schools may exercise in fashioning programming. In that case, the Supreme Court held that a school board may not remove books from its library based on the mere disapproval of ideas and the

has increasingly governed non-governmental secular and religious speech, and free speech principles do not generally compel particular government speech.²⁰⁰ At most, courts have applied a deferential reasonableness standard when faced with programming by a school (rather than a student). For instance, in evaluating the anti-harassment training for students in *Morrison*, the district court rejected the free speech challenge, reasoning that “the student training is speech by the school and, as such, need not be neutral so long as the viewpoint or content is reasonably related to legitimate pedagogical concerns.”²⁰¹

More starkly, the state Board of Education explicitly rejected the free speech claim in the second round of the Montgomery County litigation based on the inapplicability of viewpoint discrimination principles to curriculum. In assessing whether the revised lesson plans violated the plaintiffs’ free speech rights by expressing “only one viewpoint on homosexuality,”

desire to impose a particular political or religious view. *See id.* at 872. Significantly, however, the plurality distinguished the school library from the classroom, carefully noting that its decision “does not intrude into the classroom, or into the compulsory courses taught there.” *Id.* at 862. Indeed, the dissenting justices explained that the Court had reached too far into local school board discretion, finding untenable the second-guessing of school officials in both the library and the classroom. *See id.* at 893 (Burger, C.J., dissenting). Furthermore, neither the *Hansen* court nor the federal court in *Citizens for a Responsible Curriculum* cited *Pico* for its First Amendment holding. Instead, both relied on viewpoint discrimination principles, citing *Rosenberger*. *See Citizens for a Responsible Curriculum*, 2005 WL 1075634, at *12; *Hansen*, 293 F. Supp. 2d at 799. Interestingly, as explained *infra* Part V, some gay rights lawyers have attempted to stretch the *Pico* holding into the classroom when arguing for rights to gay-inclusive instruction.

²⁰⁰ *See, e.g.*, Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 674 (1998) (“Much like . . . a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others.”). Christian Right advocates advance similar free speech claims in the evolution/intelligent design context. Relying on the Supreme Court’s adoption of the liberal free speech approach, some argue that “if public schools or other governmental agencies bar teachers from teaching about [intelligent] design theory but allow teachers to teach [evolution], they will undermine free speech and foster viewpoint discrimination.” David K. DeWolf, Stephen C. Meyer, & Mark Edward DeForrest, *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 106 (2000). The claim, of course, suffers doctrinal deficiencies similar to those observed in the gay-inclusive curriculum context.

²⁰¹ *Morrison v. Bd. of Educ.*, 419 F. Supp. 2d 937, 942 (E.D. Ken. 2006), *aff’d on other grounds*, 521 F.3d 602 (6th Cir. 2008). This standard derives from the Supreme Court’s decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), in which the Court held that with regard to school-sponsored speech, or student speech that would reasonably be perceived to bear the school’s imprimatur, “educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273. In this sense, the *Morrison* court applied precedent that focused on student speech and was therefore inapposite. After citing *Rosenberger* for the proposition that “government speech—speech by the school itself . . . is given a certain amount of latitude in that it need not be neutral, so long as the speech does not run afoul of the Establishment Clause or the Equal Protection Clause,” the court also appealed to the *Hazelwood* standard governing student speech sponsored by the school. *Morrison*, 419 F. Supp. 2d at 941. Perhaps the court felt compelled to do so because the case also featured anti-harassment policies that implicated student speech. Or perhaps the court found *Hazelwood* relevant in order to explicitly and unequivocally distinguish *Hansen*, which applied the *Hazelwood* standard. *See id.* at 941–43.

the Board, unlike the federal court in the 2005 challenge, characterized Supreme Court precedent so as to place public school curriculum outside the bounds of viewpoint discrimination considerations.²⁰² Perhaps especially bothered by PFOX, which advocated for a curriculum that included “ex-gay” as a sexual orientation, the Board compared the situation to teaching the Holocaust without including the views of Holocaust deniers. The Board reasoned that a “viewpoint-neutrality requirement would force the County Board into a Hobson’s choice: either abandon any lessons on the Holocaust or else address the horrors of that event, but be forced to turn around and tell students that perhaps the Holocaust never happened.”²⁰³ The Board concluded that “[w]hile the First Amendment prohibits the government from silencing individuals who argue that the Holocaust never happened, it does not give those same individuals a right to insist that the government convey their views when fashioning a school curriculum.”²⁰⁴ Here, then, the Board used a more restrained doctrinal position to stake out a left multicultural brand of pluralism—one that validates lesbian and gay inclusion in an exclusively affirmative way.²⁰⁵

Nonetheless, that both the *Hansen* and *Citizens for a Responsible Curriculum* courts credited the free speech claim, while dismissing parental rights and free exercise claims, suggests the currency of the inclusion model of pluralism elaborated by Christian Right lawyers. The emphasis on inclusion of diverse viewpoints in a pluralistic society so thoroughly pervades school-based advocacy that the boundaries between the classroom (and government speech) and spaces outside the classroom (and student speech) have loosened.

In addition to its doctrinal limitations in the curriculum context, the free speech claim poses remedial complications. The free speech claim lends itself to a call for “balanced” curriculum, rather than a curriculum without any reference to sexual orientation.²⁰⁶ Christian Right lawyers deployed the free speech claim this way in the Montgomery County litigation, using the ex-gay perspective of PFOX to suggest the need to include an additional category of sexual orientation. Indeed, focusing on resort to the free speech

²⁰² *Citizens for a Responsible Curriculum v. Montgomery County Bd. of Educ.*, No. 07-30, at 6 (Md. State Bd. of Educ. June 27, 2007). The Board’s decision was affirmed by a state circuit court. *See Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch.*, No. 284980 (Md. Cir. Ct. Jan. 31, 2008).

²⁰³ *Citizens for a Responsible Curriculum*, at 6–7 (Md. State Bd. of Educ. June 27, 2007).

²⁰⁴ *Id.* at 7.

²⁰⁵ Of course, this affirmative position tends to masquerade as neutral, presenting objective information on sexual orientation while implicitly discrediting religious objections to homosexuality.

²⁰⁶ The “balanced” curriculum agenda links rhetorically to other Christian Right programming priorities, most notably the treatment of creationism or intelligent design within a science curriculum. *See, e.g., GUTMANN, supra* note 13, at 101–07 (exploring the turn away from advocacy with no mention of evolution toward advocacy centered around “balanced treatment of creationism along with evolution”).

claim in the programming context reveals how the controversial position represented by the ex-gay movement is vital to the claims of the more mainstream Christian Right.

The “balanced” curriculum position, which fits best with the inclusion model of pluralism embraced by the Christian Right, may undermine the remedy desired by many constituents. Unlike in other contexts where the free speech claim tracks the desired remedy—inclusion at the proverbial table on equal terms—the remedial disconnect in the school programming context underscores the uneasy fit of the free speech framing. Christian parents objecting to gay-inclusive curriculum likely prefer that the curriculum not delve into such purportedly controversial territory.²⁰⁷ In the event that it does, they would prefer that their children be exempted from it.²⁰⁸

The organized parent group in Montgomery County provides an illustration. While Christian Right lawyers argued for the inclusion of a variety of viewpoints based on a free speech claim (and prevailed on such grounds in the first round of litigation), the client, CRC, was not committed to this model of inclusion. Instead, parents in CRC wanted their children to avoid the discussion of sexual orientation altogether, regardless of how many viewpoints were included, and wanted the children of other parents to avoid the discussion as well. CRC deployed the exemption option offered by the school as a way to pressure school officials into a curriculum that adhered to their religious beliefs.²⁰⁹ Urging parents to exempt their children from the new lesson plans, CRC explained that “[i]f enough children opt-out, and enough parents complain (loudly and frequently), [the school district] may be forced into establishing a parallel curriculum”²¹⁰ In other words, as CRC’s advocates were pressing free speech claims so that the curriculum included the objectors’ perspective on sexual orientation and sexuality, CRC itself attempted to orchestrate a large-scale opt-out as a way to influence the school district to change the curriculum entirely, omitting all views on ho-

²⁰⁷ In a poll conducted by the Kaiser Family Foundation, Harvard University’s Kennedy School of Government, and National Public Radio, only about fifty percent of parents thought it was appropriate to teach about homosexuality in middle school. Only four percent thought such instruction should teach “that homosexuality is acceptable.” See Diana Jean Schemo, *Lessons on Homosexuality Move into the Classroom*, N.Y. TIMES, Aug. 15, 2007, at B6.

²⁰⁸ Requests for exemptions are common in curricular challenges. See, e.g., *Parker v. Hurlley*, 514 F.3d 87, 90 (1st Cir. 2008) (“Two sets of parents, whose religious beliefs are offended by gay marriage and homosexuality . . . assert that they must be given prior notice by the school and the opportunity to exempt their young children from exposure to books they find religiously repugnant.”).

²⁰⁹ The parents were given an opt-in mechanism. See *Citizens for a Responsible Curriculum*, *supra* note 112. As opposed to an opt-out mechanism, which requires parents to explicitly exempt their children from class, an opt-in mechanism requires parents to specifically give their children permission to attend. An opt-in mechanism, then, represents a stronger parental protection than an opt-out mechanism.

²¹⁰ *Id.*

mosexuality.²¹¹ Indeed, CRC members were not satisfied with the exemption mechanism offered by the school, clearly wanting to reach beyond their own children to influence the instruction all children received.

In sum, not only is the free speech claim of suspect application in the curriculum context, but it suggests a limited remedy—“balanced” programming—that may miss the point for many Christian parents, who may not want their children (or any children) exposed to materials on sexual orientation and sexuality. It is to the alternative parental rights and free exercise claims that I now turn.

B. Accommodation Based on Parental Rights and Free Exercise

Lawyers representing parents challenging school programming with which they disagree on religious grounds most often claim both free exercise and parental rights violations.²¹² These claims depart from the inclusion model of pluralism underpinning the free speech claim for religious freedom. Instead, the parental rights and free exercise claims hew to an accommodation model of pluralism that allows distinctive religious cultures to survive, even if such survival depends on shielding adherents from competing perspectives. That is, religious diversity in a pluralistic society comes to depend on the preservation of distinctive, even if illiberal, belief systems. Accordingly, this brand of pluralism stresses legitimate group difference over a civic education that inculcates liberal values, including tolerance, autonomy, and critical deliberation.²¹³

²¹¹ As CRC explained, “if 10 students per school OPT-OUT of the program, [the school district] is forced to assign a teacher and a classroom to the alternative lessons.” *Id.*

²¹² Here, I am dealing specifically with challenges to school-wide programming or curricular choices in the domain of sexuality. This analysis, however, would apply to attempts by schools to include other potentially controversial topics in the curriculum. For instance, litigation ensued when the Byron, California school system included instruction about Islam in order to increase student sensitivity after September 11th. *See Eklund v. Byron Union Sch. Dist.*, No. 04-15032, 2005 WL 3086580, at *1 (9th Cir. Nov. 17, 2005). The issues of evolution/intelligent design and Bible instruction, however, pose somewhat different questions, implicating the Establishment Clause in a central way. Courts have been much more likely in this context to reject school decisions. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987); *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 766 (M.D. Pa. 2005).

²¹³ This new invocation resonates with a strand of multiculturalism that, unlike the left multiculturalism embraced by gay rights lawyers, preserves the distinctive (perhaps illiberal) traditions of religious minorities. While religiously grounded multiculturalism generally focuses on marginalized, non-Western religions, Christian Right lawyers hint at this position to the extent that it stresses accommodation and facilitates a framing of religious adherents as minorities in an increasingly hostile (secular) society. *See Ayelet Shachar, Two Critiques of Multiculturalism*, 23 *CARDOZO L. REV.* 253, 253, 261, 265–266 (2002). *But see KYMLICKA, supra* note 42, at 177 (distinguishing the demand for withdrawal by religious groups from the late-twentieth-century move toward multiculturalism, which focuses on inclusion of non-white and non-Christian minorities).

Despite overtures to this alternative iteration of pluralism, courts have repeatedly declared that parents' rights do not allow them to dictate a school's curriculum and that general school programming does not impinge on religious freedom. In rejecting parental challenges, courts have explicitly rejected opt-out requests.

In one of the most prominent cases, *Brown v. Hot, Sexy and Safer Productions*, the First Circuit rejected parental challenges to a mandatory AIDS education program for high school students. The court explained that "the rights of parents . . . do not encompass a broad-based right to restrict the flow of information in the public schools."²¹⁴ The court also determined that free exercise rights are not infringed by "a neutral requirement that applie[s] generally to all students."²¹⁵ In rejecting a parental challenge to mandatory middle school health classes in *Leebaert v. Harrington*, the Second Circuit relied on *Brown*, concluding that approaching curricular objections with heightened scrutiny "would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children."²¹⁶ In *Fields v. Palmdale School District*, the Ninth Circuit relied on *Brown* to reject a parental challenge to a survey administered to students touching on issues of sex, holding that while parents enjoy the "right to inform their children when and as they wish on the subject of sex," they do not possess a "constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so."²¹⁷

More recent cases on gay-inclusive programming rely on these earlier decisions. In *Parker v. Hurley*, the district court rejected the parental challenge to gay-inclusive curriculum, finding that these parents "have chosen to send their children to the Lexington public schools with its current curriculum," and "[t]he Constitution does not permit them to prescribe what those children will be taught."²¹⁸ The First Circuit affirmed, finding "well recognized" the proposition that parents "do not have a constitutional right to 'direct how a public school teaches their child.'"²¹⁹ Furthermore, the court rejected the free exercise claim, holding that the "mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently."²²⁰

²¹⁴ 68 F.3d 525, 534 (1st Cir. 1995).

²¹⁵ *Id.* at 539.

²¹⁶ 332 F.3d 134, 141 (2d Cir. 2003).

²¹⁷ 427 F.3d 1197, 1206 (9th Cir. 2005).

²¹⁸ 474 F. Supp. 2d 261, 264 (D. Mass. 2007).

²¹⁹ *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008) (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005)).

²²⁰ *Id.* at 105.

Likewise, in *Morrison v. Board of Education*, the district court rejected a challenge to diversity programming that consisted of mandatory, school-wide training sessions for middle and high school students aimed at reducing anti-gay harassment. In rejecting the parental rights claim, the court concluded that the parents “do not have the right to impede the Board’s reasonable pedagogical prerogative, nor do they have the right to opt-out of the same.”²²¹ In rejecting the free exercise claim, the court stressed a disclaimer read at the end of each training session, stating that students’ religious views “‘are very sacred and they should only be influenced by you, your parents and your family.’”²²²

From *Brown* to more recent cases in Massachusetts, Kentucky, and Maryland, it is clear that parental rights and free exercise challenges to sex-related or gay-inclusive programming routinely fail. Yet Christian Right cause lawyers continue to threaten school districts with litigation and to bring claims on behalf of aggrieved parents. Doctrinal gaps left open by the increasingly conservative Supreme Court help explain this trend.

As the history of the free speech claim for religious liberty demonstrates, Christian Right cause lawyers center their strategy on a Supreme Court populated by conservative justices backed by the movement.²²³ The most important goal for some advocates is to have a case heard by the Court.²²⁴ As ACLJ general counsel Jay Sekulow explains, his firm “look[s] at cases that are going to set a national precedent.”²²⁵ Indeed, Sekulow ad-

²²¹ 419 F. Supp. 2d 937, 946 (E.D. Ky. 2006).

²²² *Id.* at 944–45.

²²³ See HUNTER, *supra* note 1, at 252–53 (explaining how both sides of the “culture war” want the Supreme Court to reflect their ideologies). ACLJ, for instance, enthusiastically supported the most recent Supreme Court appointees, Justice Alito and Chief Justice Roberts. See American Center for Law & Justice, President Nominates Sam Alito to Supreme Court, <http://www.aclj.org/TrialNotebook/Read.aspx?id=272> (last visited Mar. 15, 2009); American Center for Law & Justice, Petition to Support John G. Roberts, Jr., <https://www.aclj.org/Petition/default.aspx?SC=3034&AC=1> (last visited Mar. 15, 2009). Of the forty-two conservative and libertarian public interest law firms that Ann Southworth documents in her study of conservative cause lawyering, the firms filed briefs in 144 Supreme Court cases between 2000 and 2004. Six organizations, including ACLJ, filed over a dozen briefs during that period. See Southworth, *Conservative Lawyers*, *supra* note 44, at 1268. In her most recent study, Southworth quotes a religious liberties lawyer: “We always have half of our eye on the Supreme Court.” SOUTHWORTH, *LAWYERS OF THE RIGHT*, *supra* note 44, at 73.

²²⁴ See HACKER, *supra* note 2, at 26 (noting evangelical Christian law firms’ “ultimate goal of ‘arguing cases up to the Supreme Court’”). Within a traditional model of cause lawyering, Supreme Court pronouncements provide the ultimate resolution, offering a way for a declaration of rights to affect behavior on the ground on a national scale, and Supreme Court participation signals to supporters and to critics that the involved organizations are “‘players’ in the most important judicial arena of all.” See BROWN, *supra* note 3, at 78; SCHEINGOLD, *supra* note 92, at 173 (“The ultimate goal is a definitive decision by the United States Supreme Court itself. Traditional activists invest in leading case tactics because they believe that authoritative pronouncements by the Supreme Court will alter patterns of behavior in the real world.”).

²²⁵ HACKER, *supra* note 2, at 27; see also *id.* at 23 (quoting ACLJ general counsel Jay Sekulow as stating that “the only books we wanted to write were books that ended up in

mitted when discussing a school voucher case, “[w]e took the case knowing we would lose in the lower courts with the idea we would go to the Supreme Court.”²²⁶

Advocates might attempt to recreate the success of the free speech claim, which was grounded in Supreme Court decisions, in the school programming context. Most cases relating to curricular challenges, including gay- and sexuality-specific disputes, come from federal district and appellate courts. It is not unreasonable for lawyers to believe that the Court would take issue with, for instance, decisions from the First and Ninth Circuits in this domain.²²⁷

To that end, Christian Right cause lawyers have seized on two important doctrinal ambiguities left open by the Supreme Court in the parental rights and free exercise domains in an attempt to gain Supreme Court review and garner heightened scrutiny. These lawyers present the parental right as universally fundamental and argue for strict scrutiny for a conjoined parental rights/free exercise, or “hybrid,” claim, all the while appealing to an image of Christian parents as a vulnerable minority in a pluralistic society.

1. *Parental Rights Claims*

Parental rights have particular appeal in a pluralist paradigm.²²⁸ Allowing parents to control the upbringing of their children acknowledges the interest in preserving diversity: parents are allowed to impart values, regardless of majoritarian preferences, on their children, who are likely to carry them on. In this way, religious diversity in America is intimately linked with parental rights. In the school context, parental rights have the most resonance when asserted against state-mandated public education; private

those [book]cases right there [pointing to shelves holding the Supreme Court Reporter]).

²²⁶ *Id.* at 27. ACLJ “cultivat[es] cases in various issue areas with unique fact patterns in the hope that some will find their way up for review by the high court.” *Id.* at 35. Hacker documents that a significant percentage of ACLJ’s cases between 1987 and 2004 were part of an effort to take the case up the appellate chain. *See id.* at 44. ACLJ’s website describes the group’s litigation based primarily on its Supreme Court work. While noting that ACLJ “litigates at all levels in state and federal courts across the nation,” the website explains that “[m]any of the issues that we are involved with at the ACLJ end up at the Supreme Court of the United States” and “Chief Counsel Jay Sekulow has appeared before the high court on numerous occasions—conducting oral arguments on some of the most important issues of the day.” *See* ACLJ, Cases, <http://www.aclj.org/Cases/> (last visited Mar. 15, 2009).

²²⁷ Although talk of the Ninth Circuit’s record reversal rates is overstated, during the 2004–05 term, the First and Ninth Circuits were among the top four circuits for reversal rates, with rates of one hundred percent and eighty-four percent respectively. *See* Media Matters for America, O’Reilly Echoed Right-Wing Falsehood that Supreme Court Overturns 9th Circuit at a “Record Rate”, <http://mediamatters.org/items/200512150016> (last visited Mar. 15, 2009).

²²⁸ *See* HUNTER, *supra* note 1, at 207 (for conservatives, “genuine pluralism in education can only be based upon the concept of parents’ rights”); *see also* GALSTON, *supra* note 11, at 108.

parochial schools represent recognition of parental authority and the parental prerogative to educate one's children exclusively in one's religious tradition.²²⁹ More recently, parental rights, and the corresponding insistence on pluralism and diversity, have been applied to the school voucher movement: parental rights signal choice in service of diversity.²³⁰ In the domain of sexuality, parental rights have added resonance since sex is thought of as an especially private, personal, family-centered issue.²³¹ By preserving parental authority and religious diversity, it is an accommodation model of pluralism, rather than an inclusion model, to which parental rights attach. This accommodation model of pluralism permits religious individuals to wall themselves off from a more secular society.²³²

Two Supreme Court cases from the first half of the twentieth century, *Meyer v. Nebraska* and *Pierce v. Society of the Sisters of the Holy Names*, form the foundation of parental rights doctrine.²³³ In *Meyer*, the Supreme Court struck down Nebraska's statutory ban on foreign language instruction in schools, concluding that the legislation interferes "with the power of parents to control the education of their own."²³⁴ In *Pierce*, the Court again struck down a sweeping law—Oregon's Compulsory Education Act, which prohibited parents from sending their children to parochial or private schools and thus mandated public school attendance.²³⁵

For decades, parental rights doctrine sat relatively untouched, but the Supreme Court has returned to it in more recent years. In *Troxel v. Gran-*

²²⁹ See *Pierce v. Soc'y of the Sisters of the Holy Names*, 268 U.S. 510, 534–35 (1925) (holding that law requiring public school attendance and thereby prohibiting parochial school attendance unconstitutionally burdened parental rights).

²³⁰ See GUTMANN, *supra* note 13, at 65; Gutmann, *supra* note 39, at 572 ("Proponents of unregulated voucher systems . . . invoke support for social diversity . . .").

²³¹ Cf. GUTMANN, *supra* note 13, at 109 ("The strongest case for banning courses on sex education from public schools (regardless of democratic will) rests on an appreciation of the intimacy of the subject matter.").

²³² See HUNTER, *supra* note 1, at 208 ("[A] government monopoly [on education] cannot respond to the rights of parents to educate their children in the moral universe of their particular choice. It is the logic of parents' rights and the pluralism that parents' rights implies that necessitates, for the conservatives, the breakup of the public school monopoly.").

²³³ *Pierce*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²³⁴ *Meyer*, 262 U.S. at 401.

²³⁵ Notably, *Pierce* also posed the intersection of parental rights and free exercise. In striking down the Act, the Court relied on its holding just two years earlier: "Under the doctrine of *Meyer* . . . , we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534–35. Two decades later, the Court had the opportunity to articulate limitations on the parental rights articulated in *Meyer* and *Pierce*. In *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944), the Court rejected a parental control claim, which again intersected with issues of religious free exercise. The child's aunt and legal guardian, a Jehovah's Witness, had allowed her niece to sell religious literature in violation of the state's child labor law. The Court reasoned that "[a]cting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." *Id.* at 166.

ville, the Court struck down a Washington statute allowing for third-party visitation rights against a parent's wishes, whenever such visitation was deemed in the child's best interests.²³⁶ In her plurality opinion, Justice O'Connor, citing *Meyer* and *Pierce*, appealed to the liberty interests protected by the Due Process Clause and characterized the right at stake as fundamental.²³⁷ Other Justices did the same, providing a clear majority of the Court specifying the fundamental nature of the parental right.²³⁸ But, as Justice Thomas pointed out, the *Troxel* plurality did not apply strict scrutiny even though a fundamental right was at stake.²³⁹ Nonetheless, Christian Right litigators use *Troxel* to argue that parental rights should, as a general matter, be considered fundamental and thus merit strict scrutiny.

Courts, however, have routinely rejected the framing of parental rights as fundamental in the curriculum context. They conceptualize parental rights as traditionally negative rights, protecting parents from state interference with regard to their children.²⁴⁰ Although the distinction between posi-

²³⁶ 530 U.S. 57, 61–63 (2000).

²³⁷ *Id.* at 65 (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

²³⁸ Chief Justice Rehnquist, along with Justices Ginsberg and Breyer, joined Justice O'Connor's opinion. *See id.* at 60. Justice Thomas, in his concurrence, and Justice Stevens, in his dissent, also specified the fundamental nature of the parental right. *See id.* at 80 (Thomas, J., concurring) (recognizing the “fundamental right of parents to direct the upbringing of their children”); *id.* at 87 (Stevens, J., dissenting) (“Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children.”); David D. Meyer, *Lochner Redeemed: Family Privacy after Troxel and Carhart*, 48 UCLA L. REV. 1125, 1135–55 (2001) (providing a thorough breakdown of the opinions in *Troxel*).

²³⁹ 530 U.S. at 80 (Thomas, J., concurring).

Our decision in [*Pierce*] holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.

Id. As Adam Winkler has argued, despite common wisdom to the contrary, courts often apply something other than strict scrutiny when fundamental rights are implicated. *See* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227–28 (2006). Scholars have voiced concern over what exactly *Troxel* means for parental rights doctrine. For instance, David Meyer discerns a more middle-ground balancing test applied by the Court in such cases, seeing *Troxel* as a ratcheting down of the otherwise strict level of scrutiny. *See* Meyer, *supra* note 238, at 1162–63.

²⁴⁰ *See* James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1374–75 (1994) (distinguishing “parents’ negative claim-rights against state interference in their child-rearing practices and decision-making” from “a ‘positive claim-right’ against the State when the State is under a duty owed to the parent to provide some form of assistance to the parent”); *see also* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864 (2001) (“The distinction between positive and negative rights is an intuitive one. One category is a right to be free from government, while the other is a right to command government action.”).

tive and negative rights is theoretically problematic,²⁴¹ it helps to explain courts' reluctance to find parental rights violations in the classroom setting. Courts have no problem prohibiting the state from telling parents they must send their children to public school (negative rights), but courts do not want to tell the state that schools must instruct children in a way that meets parents' expectations or demands (positive rights).²⁴²

This distinction appeared to animate the Second Circuit's post-*Troxel* decision in *Leebaert v. Harrington*, a case brought by ACLJ.²⁴³ While *Leebaert* claimed that his constitutional right to direct the upbringing and education of his child required the Fairfield, Connecticut school district to excuse his son from attending health education classes, the court, rejecting the father's challenge, found "nothing in *Troxel* that would lead us to conclude . . . that parents have a *fundamental* right to the upbringing and education of the child that includes the right to tell public schools what to teach or what not to teach him or her."²⁴⁴

Nonetheless, lawyers for the Christian Right consistently assert, particularly trying to exploit the strong language from *Troxel*, that the parental right is more generally fundamental and subject to strict scrutiny. For instance, in its position statement on parental rights, ACLJ advises its constituents that the fundamental liberty interest of parents articulated in *Troxel* supports parental opt-out rights with regard to classroom instruction.²⁴⁵ Similarly, the parents in *Parker* relied on *Troxel* as "recognizing a substantive due process right of parents 'to make decisions concerning the care, custody,

²⁴¹ Scholars have offered pointed critiques of the positive/negative rights distinction, arguing that all rights depend on government action for their enforcement. See, e.g., Cross, *supra* note 240, at 864–65.

²⁴² Some courts treat parental rights in the family law context differently than parental rights in other contexts, such as education. The Ninth Circuit in *Fields v. Palmdale School District* went so far as to suggest that "the *Meyer-Pierce* right does not extend beyond the threshold of the school door." 427 F.3d 1187, 1207 (9th Cir. 2005). The court later issued an amended opinion, deleting this controversial statement and replacing it with the following: "In sum, we affirm that the *Meyer-Pierce* due process right of parents to make decisions regarding their children's education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions" *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190–91 (9th Cir. 2006).

²⁴³ 332 F.3d 134 (2d Cir. 2003); see also *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) ("*Troxel* does not change the [analysis] in the context of parental rights concerning public education. While Parents may have a fundamental right in the upbringing and education of their children, this right does not cover the Parents' objection to a public school Uniform Policy.").

²⁴⁴ *Leebaert*, 332 F.3d at 135, 142 (emphasis in original).

²⁴⁵ See ACLJ Memorandum of Law, *The Parental Right to Opt Children Out of Objectionable School Curricula* (Nov. 20, 2001), <http://www.aclj.org/Issues/Resources/Document.aspx?ID=15>. ACLJ also appeals to *Troxel* in its demand letter arguing that Portland, Maine's contraception program violates parental rights. See Letter from Jay Alan Sekulow, Chief Counsel, American Center for Law and Justice, & Stephen Whiting, Maine Director, American Center for Law and Justice, N.E., to John Coyne, Chairperson, Portland School Committee 7 (Nov. 2, 2007), available at http://www.aclj.org/media/pdf/Parental_Rights_at_King_Middle_School_11022007.pdf.

and control of their children,'” while at the same time disclaiming any intent to control the curriculum.²⁴⁶ Unsurprisingly, the First Circuit found *Troxel* “not so broad as plaintiffs assert.”²⁴⁷

2. “Hybrid” Parental Rights/Free Exercise Claims

Unsuccessful in garnering heightened scrutiny for parental rights standing alone, Christian Right lawyers have paired the parental right with a free exercise right in an attempt to gain heightened scrutiny. Free exercise claims strike a chord with pluralistic notions of religious diversity. Some scholars have argued that the religion clauses of the First Amendment form “a charter for democratic and civil-religious pluralism.”²⁴⁸ Going further, Ted Jelen contends that the free exercise clause is so significant to religious pluralism because “the more diverse the local or national religious landscape, the more distinctive (and therefore valuable) adherence to one’s own religious tradition might seem.”²⁴⁹ In other words, the free exercise clause ensures the value of one’s own religion in part because it facilitates the practice of multiple religions.

Litigants are quick to work within these pluralist notions. For instance, the *Parker* parents asserted that “[t]he whole purpose of civil rights litigation is to protect minorities from . . . government overreaching” and characterized themselves as “a tiny minority comprised of people who harbor deep and abiding religious beliefs consistent with the ‘Defense of Marriage Act.’”²⁵⁰ Indeed, the language from the *Parker* pleadings evidences the shift away from majoritarian rhetoric: Christians are now “a tiny minority.” The parents’ claims make religious beliefs special, positioning them as different in kind from other expressive activity. While these claims still work with ideas of diversity and pluralism, they nonetheless do so within a religious framework—it is religious diversity to which they attach.²⁵¹ As will become clear in the next Part, while the free speech claim tracks an inclusion model of pluralism that is in many ways grounded in secular liberalism, the parental rights and free exercise claims hew to a religiously-focused pluralism that seeks to accommodate illiberal impulses against subjectivity and tolerance.

The coupling of parental rights and free exercise claims, a coupling that the Supreme Court has labeled “hybrid” claims, springs from the significant ratcheting down of the level of scrutiny afforded free exercise claims stand-

²⁴⁶ *Parker v. Hurley*, 514 F.3d 87, 101, 102 (1st Cir. 2008).

²⁴⁷ *Id.* at 101.

²⁴⁸ Marty, *supra* note 8, at 22.

²⁴⁹ Jelen, *supra* note 18, at 30.

²⁵⁰ Petition for Writ of Certiorari at 9, *Parker v. Hurley*, 129 S. Ct. 56 (2008) (No. 07-1368) [hereinafter *Parker Cert. Petition*].

²⁵¹ *Id.* at 23 (“The interesting dynamic in this case is that the petitioners, a small minority in Lexington, Massachusetts, wish to remain part of the fabric of the public school. They ask only that they, as a family unit, not be placed at risk of losing their religion . . .”).

ing alone. In *Employment Division v. Smith*, the Court rejected a free exercise claim based on a neutral law of general application, departing from its more stringent *Sherbert* test, which required that “governmental actions that substantially burden a religious practice . . . be justified by a compelling governmental interest.”²⁵² Notably, however, Justice Scalia, writing for the majority in *Smith*, stated that:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children.²⁵³

In turning down the claim at issue, the Court noted that the case “does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.”²⁵⁴ Since the Court’s decision in *Smith* appeared to lower the standard to which neutral, generally applicable government regulations (like curriculum) are subjected under free exercise analysis, the existence of a “hybrid” claim that garners heightened scrutiny becomes crucially important to litigants with free exercise complaints.²⁵⁵

The 1972 case of *Wisconsin v. Yoder*, which Justice Scalia cited in *Smith* for the “hybrid” rights concept, has come to signify the paradigmatic “hybrid” rights case.²⁵⁶ In *Yoder*, Amish parents challenged Wisconsin’s compulsory education law, arguing that the First and Fourteenth Amendments prevent the state from forcing them, after their children finished the eighth grade, to send their children to formal school until age sixteen. In the name of parental rights and free exercise, the Court sided with the Amish parents. Approaching the conjoined claim with a heightened level of scrutiny, the Court explained that “when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of

²⁵² 494 U.S. 872, 883 (1990) (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)); see also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1467 (1999) (explaining that before *Smith*, courts determined whether a law that “substantially burdened” a religious objector could nonetheless be applied to such objector by applying “strict scrutiny,” assessing whether the law served a “compelling government interest” and did so “in the least restrictive way possible”).

²⁵³ 494 U.S. at 881.

²⁵⁴ *Id.* at 882.

²⁵⁵ See, e.g., *Parker v. Hurley*, 514 F.3d 87, 95 (1st Cir. 2008) (“What is clear from *Smith* is that not all free exercise challenges will survive motions to dismiss and not all will receive strict scrutiny review.”).

²⁵⁶ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Smith*, 494 U.S. at 881.

the State' is required to sustain the validity of the State's argument under the First Amendment."²⁵⁷

In the name of religious difference and a state commitment to diversity, the court allowed the Amish to wall themselves off from society.²⁵⁸ An accommodation model of pluralism prevailed. Some courts and scholars view *Yoder* merely as an outlier due to the exceptional situation of the Amish, a group that functions peacefully apart from practically all segments of mainstream American society.²⁵⁹ But the idea of diversity embodied by *Yoder* is crucial to the Christian Right project. Advocates must rely on the logic of *Yoder* at the same time that they stress Christians' otherwise full participation in society.

Unlike the free speech claim, which calls for a "balanced" curriculum, with parental rights and free exercise claims, parents ask that the curriculum not include material on sexual orientation, or, if it does, that they receive exemption rights. It is a difficult balancing act to rely on *Yoder*, in which the petitioners were disengaging from society, for a claim in which petitioners demand continued inclusion but on their own terms. In fact, the Christian Right's free speech strategy, which has further entrenched a focus on inclusion, might have unwittingly made these claims more unthinkable and simultaneously bolstered the claims of gay rights lawyers seeking to justify gay-inclusive programming and judicial deference to such programming.

The dicta in *Smith* coupled with the holding in *Yoder* have yielded confusion for lower federal courts, as well as commentators, as to whether and to what extent a different mode of analysis informs a parental rights claim when religious concerns are present, and who exactly can claim exemptions in order to preserve a distinctive religious culture.²⁶⁰ Some courts have re-

²⁵⁷ *Yoder*, 406 U.S. at 233.

²⁵⁸ Ayelet Shachar situates the accommodation offered in *Yoder* within a multiculturalist discourse that accounts for minority (even illiberal) cultures. See Shachar, *supra* note 213, at 254.

²⁵⁹ See *Duro v. Dist. Attorney*, 712 F.2d 96, 98 (4th Cir. 1983) (in rejecting Pentecostal parent's objection to state compulsory education law, the court found *Yoder* distinguishable "because it arose in an entirely different factual context"); Dwyer, *supra* note 240, at 1389 (in arguing for limits on parental rights doctrine, Dwyer notes that in *Yoder* the Supreme Court "placed great weight on the unique characteristics of the Amish community"); Gutmann, *supra* note 39, at 568.

²⁶⁰ See, e.g., *Parker*, 514 F.3d at 97 ("What the Court meant by its discussion of 'hybrid situations' in *Smith* has led to a great deal of discussion and disagreement. Observers debate whether *Smith* created a new hybrid rights doctrine, or whether in discussing 'hybrid situations' the Court was merely noting in descriptive terms that it was not overruling certain cases such as *Pierce* and *Yoder*." (internal citation omitted)); Hicks v. Halifax County Bd. of Educ., 93 F. Supp. 2d 649, 660-61 (E.D.N.C. 1999) ("It is true that it is a difficult task to make sense of *Smith*'s hybrid-rights language within the larger context of the Supreme Court's free exercise jurisprudence. Yet the language of *Smith* remains, [and] . . . it is the responsibility of this court, until the Supreme Court changes its interpretation, to give meaning to the seemingly impenetrable hybrid-rights exception by applying the law to the facts of cases before it."); see also Steven H. Aden and 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, 602 (2003) (explaining that

fused to apply the “hybrid” rights concept. For instance, the Sixth Circuit declared the concept of hybrid claims “completely illogical,”²⁶¹ and the Second Circuit dismissed it as dicta.²⁶² Others have applied it with such a rigorous standard that the concept does no independent work. For example, the Tenth Circuit explained that a hybrid claim “at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one’s child.”²⁶³ Still others have attempted to make the hybrid rights concept somewhat meaningful, with one federal district court commenting that “the mere presence of the [parental rights] interest, as a genuine claim, supported by evidence in the record, . . . triggers the heightened scrutiny of the free exercise claim.”²⁶⁴ Clearly, the lower federal courts are in disarray over what the hybrid rights concept means, if anything.²⁶⁵

Lawyers challenging public school programming continue to press the hybrid rights concept. In *Parker*, the parents’ appellate brief devoted more space to this argument than to any other claim, contending that the “violations must be addressed synergistically” and subjected to strict scrutiny.²⁶⁶ The First Circuit, though, passed on the invitation to clarify the concept, explaining that it need not “enter[] the fray over the meaning and application of *Smith*’s ‘hybrid situations’ language.”²⁶⁷ Here, then, is a perfect example of an issue for which the Christian Right movement would like Supreme Court review.

In seeking certiorari from the Supreme Court, the *Parker* parents pushed to garner heightened scrutiny by urging the Court to resolve the two ambiguities discussed above, presenting the issue of fundamental parental rights and “hybrid” rights as in need of Supreme Court review. First, they presented a circuit split based on the interpretation of parental rights in the school context, arguing that the Court should resolve the question of whether, in the Ninth Circuit’s words, parents “leave their [fundamental]

courts have struggled in trying to accommodate “hybrid” claims based partly on “the difficulty in determining the proper burdens and procedures [required] to assert a hybrid claim”).

²⁶¹ *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993).

²⁶² *Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003).

²⁶³ *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998); see also *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (holding that to assert a “hybrid” claim, the plaintiff alleging a free exercise violation must make out a “colorable claim” of another constitutional right, meaning that she must show “a ‘fair probability’ or a ‘likelihood’” of “success on the merits”).

²⁶⁴ *Hicks*, 93 F. Supp. 2d at 662.

²⁶⁵ Their confusion is only exacerbated by Justice Souter’s dismissive language in *Church of the Lukumi Babalu Aye v. City of Hialeah*. See 508 U.S. 520, 566–67 (1993) (Souter, J., concurring in part) (describing *Smith*’s “hybrid” rights distinction as “ultimately untenable”).

²⁶⁶ See Brief of Appellant at 35–44, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (No. 07-1528).

²⁶⁷ *Parker*, 514 F.3d at 98.

'Meyer/Pierce' rights at the school house door."²⁶⁸ They contended that "if the fundamental parental right has any true meaning, it is to preclude a public school from egregiously usurping the parental role in religious and moral matters of the utmost importance."²⁶⁹ After also arguing that the Court should determine whether indoctrination constitutes a free exercise burden, the petitioners focused on their "hybrid" rights claim.²⁷⁰ They argued that "[b]ecause the parameters of [hybrid rights] claims have generated enormous controversy, certiorari should be granted to provide guidance to the lower courts concerning the manner and means of construing them."²⁷¹ While the Supreme Court rejected the Parkers' petition for certiorari, lawyers for the Christian Right will likely continue to press the issue of "hybrid" parental rights and free exercise claims and urge the Court to take up the call for accommodation.²⁷²

This Part's analysis of the Christian Right's doctrinal claims reveals that its lawyers invoke a commitment to pluralism, yet they rely on different visions of pluralism that evidence significant tensions. Christian Right lawyers assert doctrinally and remedially problematic free speech claims to demand inclusion of their perspective in gay-inclusive curriculum. Such claims rely on a model of pluralism that values inclusion of multiple viewpoints and engagement with difference. At the same time, lawyers for the Christian Right assert parental rights and free exercise claims to shield chil-

²⁶⁸ *Parker Cert. Petition*, *supra* note 250, at 7.

²⁶⁹ *Id.* at 13.

²⁷⁰ *See id.* at 15.

²⁷¹ *Id.* at 25. In discussing the Christian Right's Supreme Court focus, it is important to note that almost all of the parental challenges to school programming play out in federal court and make federal constitutional claims the centerpieces of the suits. This is the case even though many states have constitutional and statutory provisions that may provide greater protection for religious freedom. After the Supreme Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), struck down application to the states of the federal Religious Freedom Restoration Act ("RFRA") (42 U.S.C. § 2000 (1993)), itself a response to the Court's ratcheting down of free exercise scrutiny in *Smith* and an attempt to return to the Court's *Sherbert* regime, some states passed their own RFRAs in an attempt to provide greater protection for religious freedom under state law. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1493 (2008); FL. STAT. § 761 (2008); 775 ILL. COMP. STAT. 35 (2008). In addition, some state courts have interpreted their own free exercise clauses as embodying a more *Sherbert*-like standard. *See, e.g.*, Attorney Gen. v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994) (interpreting the Massachusetts Constitution to provide greater free exercise protection than the federal Constitution). Even though state law provisions might offer an innovative way to attack school programming under religious freedom principles, litigants have largely focused on federal claims and federal litigation. The First Circuit asked for supplemental briefing in *Parker* regarding whether it should abstain from deciding the federal constitutional claims pending resolution of the state law claims, including a state free exercise claim, or, alternatively, whether it should certify questions of state law to the Massachusetts Supreme Judicial Court, but neither side endorsed the proposed courses of action. *See* Supplemental Brief for Defendant-Appellees at 1, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (No. 07-1528). The plaintiffs themselves neither filed their state law claims in state court nor sought resolution of those claims. *See Parker*, 514 F.3d at 94 n.3.

²⁷² *See Parker Cert. Petition*, *supra* note 250, at 25-28.

dren from gay-inclusive instruction. Such claims draw on a model of pluralism that values withdrawal based on religious beliefs and accommodation of orthodox religious value systems.

In discussing religious conservatism and secular humanism, James Davison Hunter argues that “[f]or the orthodox, genuine pluralism only exists when there is respect for the integrity of diverse even if exclusive religious and moral commitment.”²⁷³ On the other hand, Hunter observes that “[f]or progressivists, pluralism can only exist when there is an acceptance of all religious and moral commitments as equally valid and legitimate; as simply different but equally authentic ways of articulating truth.”²⁷⁴ Although Hunter’s dichotomy is excessively stark to the extent that it emphasizes a progressive relativism, this Part has shown how a similar distinction plays out in the sexual orientation context. The pluralism put forward by Christian Right lawyers through parental rights and free exercise claims requires accommodation of parents’ orthodox beliefs by shielding children from gay-inclusive state messages. On the other hand, the inclusion model of pluralism evidences some of the tendencies Hunter ascribes to progressives. Indeed, the gay rights model of pluralism that I construct in Parts IV and V stresses inclusion and diversity in a way that actually resonates with aspects of the Christian Right’s inclusion model. Christian Right lawyers, then, are caught between competing models of pluralism: is the movement taking a place at the proverbial table, or instead seeking to leave its seat vacant in the name of pure religious commitment?

IV. IDEOLOGICAL STAKES AND IMPLICATIONS

This Part assesses the normative purchase of Christian Right claims and gay rights responses by teasing out the ideological stakes in the school programming context. I first show that the accommodation model of pluralism advanced by parental rights and free exercise claims prioritizes exclusive religious commitments and recognizes exposure as harmful in a way that cannot function in an inclusion model of pluralism premised on the potential validity of competing belief systems. It is here that the appeal to religious diversity becomes incapable of success in a more secular tradition of subjectivity, critical deliberation, and tolerance. The exact ethos that has credited the inclusion model of pluralism (and the corresponding free speech claim) marginalizes the accommodation model of pluralism (and the corresponding parental rights and free exercise claims).

I then explain how, faced with this tension, Christian Right lawyers appeal to the special status of sex in an attempt to counter the left multicultural identity-based framing of the gay rights movement. But while Chris-

²⁷³ HUNTER, *supra* note 1, at 211.

²⁷⁴ *Id.*

tian Right advocates position gay-inclusive programming as about sex, courts tend to accept the gay rights movement's framing of such programming as about diversity in a multicultural society. As gay rights lawyers continue to cement sexual orientation as a stable identity category (regardless of its descriptive accuracy), the characterization of homosexuality as merely a sex-based attribute becomes increasingly unconvincing.

A. "Mere Exposure" and Liberal Pluralism

As an initial matter, when faced with controversial programming and curricular decisions by school officials and administrators, parents often claim that the school is indoctrinating their children, attempting to instill in students a particular normative position. Parents, for example, may feel that a comprehensive sex education curriculum intends to convince students that sex before and outside of marriage is acceptable. Similarly, the *Parker* parents objected to a book, *King & King*, depicting a wedding between two princes because it "celebrates a gay marriage" and thereby attempts to "systematically indoctrinat[e]" their children.²⁷⁵ The First Circuit itself noted that the "book affirmatively endorses homosexuality and gay marriage," and further commented that "[i]t is a fair inference that the reading . . . was precisely *intended* to influence the listening children toward tolerance of gay marriage."²⁷⁶ While turning down the legal legitimacy of the claim of indoctrination, the court nonetheless noted the exact school agenda about which the parents complained. Given courts' emphasis on coercion in parental rights and free exercise analysis, parents' appeal to indoctrination makes some sense from a doctrinal perspective.²⁷⁷ The claim also has rhetorical appeal within a liberal, pluralistic lens that emphasizes state neutrality.²⁷⁸ And it recognizes that the left multiculturalism pushed by gay rights advocates serves a far-reaching normative agenda.

Parents, though, also sincerely experience harm in situations that do not approach indoctrination. They may suffer injury when schools present material as part of a broader agenda of tolerance and diversity rather than an affirmatively pro-gay or pro-sex position. For example, the *Parker* parents objected to other books that presented same-sex couples without the more

²⁷⁵ *Parker v. Hurley*, 514 F.3d 87, 90, 93 (1st Cir. 2008) (emphasis added).

²⁷⁶ *Id.* at 106.

²⁷⁷ See ACLJ Memorandum of Law, *supra* note 245 (advising parents that, as opposed to "mere exposure," "the higher the degree of coercion on students to participate in, or otherwise endorse the classroom activity, the stronger the constitutional argument in favor of a parental opt-out right"). Indeed, the indoctrination claim was one of the three bases on which the *Parker* plaintiffs sought certiorari from the Supreme Court. See *Parker* Cert. Petition, *supra* note 250, at 15.

²⁷⁸ See Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 985 (explaining in the context of school programming that "'[n]eutrality' has become a political and constitutional buzzword").

affirmative views embodied by *King & King*.²⁷⁹ Moreover, parents might object to material on sexual orientation even if religious or moral objections to homosexuality are included in a “balanced” presentation. Or they may experience harm when schools are actually expressing approval of the parents’ beliefs; for instance, parents complain about comprehensive sex education even when such programming positions abstinence as the best option for young people, as it does in Montgomery County.²⁸⁰ The exposure of their children to certain programming itself causes injury. In this sense, parental rights and free exercise claims, in their more inclusive mode, focus on exposure, rather than indoctrination.

Claims based on exposure, however, present a challenge to the liberal notions of pluralism and diversity embodied by the Christian Right’s inclusion model of pluralism. The idea of harm from exposure, which sounds in an accommodation model of pluralism that calls for withdrawal, is in tension with an inclusion model of pluralism that values participation and engagement with difference.

The concept of “mere exposure” finds its roots in the famous case of *Mozert v. Hawkins County Board of Education*, in which fundamentalist Christian parents objected to the school district’s use of a basic reader series.²⁸¹ The parents in *Mozert* asserted that, according to their religious beliefs, “they must not allow their children to be exposed to the content of the [reader] series.”²⁸² In what ended a lengthy course of litigation, featuring multiple opinions from both the district and appellate courts, the Sixth Circuit rejected the parents’ claims, holding that the public school curriculum did not unconstitutionally burden the parents’ and children’s free exercise rights. The *Mozert* plaintiffs asserted that their sincerely held religious beliefs were:

[c]ontrary to the values taught or inculcated by the reading textbooks and that it is a violation of the religious beliefs and convictions of the plaintiff students to be required to read the books and a

²⁷⁹ See *Parker*, 514 F.3d at 92–93.

²⁸⁰ See Respondents’ Memorandum in Response to the Petition for Review at 16, *Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch.* (Md. Cir. Ct. 2007) (No. 284980).

²⁸¹ 827 F.2d 1058, 1063 (6th Cir. 1987).

²⁸² *Mozert v. Hawkins County Pub. Sch.*, 647 F. Supp. 1194, 1197, 1198 (E.D. Tenn. 1986), *rev’d*, 827 F.2d 1058 (6th Cir. 1987). The parents objected to texts dealing with “futuristic supernaturalism,” “occult practice,” “telepathy,” “evolution,” and “role reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes,” and to texts that “expose[d] their children to other forms of religion and to the feelings, attitudes and values of other students that contradict the plaintiffs’ religious views without a statement that the other views are incorrect and that the plaintiffs’ views are the correct ones.” *Mozert*, 827 F.2d at 1062.

violation of the religious beliefs of the plaintiff parents to permit their children to read the books.²⁸³

The children were deemed to have the same religious views as their parents and as such asserted their own free exercise claims.²⁸⁴ Yet at the same time, the parents' claims were based on their fears of exposing their children to contrary views, evidencing a fear that the children would have different views and revealing a recognition that their children's religious views were not (fully) formed.²⁸⁵

Following the lead of the school district and, to a certain extent, the parents, the Sixth Circuit framed the question in terms of "exposure" rather than endorsement or indoctrination, asking whether "a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds" constitutes a free exercise violation.²⁸⁶ The court concluded that the fact that reading the materials might lead the students to come to conclusions contrary to the teachings of their (parents') religion was insufficient to establish an unconstitutional burden.²⁸⁷

Significantly, the court presented the issue of the curriculum's balance before dismissing the question as largely irrelevant given the purported injury. The court expressed doubt as to whether a more balanced presentation would even satisfy the parents' religious views, since it was "clear that to the plaintiffs there is but one acceptable view—the Biblical view, as they interpret the Bible."²⁸⁸ In fact, one parent testified that "evolution, false supernaturalism, feminism, telepathy and magic . . . could not be presented in any way without offending her beliefs."²⁸⁹

As Nomi Stolzenberg convincingly pointed out after *Mozert*, the court misapprehended the basis and nature of the parents' objection.²⁹⁰ It is exactly the neutrality, subjectivity, and tolerance furthered by the curriculum to which the parents objected.²⁹¹ In this way, the fact that their children were merely exposed to the texts does not relieve the problem; instead, such exposure is the exact injury. Recognizing that children may in fact arrive at conclusions contrary to those of their parents, the court conceptualized the potential harm, yet failed to understand it as such. As Stolzenberg explains,

²⁸³ *Mozert*, 827 F.2d at 1060.

²⁸⁴ *Mozert*, 647 F. Supp. at 1197 ("[P]laintiffs assert the free exercise rights of both the students and the parents, who assert that their religion compels them not to allow their children to be exposed to the Holt series.").

²⁸⁵ See *Mozert*, 827 F.2d at 1069 ("Mrs. Frost did testify that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer.").

²⁸⁶ *Id.* at 1063.

²⁸⁷ *Id.* at 1070.

²⁸⁸ *Id.* at 1064.

²⁸⁹ *Id.*

²⁹⁰ Stolzenberg, *supra* note 36, at 588–98.

²⁹¹ *Id.* at 591. It is important to note that liberalism is not neutral. As K. Anthony Appiah notes, "liberalism must, in the end, be ready to be a fighting creed." See Appiah, *supra* note 67, at 159.

“the objective, tolerant institution of exposure is itself a form of indoctrination.”²⁹² The children were being taught to approach ideas and beliefs with rationality and to understand ideas as subjective. Such values, fostered through “mere exposure,” were directly at odds with the fundamentalist Christian parents’ beliefs in the totalizing and unquestionable truth of their religion.²⁹³ As the parents contended, the books in the reader series taught “that certain values, held to be absolute by [them], are relative depending upon the situation.”²⁹⁴ Pluralism and tolerance, viewed as neutral by the court, are values in themselves, and such values seriously threatened the fundamentalist Christian parents’ ability “to transmit the truth (as they see it) to their children.”²⁹⁵

Pointing to the type of injury which Stolzenberg identifies, and which the *Mozert* court dismissed, Stephen Gilles explains the way in which an injury to parents may exist *even if* children adhere to their parents’ beliefs after being exposed to competing belief systems.²⁹⁶ As Gilles explains, positioning parental beliefs as unaffected by adherence post-exposure “unjustifiably privileges critical reason” and neglects the fact that people “make commitments and adhere to unprovable, deeply felt beliefs.”²⁹⁷ In this sense, it is not necessarily unreasonable for adherents of a particular religious faith to oppose exposure of their children to competing ideas and also not to advocate that their children arrive at their own belief system—even if that belief system matches the parents’—through critical reasoning.²⁹⁸ Richard Garnett makes the complementary point, warning that “we should resist the temptation to treat as harmful the transmission of unpopular or illiberal religious beliefs.”²⁹⁹ In addition, as the *Mozert* example makes clear, the exposure of children to competing values and beliefs not only risks displacing parents’ belief systems in children’s minds, but also may taint the child in the parents’ eyes. James Dwyer points out that religious parents fear that they might “become alienated from their children, viewing their children as different or separate from them, or as morally tainted or impure, as a result of the state

²⁹² Stolzenberg, *supra* note 36, at 611.

²⁹³ *Id.* at 612–13.

²⁹⁴ *Mozert v. Hawkins County Pub. Sch.*, 765 F.2d 75, 76 (6th Cir. 1985).

²⁹⁵ Stolzenberg, *supra* note 36, at 627; *cf.* Brief of Appellant, *supra* note 266, at 7 (describing the school’s purpose as “dissemination of the ideology of ‘diversity’”).

²⁹⁶ Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 976–79 (1996).

²⁹⁷ *Id.* at 976.

²⁹⁸ School districts argue from a presumption of subjectivity, viewing children’s minds as properly up for grabs and positioning their parents’ belief systems as contestable. For instance, the Lexington school district in *Parker* argued to the First Circuit that the district court “was not sanctioning efforts to ‘change’ the minds of children regarding marriage and procreation; instead, it was registering approval of the use of reading materials that expose children to different ideas *before their minds are made up.*” Brief of Defendant-Appellees, *supra* note 153, at 46–47.

²⁹⁹ Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 143 (2000).

ordering . . . education of the children in ways antithetical to the parents' religious world view and self-conception."³⁰⁰

These scholars' assessments reveal the way in which the claims of objecting parents may be simply incompatible with entrenched notions of American education, which are based on ideals of tolerance, subjectivity, and pluralism. As Stolzenberg demonstrates, whether one's view of public education is grounded in liberalism or civic republicanism, neither view can accommodate the parental complaints of "mere exposure." Both ideologies, which play out in education policy and in judicial opinions passing on the constitutionality of such policy, are "based on the critical-objective faculties of thought."³⁰¹ As Stolzenberg explains, civic republicanism "professes the necessity of value-inculcation, yet among the values whose inculcation it requires—the 'civic virtues' of a republican society—are the very principles that define a liberal society dedicated to the toleration of diverse values and the necessity of a free choice among them"³⁰²

The *Mozert* court itself grounded its rationale in liberal and civic republican understandings of public education, explaining that "public schools serve the purpose of teaching fundamental values 'essential to a democratic society[.]' . . . 'includ[ing] tolerance of divergent political and religious views' while taking into account 'consideration of the sensibilities of others.'"³⁰³ The court stated that the "tolerance of divergent . . . religious views" advocated by the Supreme Court "is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires recognition that in a pluralistic society we must 'live and let live.'"³⁰⁴ Indeed, it should now be clear that this is the exact ethic against which the parents challenging the reader series sought to guard their children. Pluralism and tolerance, now

³⁰⁰ JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 141 (1998); see also James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996). Charles Russo, a conservative Catholic commentator, contends "that including material on [same-sex marriage] may tear at the fabric of society by causing inter-generational rifts as children are indoctrinated on points-of-view that are not consonant with the values of their parents." Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of Their Children*, 32 U. DAYTON L. REV. 361, 375 (2007).

³⁰¹ Stolzenberg, *supra* note 36, at 655.

³⁰² *Id.* William Galston, on the other hand, argues that "liberal freedom entails the right to live unexamined as well as examined lives—a right the effective exercise of which may require parental bulwarks against the corrosive influence of modernist skepticism." GALSTON, *supra* note 4, at 254.

³⁰³ *Mozert v. Hawkins County Pub. Sch.*, 827 F.2d 1058, 1068 (6th Cir. 1987) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)); cf. Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *MULTICULTURALISM*, *supra* note 32, at 107, 133 ("[F]undamentalist worldviews are dogmatic in that they leave no room for reflection on their relationship with the other worldviews with which they share the same universe of discourse and against whose competing validity claims they can advance their positions only on the basis of reasons.").

³⁰⁴ *Mozert*, 827 F.2d at 1069.

staples of Christian Right advocacy, were unabashedly the values the fundamentalist Christian parents in *Mozert* were protesting.

B. *Mozert Redux*

The dispute over a gay-inclusive curriculum sounds at times like *Mozert* all over again. Parents argue that exposure of their children to sexual orientation undermines the parents' ability to guard their children from sex and to impart their opposition to homosexuality. While the children may still subscribe to their parents' religious views on homosexuality, they have learned that such a view is subjective. As the *Parker* parents argued, the school district's position that such parents may still instruct their children on issues of sexuality does nothing to alleviate the harm to religious parents.³⁰⁵ Tracking the injury claimed in *Mozert*, the *Parker* parents argued that the school district's position "neglects to address the fact that the [parents] firmly believe that the moral instruction of their children is their sacred duty."³⁰⁶ Since "[t]he exercise of parental authority to direct their children in their faith is one of the most basic tenets of the [parents'] religion," the school district's instruction, "without notifying the [parents], is clearly burdensome in the extreme."³⁰⁷ Although the parents repeatedly asserted that the school district was "indoctrinating" their children, they ultimately struck at the heart of their claim, contending that "[t]he very exposure of children to [contrary] beliefs . . . burdens the parents' ability to instruct their children in accord with their religion."³⁰⁸

Christian Right advocates, however, depart from *Mozert*-style argumentation by reconfiguring notions of pluralism to accommodate parental rights and free exercise claims, as discussed in Part III.B. Through claims that call for the shielding of children from materials that run counter to orthodox, unflinching beliefs, lawyers invoke an accommodation model of pluralism profoundly different than the inclusion model of pluralism that stresses engagement and dialogue.³⁰⁹

Can a liberal pluralism, like that celebrated by the *Mozert* court, accommodate these religious impulses? Some liberal theorists believe so. Scholars embracing a political liberalism that values diversity over autonomy and that resists a strong normative view of civic education urge society, and the education system, to accommodate diversity quite extensively.³¹⁰

³⁰⁵ See Appellants' Reply Brief at 7, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (No. 07-1528).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Marty, *supra* note 8, at 17–18 ("When citizens act in the name of a transcendent force or person—usually their God—they change the rules of the pluralist games and rule out those who do not share witness or obedience to that God.")

³¹⁰ Political liberalism, as set out by John Rawls, assumes that "a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of

William Galston endorses a liberalism that prioritizes diversity by affording maximum “space for the enactment of individual and group differences.”³¹¹ To Galston, “[l]iberty unleashes diversity.”³¹² He argues that liberal pluralism “does not warrant the conclusion that the state must (or may) structure public education to foster in children skeptical reflection on ways of life inherited from parents or local communities.”³¹³ That is, a public education grounded in liberal pluralism (and a corresponding focus on expressive liberty) may account for the religiously motivated parental desire to pass on beliefs to one’s children without consideration of conflicting beliefs or values.³¹⁴ Although Galston does not address legal doctrine, his defense of rights to accommodation links to the turn toward minority-based rights claims as he distinguishes between offensive public claims (e.g., arguing for a “Christian nation”) and defensive public claims (e.g., exemption requests from policies acceptable to the majority).³¹⁵ His analysis provides a roadmap for Christian Right lawyers who articulate parental rights and free exercise claims within an accommodation model of pluralism.

Similarly, Jeff Spinner-Halev argues that liberal principles may accommodate parents who seek an education that will help their children carry on their parents’ religious beliefs.³¹⁶ In more general terms, he contends that “[i]f liberalism is going to take the ideas of liberty and toleration seriously, it must be prepared to tolerate non-liberal religions.”³¹⁷ Otherwise, Spinner-Halev asserts, liberalism’s celebration of tolerance rings “hollow.”³¹⁸ The liberal priority on diversity and religious pluralism, then, might require accommodation of distinctive (even if illiberal) traditions. As Menachem Mautner argues, those who identify diversity as the central liberal value endorse “the multicultural condition” by resisting the urge to evaluate illiberal traditions by liberal standards.³¹⁹

human reason within the framework of the free institutions of a constitutional democratic regime.” RAWLS, *supra* note 12, at xvi. In this sense, political liberalism contrasts itself with comprehensive liberalism, in which the state stakes out a general normative vision for its citizens. See *id.* at xviii, xxix, 195–96.

³¹¹ GALSTON, *supra* note 11, at 23.

³¹² *Id.* at 61. Galston’s theory of liberal pluralism includes within it Berlinian value pluralism (referencing Isaiah Berlin), which embraces a diversity of conceptions of the good life. See *id.* at 4–6.

³¹³ GALSTON, *supra* note 4, at 253; see also Jason A. Scorza, *Facing Up to Civic Pluralism: A Friendly Critique of Galston*, 4 THEORY & RES. EDUC. 291, 294 (2006) (explaining that Galston’s liberal pluralism would not “coerce the Amish into fulfilling all standard educational requirements”).

³¹⁴ See GALSTON, *supra* note 11, at 102.

³¹⁵ See *id.* at 116–17.

³¹⁶ Jeff Spinner-Halev, *Liberalism and Religion: Against Congruence*, 9 THEORETICAL INQUIRIES L. 553, 556 (2008).

³¹⁷ *Id.* at 564.

³¹⁸ See *id.*

³¹⁹ Menachem Mautner, *From “Honor” to “Dignity”: How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 THEORETICAL INQUIRIES L. 609, 612 (2008). Mautner’s point demonstrates how one can reconfigure multiculturalism, which I have

Nonetheless, the parental impulse here is incompatible with popular and deeply entrenched liberal notions of pluralism in significant ways. Theorists who situate themselves in political liberalism but take a capacious, more normative view of civic education resist the parental claim against exposure to diversity. Stephen Macedo, for instance, argues in the context of *Mozert* that “‘exposure to diversity’ is a necessary means for teaching a basic civic virtue,” which is within the state’s authority.³²⁰ Macedo contends that parents do not have a right to opt-out of education that instills basic liberal values, and therefore they have no “right to shield their children from the fact of reasonable pluralism.”³²¹ Significantly, while Macedo rejects a claim to accommodation, he sympathizes with a claim that the curriculum should be more “balance[d].”³²² That is, Macedo’s political liberalism rejects exemption rights at the same time that it rejects programming that might comprehensively embrace secularist values and (impliedly) denigrate religious worldviews.³²³ In this sense, he dismisses an accommodation model of pluralism in favor of an inclusion model.

Scholars who endorse a comprehensive liberalism that prioritizes individual choice and autonomy express a normative view of civic education that rejects the accommodation of illiberal tendencies.³²⁴ Amy Gutmann, in her theory of democratic education, dismisses “a right of parents to insulate their children from exposure to ways of life or thinking that conflict with their own.”³²⁵ Gutmann criticizes the accommodation model of pluralism as “superficial.”³²⁶ Arguing that the pluralism identified with parental rights does not correlate with the political value of pluralism in a democratic society, Gutmann contends that “[t]o reap the benefits of social diversity, children must be exposed to ways of life different from their parents and—in the course of their exposure—must embrace certain values, such as mutual respect among persons, that make social diversity both possible and desira-

positioned as a left/progressive project vis-à-vis gay rights advocacy, to serve the interests of conservative religious groups seeking to disengage partially from society.

³²⁰ Macedo, *supra* note 38, at 485.

³²¹ *Id.*

³²² *Id.* at 487.

³²³ *See id.* at 485, 487.

³²⁴ *See* Gutmann, *supra* note 39, at 565 (“Political liberals with a demanding understanding of civic education often ally with comprehensive liberals against their fellow political liberals who defend a less demanding notion of what civic education entails.”); *see also* GALSTON, *supra* note 11, at 20–21 (distinguishing between autonomy and diversity liberals).

³²⁵ GUTMANN, *supra* note 13, at 29; *see also* Martha C. Nussbaum, *Radical Evil in Liberal Democracies: The Neglect of the Political Emotions*, in *DEMOCRACY AND THE NEW RELIGIOUS PLURALISM*, *supra* note 17, at 171, 184 (arguing that within a liberal model of public education, one should “support education at all levels aimed at conveying understanding of and respect for different religious and secular comprehensive doctrines and different ethnic and national traditions”).

³²⁶ *See* GUTMANN, *supra* note 13, at 33.

ble.”³²⁷ She believes that resting control exclusively in parents does not ensure, and at times undermines, this liberal objective.³²⁸

The engagement Macedo and Gutmann value is consistent with the pluralist vision projected by Christian Right lawyers in their free speech claims for religious liberty and adopted by courts assessing these Christian Right claims of inclusion. Because gay rights lawyers urge courts to view objecting parents as illiberal, schools as rooted in liberal tolerance, and gay rights as the latest installment of identity politics in a discourse of left multiculturalism, the Christian Right’s own adoption of a liberal, pluralistic lens that stresses participation and inclusion hinders its ability to rebut these characterizations. Accordingly, courts turn down the claims of religious parents by adhering to a liberal, pluralist vision that calls for exposure to difference and to a normative view of education that prioritizes critical, rational deliberation when faced with competing conceptions of the good life.³²⁹ Therefore, Christian Right lawyers find that the normative strength of parental rights and free exercise claims is increasingly weak in light of judicial (and societal) presumptions regarding diversity and civic education—presumptions Christian Right lawyers have made staples of their own advocacy.

In *Parker*, the First Circuit captured the parents’ claim as one based on “exposure.”³³⁰ Pointing to the work of Nomi Stolzenberg, the court acknowledged the notion that teaching tolerance can itself constitute harm. Indeed, the court declared that “[t]o the extent that *Yoder* embodies judicial protection for social and religious ‘sub-groups from the public cultivation of liberal tolerance,’ plaintiffs are correct to rely on it.”³³¹ But the court quickly fell back on the factual specificity of *Yoder* to distinguish it, pointing out that the holding in *Yoder* was “essentially *sui generis*.”³³² Exemption became an all-or-nothing proposition: if the parents wanted otherwise to participate fully in society, they could not selectively withdraw based on religious objections.

Moreover, even after acknowledging the potential harm of “mere exposure” and the corresponding commitment to “liberal tolerance” that such exposure facilitates, the court pulled back, stating that “[e]xposure to the materials in dispute here will not automatically and irreversibly prevent the parents from raising [their children] in the religious belief that gay marriage is immoral.”³³³ The parents’ claim failed once again because of their ability

³²⁷ *Id.*

³²⁸ *See id.*

³²⁹ Gutmann argues that “it would be an illegitimate pretension to educational authority on anyone’s part to deprive any child of the capacities necessary for choice among good lives.” *See id.* at 40.

³³⁰ *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008) (“They assert that they must be given prior notice by the school and the opportunity to exempt their young children from exposure to books they find religiously repugnant.”).

³³¹ *Id.* at 100 (quoting Stolzenberg, *supra* note 36, at 637).

³³² *Id.*

³³³ *Id.*

to present competing views to their children. This, indeed, is *Mozert*-style subjectivity. The children were given the benefits of critical deliberation and independent judgment, celebrated values in a liberal, pluralistic society.³³⁴ Christian Right lawyers were not allowed to have it both ways: they could not demand inclusion in a diverse society and then withdraw selectively when confronted with the inclusion claims of other minority voices.

C. Identity Politics and Sex(ual Orientation)

Given that courts reject the contention that a truly pluralistic society would accommodate parents' unflinching religious beliefs, Christian Right lawyers attempt to escape the liberal priority on subjectivity by exploiting the special status accorded sex. Advocates thereby attempt to counter gay rights lawyers' minoritizing, identity-based moves with a powerful weapon in the public school domain.

Gay rights lawyers position homosexuality and sexual orientation as "like race" and "like gender" in a left multicultural discourse.³³⁵ Springing from pluralism's recognition of diversity, left multiculturalism seeks recognition for minority groups by stressing coherent group-based identity.³³⁶ Lawyers construct an identifiable lesbian and gay population with common characteristics and goals. In this sense, they conceptualize the fight for gay rights as part of an identity-based project, and as like previous identity-based campaigns. Gay rights lawyers exercise constitutive power in this regard. Given that equal protection analysis at least implicitly compares forms of discrimination and includes considerations of immutability, they have strategic reasons to portray constituents in this way, regardless of its descriptive

³³⁴ Gutmann's theory of democratic education is based on the principle of "nonrepression," which "secures freedom from interference only to the extent that it forbids using education to restrict *rational* deliberation or consideration of different ways of life." GUTMANN, *supra* note 13, at 44. This principle would restrict the Amish in a way rejected by the *Yoder* Court. *See id.*

³³⁵ *See, e.g.,* Halley, *supra* note 2, at 40.

³³⁶ *See* Roof, *supra* note 10, at 8. I am using an admittedly oversimplified version of multiculturalism, which is a contested term subject to numerous interpretations. While I am locating this left multiculturalism within liberal notions of pluralism, there are important ways in which it departs from and moves beyond liberal ideals. While multiculturalism's emphasis on recognition for subordinated groups might be necessary to secure the place in society required for involvement in a participatory pluralism, it might also conflict with liberal pluralism's goal of inter-group commonality and rising above group-based difference. Multiculturalism's impulse to prioritize the group contrasts with a classic liberal impulse to prioritize the individual. *See id.* at 9; *see also* BROWN, *supra* note 4, at 21 ("[L]iberalism's unit of analysis, the individual, and its primary project, maximizing individual freedom, . . . together stand antithetically to culture's provision of the coherence and continuity of groups . . ."). Nonetheless, some scholars have explicitly set out to situate the multiculturalist aim for group-differentiated rights within liberal theory. *See, e.g.,* KYMLICKA, *supra* note 42, at 75-106 (arguing that group-based minority rights actually promote the individual freedom and autonomy valued by liberalism).

accuracy.³³⁷ Nonetheless, most lesbians and gay men understand themselves as part of a movement that involves more than just the gender of their sex partners and have accepted the identity-focused, left multicultural overtures of movement leaders.³³⁸

The gay rights movement's identity-based project has particular resonance in the school domain. Advocates frame gay-inclusive curriculum in terms of diversity, not sex.³³⁹ For instance, in considering appropriation of the Massachusetts sex education opt-out statute by parents in Lexington, a GLAD attorney explained that such parents are attempting to "take very, very narrow opt-out and parental notification rules that exist . . . for sex education . . . and they are trying to take that . . . [to] where kids are not talking about sex."³⁴⁰ To gay rights advocates, the Lexington curriculum is not about sex; it is about "who's in a family."³⁴¹

Yet at the same time, as scholars writing from a queer theoretical orientation point out, notions of sex and sexual shame are constitutive (and liberating).³⁴² Sexual acts (whether same-sex sex or, more generally, non-normative sex) contribute to a status (lesbians and gay men, or, more generally, queers).³⁴³ In this sense, a gay rights project materially differs from identity-based projects based on race or gender, a feature acknowledged by even the most centrist gay rights advocates.³⁴⁴ This distinctive feature of the gay rights movement helps to better understand religious parents' objections to injecting homosexuality into classroom instruction.

³³⁷ See Halley, *supra* note 2, at 46, 52 (pointing to the power of analogy in adjudication and noting how arguments from biology are intended to analogize to race); *cf.* WARNER, *supra* note 50, at 46, 76–77, 88–89 (contrasting the politics and ideals of queer culture with those of the mainstream gay rights movement).

³³⁸ See SEDGWICK, *supra* note 2, at 83 ("[S]ubstantial groups of women and men under this representational regime have found that the nominative category 'homosexual,' or its more recent near-synonyms, does have a real power to organize and describe their experience of their own sexuality and identity.").

³³⁹ *Cf.* WARNER, *supra* note 50, at 31 (explaining how "the official gay movement . . . has chosen to articulate the politics of identity rather than to become a broader movement targeting the politics of sexual shame").

³⁴⁰ Jacobs, *supra* note 158, at 1.

³⁴¹ *Id.*

³⁴² See WARNER, *supra* note 50, at 47–48 ("Gay political groups owe their very being to the fact that sex draws people together and that in doing so it suggests alternative possibilities of life. How ironic, then, that so often the first act of gay political groups is to repudiate sex.").

³⁴³ See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., Random House 1978) (explaining how the "practice of sodomy" ultimately yielded the homosexual); see also LEO BERSANI, *HOMOS* 34 (1995) ("The invention of the homosexual may have been the precondition of sexual liberation in that the homosexual essence partially desexualizes . . . the very acts that presumably called the essence into being."); WARNER, *supra* note 50, at 29 ("The concept of perversion, as distinct from perverse acts, led to the concept of sexual identity (or its close kin, sexual orientation).").

³⁴⁴ See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2181 (2002). Here, I am not arguing that sexual orientation is socially constructed in a way that race and gender are not. Rather, I am merely pointing out sexual orientation's unique conduct-status phenomenon, in which sexual acts become constitutive of identity.

Just as discourse in left queer circles points to the sex in homosexuality and distinguishes gay-based projects from other identity-based movements, conservative religious discourse evidences a similar, though normatively conflicting, impulse. When addressing homosexuality, religious leaders and commentators often focus on homosexual “conduct,” “behavior,” and “activity.”³⁴⁵ In this sense, religious thought approaches the concept of homosexuality and the existence of lesbians and gay men through the lens of same-sex sex. Once sexual orientation is understood as being about non-procreative, non-normative sex in conservative religious discourse, it is unsurprising that it is controversial and operates differently than race and gender. That sex is a contentious religious issue is obvious.³⁴⁶ It is no wonder, then, that many major religious organizations openly characterize homosexuality as incompatible with religious doctrine and refuse to bless same-sex relationships.³⁴⁷

In this conservative religious discourse, when presumptively non-sexual or heterosexual children are exposed to issues touching on sexual orientation, they too are pushed into the sexual. As Charles Russo, a conservative Catholic commentator, argues, if same-sex marriage is covered in school, children will be “involuntarily subjected to concepts about . . . human sexuality at the hands of public school officials.”³⁴⁸ Same-sex parenting also implicates sexuality, as Russo contends that young children are “most susceptible to confusion” when “exposed to materials that discuss as intimate, and possibly medically complicated, a topic as artificial insemination, let alone sexual intercourse”³⁴⁹ This is a crucial move: not only is instruction about homosexuality about sex, but instruction that touches on same-sex relationships and parenting is also about sex. Parents have expressed this belief in litigation. For instance, the parents in *Parker* asserted that “they are devout Judeo-Christians and that a core belief of their religion is that homosexual behavior and gay marriage are immoral and violate God’s law.”³⁵⁰ The *Parker* parents’ religious beliefs focused on “behavior” and linked same-sex marriage to such “behavior.”

³⁴⁵ See, e.g., Letter from Cardinal Joseph Ratzinger to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons (Oct. 1, 1986), www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html (referring to “homosexual acts,” “homosexual behaviour,” and “homosexual activity”) [hereinafter Letter from Ratzinger to Bishops].

³⁴⁶ See, e.g., *id.* (summarizing Catholic position on homosexuality and citing numerous Biblical passages in support of the Catholic view).

³⁴⁷ See, e.g., Jonathan Wynne-Jones, *Carey and Tutu Wade into Conflict over Gays*, THE TELEGRAPH, Nov. 18, 2007, at 6. (former Archbishop of Canterbury, Lord Carey, describing homosexuality as a “deeply theological” issue and urging the Anglican Church to “stand very firmly” with Biblical views that homosexuality is wrong and undermines marriage); Letter from Ratzinger to Bishops, *supra* note 345.

³⁴⁸ See Russo, *supra* note 300, at 370.

³⁴⁹ *Id.* at 376.

³⁵⁰ *Parker v. Hurley*, 514 F.3d 87, 92 (1st Cir. 2008).

At the same time that parents like those in *Parker* track claims raised in *Mozert*, they do so in a context where the danger of “mere exposure” seems more reasonable. The domain of sex and sexuality is one in which decision makers have located the harm of “mere exposure,” and they have done so specifically within schools. Many states provide notice and exemption rights to parents in the sex-education context.³⁵¹ Such statutes recognize the experience of parental harm from children’s exposure to sex and sexuality. In fact, the *Parker* parents relied on the Massachusetts statute allowing an opt-out for curriculum that “primarily involves human sexual education or human sexuality issues.”³⁵² Accordingly, the legal system recognizes the potential harm in “mere exposure” to sex. In the school context, lawmakers recognize the harm to flow merely from information, not sexual imagery or conduct.

If we understand religious parents’ objections to gay-inclusive curriculum as rooted in objections to sex-related curriculum, the harm of “mere exposure” becomes more resonant. Moreover, the harm of “mere exposure” in the sexuality domain does not necessarily stem from the presentation of information that depicts parental religious beliefs as contestable, but instead may be rooted in the sexual as something private and from which parents have a legitimate (state-approved) interest in shielding their children.³⁵³ Accordingly, from the perspective of conservative religious parents, it is not unreasonable to think that the legal system, even when relying on liberal notions of pluralism and diversity, might recognize the harm deriving from programming that touches on sexual orientation.

Nonetheless, the Christian Right move to characterize lesbians and gay men as inherently “about sex” increasingly fails to counter left multiculturalism in the minds of decision makers. Sexual orientation is increasingly understood as a stable (often innate) identity. This identity-based characterization facilitates analogies to race- and gender-based rights both in popular culture and in legal discourse. As courts ratify this move by gay rights lawyers—as they did most recently in the California and Connecticut marriage lawsuits—Christian Right lawyers find it increasingly difficult to present a

³⁵¹ See, e.g., CAL. EDUC. CODE § 51240 (West 2008); N.J. STAT. ANN. § 18A: 35-4.7 (West 2008); N.Y. EDUC. LAW § 3204(5) (McKinney 2009).

³⁵² *Parker v. Hurley*, 474 F. Supp. 2d 261, 263 (D. Mass. 2007) (quoting MASS. GEN. LAWS ch. 71, § 32A (2008)). Similarly, courts have recognized that “mere exposure” to sex or sexual images may constitute a burden on an individual’s religion. For instance, in *Lambert v. Condor Mfg.*, 768 F. Supp. 600 (E.D. Mich. 1991), a federal district court allowed a former employee to pursue his religious discrimination claim based on his religious belief against working in a space where employees posted nude photographs of women. See *id.* at 601. His claim based on mere exposure was enough to survive summary judgment. See *id.* at 602.

³⁵³ See GUTMANN, *supra* note 13, at 5–6 (explaining the belief that “the government’s legitimate educational role does not extend to what might be called ‘moral education,’” since such education “cannot possibly be neutral with regard to morality, and . . . is properly a private, not a public, concern”); see also *id.* at 108 (discussing the legitimate notion that sex education should be a private, family matter).

conduct-based conceptualization of homosexuality.³⁵⁴ Accordingly, the Christian Right claim in this context is increasingly less convincing. Indeed, as sexual orientation becomes more deeply ingrained as innate in the popular imagination, the harm of “mere exposure,” which often ties to fears of influence over children’s sexual orientation, appears even more attenuated.

The *Parker* district court affirmed the gay centrist position of sexual orientation as a stable, seemingly innate, identity category—like race and gender—in an increasingly diverse society. First, it rested the rationale for the gay-inclusive curriculum on liberal notions of education and pluralism, reasoning that “[s]tudents today must be prepared for citizenship in a diverse society,” and “one dimension of our nation’s diversity is differences in sexual orientation.”³⁵⁵ The court noted that the curriculum in Lexington accorded with Massachusetts law recognizing same-sex marriage and with Massachusetts Department of Education guidance encouraging instruction on “different types of families,” which was issued in light of Massachusetts law prohibiting discrimination in public schools based on sex or sexual orientation.³⁵⁶ The court linked the gay-inclusive curriculum to legal rights of lesbians and gay men that rely on an identity-based, rather than a sex-based, notion of sexual orientation.

Next, the district court’s treatment of the opt-out request shored up the identity politics of gay rights cause lawyers. Although the court dismissed the state law opt-out claim without prejudice after deciding the federal constitutional issues, it suggested the opt-out statute was inapplicable given that issues of sexual orientation were raised in books that constituted part of the school’s diversity curriculum. The court noted that an opt-out would undermine the point of the gay-inclusive lesson plans to the detriment of all students. It explained that “[a]n exodus from class when issues of homosexuality or same-sex marriage are to be discussed could send the message that gays, lesbians, and the children of same-sex parents are inferior and, therefore, have a damaging effect on those students,” and “[i]t might also undermine the [school’s] efforts to educate the remaining other students to understand and respect differences in sexual orientation.”³⁵⁷ In doing so, the court privileged a harm to lesbian and gay students (and children of

³⁵⁴ See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 438–39 (Conn. 2008) (“[G]ay persons, because they are characterized by a ‘central, defining [trait] of personhood, which may be altered [if at all] only at the expense of significant damage to the individual’s sense of self’ are no less entitled to consideration as a suspect or quasi-suspect class than any other group that has been deemed to exhibit an immutable characteristic.”) (internal citation omitted); *In re Marriage Cases*, 183 P.3d 384, 444 (Cal. 2008) (“There is no persuasive basis for applying to statutes that classify persons on the basis of the suspect classification of sexual orientation a standard less rigorous than that applied to statutes that classify on the basis of the suspect classifications of gender, race, or religion.”).

³⁵⁵ *Parker*, 474 F. Supp. 2d at 274.

³⁵⁶ See *id.* at 274–75 (citing 603 MASS. CODE REGS. § 26.06(1)).

³⁵⁷ *Id.* at 265.

lesbian and gay parents) over a harm to religious students (or, more precisely, religious parents). The court essentially rejected the belief that discussions of lesbians and gay men *per se* constitute discussions of sex. The distinction between identity and act animated the court's decision in favor of the gay-inclusive curriculum and the supporting gay rights organizations. The court embraced the gay rights brand of pluralism—left multiculturalism—and included sexual orientation within notions of diversity.

V. THE LIMITS OF MULTICULTURALISM

In this Part, I point to the limits of the gay rights model of left multicultural pluralism in the school context and note how Christian Right advocates seize on such limitations for political gain. First, I explain how some gay rights advocates invoke left multicultural principles to assert doctrinally problematic claims that ask courts to mandate a curriculum that embraces the gay rights movement's normative vision and to compel all students (especially children of religious objectors) to receive that vision through programming. That is, advocates move from a left multiculturalism that merely defends lesbian and gay inclusion toward one that demands affirmative state recognition. Because courts do not declare such affirmative rights, I then show how Christian Right lawyers exploit this result politically.

A. *Affirmative Rights*

Both gay rights and Christian Right lawyers understand the secondary, political effects of law and litigation.³⁵⁸ Gay rights advocates use courts' ratification of their brand of pluralism in school programming litigation to convince other schools to implement their own gay-inclusive curriculum. Indeed, the Lambda Legal attorney who handled the Montgomery County litigation noted just after that battle ended that the Washington, D.C. Board of Education approved a comprehensive sex education program after hearing "Lambda Legal's analysis about its right to pass curricular standards."³⁵⁹ Christian Right lawyers acknowledge the political usefulness of winning litigation for the gay rights movement. As TMLC chief counsel Richard Thompson explains, the Maryland state court decision upholding the revised

³⁵⁸ In exploring the political uses and implications of rights discourse, Stuart Scheingold analyzes the law as a "political instrument" and explores litigation as a "pressure group activity." See SCHEINGOLD, *supra* note 92, at 95–96.

³⁵⁹ See Hayley Gorenberg, *Intersection of Law and Policy: Curriculum Accuracy—What's in a Word?*, OF COUNSEL, Mar. 27, 2008, <http://www.lambdalegal.org/our-work/publications/general/law-and-policy-oc-march-08.html>.

Montgomery County curriculum “gives a green light to homosexual groups throughout Maryland to pressure school boards to adopt similar policies.”³⁶⁰

Nonetheless, gay rights cause lawyers would prefer that litigation yield a directive governing schools, rather than merely school-specific results based on judicial deference to local control. The default, these lawyers know, is likely a curriculum that excludes lesbian and gay issues and implicitly affirms the Christian Right ideal of family and sexuality. Seeking to move beyond merely favorable results and toward affirmative mandates, some gay rights lawyers, particularly at GLAD, take an aggressive rights-claiming position to demand gay-positive content.³⁶¹ They attempt to marry liberal priorities on pluralism, diversity, and critical deliberation to more normative notions of left multiculturalism. In its strongest form, the left multicultural pluralism endorsed by some gay rights lawyers requires affirmative state recognition; the state *must* cultivate respect for lesbians and gay men.³⁶² This claim moves beyond inclusion and tolerance and toward a more normative objective.³⁶³ And it does so with a weak doctrinal basis.

Rather than simply defend the school district’s decision in *Parker* based on the principles of local control and deference to curricular decisions, GLAD frames the materials at issue as tied up with a student’s right to receive information under the First Amendment. First, GLAD points to a “deeply-rooted constitutional ‘right to receive information and ideas,’” but fails to acknowledge the shaky jurisprudential ground upon which the right, articulated in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, rests.³⁶⁴ The fracturing of the Court in *Pico*, such that only a plurality endorsed the right to receive information, is compounded by the fact that *Pico* involved the removal of existing materials rather than the addition of new materials.³⁶⁵ Moreover, the Court explicitly limited its holding to library books, carefully distinguishing classroom instruction and curricu-

³⁶⁰ Bob Unruh, *Judge Blesses Teaching Students Homosexuality Is Innate*, WORLDNETDAILY.COM, Feb. 5, 2008, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=55666>.

³⁶¹ Compare GLAD’s aggressive position in *Parker* with Lambda Legal’s more restrained position in *Citizens for a Responsible Curriculum*. GLAD argued that “[s]tudents in Lexington, and elsewhere, have a right to learn that includes the right to receive accurate information about families, including same-sex parent families.” *Parker* GLAD Amicus Brief, *supra* note 68, at 19. Lambda Legal, on the other hand, simply argued that courts should defer to local school board decisions because “Maryland law entrusts . . . county boards with the discretion and authority to promulgate a health curriculum.” Respondent PFLAG’s Statement in Lieu of Memorandum at 2, *Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch.*, No. 284980 (Md. Cir. Ct. Jan. 31, 2008).

³⁶² The multicultural emphasis on respect is connected to the liberal priority on choice. See GUTMANN, *supra* note 13, at 32 (“Teaching mutual respect is instrumental to assuring all children the freedom to choose in the future.”).

³⁶³ See Gutmann, *supra* note 32, at 22 (“Toleration extends to the widest range of views . . . Respect is far more discriminating.”).

³⁶⁴ *Parker* GLAD Amicus Brief, *supra* note 68, at 19–20 (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 866–67, 870–71 (1982) (plurality opinion)).

³⁶⁵ See *Pico*, 457 U.S. at 862 (plurality opinion).

lum.³⁶⁶ Nonetheless, linking the right to liberal ideas about education, GLAD argues that “‘access to ideas . . . prepares students for active and effective participation in the pluralistic, often contentious society, in which they will soon be adult members.’”³⁶⁷

Next, GLAD links the right to receive information to gay identity issues. It argues that “[w]hen learning about family structure, or about societal diversity, students have a right to learn about lesbian and gay people and same-sex parent families.”³⁶⁸ GLAD contends that “[i]f a public school chooses to teach a unit about families, students in that school have a right to relevant and accurate information about what constitutes a family in America today.”³⁶⁹ The right has shifted from the already tenuous right to receive information to a right to learn particular information that correlates with notions of gay identity in a diverse society.

While a pluralist paradigm might account for religious objections by allowing parental opt-outs, this gay rights model of pluralism does not. Indeed, an accommodation model of pluralism would undermine the broader normative agenda furthered by the gay rights movement’s push for the curriculum in the first place. Gay rights lawyers are interested in values inculcation, and, in this sense, they especially want the children of religious objectors to receive gay-inclusive instruction. Arguing against opt-out rights for parents, GLAD points to “the right of *all* students ‘to receive a broad range of information so that they can freely form their own thoughts.’”³⁷⁰ The curriculum cannot be restricted (through an opt-out) or eliminated altogether, GLAD contends, because such acts would “impermissibly interfere[] with the students’ right to receive accurate, topical information and to learn.”³⁷¹

As a GLAD attorney put it, the organization submitted the arguments it did “so [schools] can have some language coming from our briefs that we hope will make it into this case so they can offensively say, you know what, it’s not just that we’re permitted to teach this material; it’s that we are mandated to teach this material.”³⁷² But gay rights organizations have not secured any affirmative right to curricular content, and the First Circuit did not

³⁶⁶ See *id.* at 862, 869.

³⁶⁷ *Parker* GLAD Amicus Brief, *supra* note 68, at 20 (quoting *Pico*, 457 U.S. at 868).

³⁶⁸ *Id.* at 23.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 22 (quoting *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998)).

³⁷¹ *Id.* at 27. Contrary to GLAD’s argument, the deference normally given to school districts suggests that courts would not go so far as to invalidate a school’s decision to allow parents to opt their children out of instruction touching on the topic of sexual orientation. Indeed, the *Parker* district court itself suggested the viability of a parental accommodation. *Parker v. Hurley*, 474 F. Supp. 2d 261, 264 (D. Mass. 2007) (noting that the Constitution “does not prohibit the defendants from voluntarily accommodating the parents’ concerns if there is a reasonable way to do so”).

³⁷² *Jacobs*, *supra* note 158.

adopt GLAD's position.³⁷³ Instead, the court merely found that the school district could persist with its curriculum. By facilitating local variation, school district discretion serves a pluralist ethic in itself, against which courts are reluctant to rule. Local school discretion ties to a democratic conceptualization of public education by allowing curriculum to reflect community values and consensus.³⁷⁴ In the end, school districts may fashion a gay-inclusive curriculum or they may not.³⁷⁵

B. Law as a Political Tool

The lack of affirmative rights and duties secured by gay rights organizations opens up possibilities for chilling effects on schools, yielding important points of leverage for Christian Right lawyers. Even if school districts are vindicated by litigation, the mere possibility of litigation may serve as a deterrent. Litigation is extremely resource-intensive, using public funds that can be better spent in other ways and placing demands on the time of busy officials, administrators, and teachers.³⁷⁶

Legal actors move toward litigation avoidance techniques to provide certainty when faced with legal ambiguity and to steer clear of litigation costs.³⁷⁷ The fact that the law regarding parental challenges to school programming is relatively well-settled in favor of curricular freedom makes

³⁷³ See *Parker v. Hurley*, 514 F.3d 87, 107 (1st Cir. 2008) (rather than finding any affirmative rights to content, simply concluding that the curriculum did not offend the United States Constitution and that parents could seek to change programming through "the normal political processes").

³⁷⁴ See GUTMANN, *supra* note 13, at 74 ("Preserving a realm of local democratic control over schools not only makes control more effective but permits the content of education to vary, as it should, with local circumstances and local democratic preferences.").

³⁷⁵ Similarly, courts have not declared an affirmative right to comprehensive sex education. See Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of their Own,"* 11 CORNELL J.L. & PUB. POL'Y 481, 491 (2002) (noting that she is "yet to find a case upholding the child's affirmative right to access to sex education and holding that the school has a duty to make sex education or condoms accessible to all students, despite the parents' objections").

³⁷⁶ For instance, a Montgomery County school board member urged TMLC to "get out of town" and "quit costing Montgomery County taxpayers money for litigation." Leah Fabel, *Montgomery County Wins Long Battle on Sex Ed*, THE EXAMINER, Feb. 2, 2008, http://www.examiner.com/a-1196553~Montgomery_County_wins_long_battle_on_sex_ed.html.

³⁷⁷ Scholars in a variety of fields have documented the impulse toward litigation avoidance experienced by various actors. For instance, in considering the role of custom in intellectual property law, Jennifer Rothman recently noted that "[l]itigation-avoidance customs are motivated by IP players' (both owners and users) interests in providing greater certainty in the face of unpredictable legal outcomes and in reaction to skyrocketing litigation costs." Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1909 (2007). As cause lawyering scholar Michael McCann has explained, social movement lawyers rely on the costs and uncertainty of litigation to force concessions from organizations and institutions. See Michael McCann, *Law and Social Movements*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 506, 514 (Austin Sarat ed., 2004).

schools' litigation avoidance techniques appear surprising. But a central ingredient in the conventional litigation avoidance picture is increasingly missing in the public school context, or, more precisely, is present for only one of the actors. Parents find heavily funded public interest law firms willing (and eager) to fund litigation relating to public school decision-making.³⁷⁸ More often than not, schools must defend lawsuits using taxpayer resources. After the Montgomery County school system's most recent state court win, a school spokesperson estimated that the litigation cost the district more than \$500,000 and pointed out that opponents received free representation from TMLC.³⁷⁹ Without the specter of high litigation costs needing to be absorbed by financially strapped parents, key players in the public school context no longer have a vital incentive to avoid litigation, but schools still have a strong incentive to avoid costly litigation. In this sense, there is a relational quality to the litigation avoidance strategies of schools and the litigation-seeking strategies of cause lawyers. The eagerness of legal organizations to commence litigation springing from school district disputes makes schools especially vigilant in avoiding potentially controversial topics.³⁸⁰

As an initial matter, this chilling effect can lead schools to adopt the accommodation model of pluralism endorsed by the Christian Right and a sex-based conceptualization of lesbians and gay men. Schools that have controversial programming may more quickly bow to pressure from parents by offering opt-out rights, which recognize exposure as injurious. They may do so in contexts outside of sex education, thereby positioning sexual orientation as invariably about sex. For instance, anecdotal evidence suggests that in the wake of the *Parker* litigation some Massachusetts schools have conceded to the objections of religious parents, notifying parents of any discussion of LGBT people or families and allowing parents to exempt their children from the instruction.³⁸¹

More importantly, the chilling effect allows Christian Right advocates to achieve a more comprehensive goal: having sexual orientation excluded from school programming. Such exclusion, rather than mere opt-out rights in an otherwise gay-inclusive curriculum, seizes on the homogenizing potential of school programming to maintain traditional (Christian) notions of family life and sexuality for all students. Even though the Lexington school district prevailed at both the district and appellate court levels, the *Parker* litigation may have a chilling effect on other schools. Schools may decide

³⁷⁸ Christian Right law firms are some of the most well-funded public interest legal organizations in the United States. For instance, ACLJ has a yearly budget that exceeds \$30 million and, as of 2005, employed forty-four full-time attorneys and one hundred support staff. See HACKER, *supra* note 2, at 28.

³⁷⁹ See Fabel, *supra* note 376.

³⁸⁰ It is important to note that this incentive structure is not entirely one-sided. Schools may shy away from curricular changes when faced with parental challenges and litigation threats backed by progressive groups like the ACLU.

³⁸¹ See Jacobs, *supra* note 158.

not to provide gay-inclusive programming at all, concluding, as a GLAD attorney explained, “We just don’t want to be sued like Lexington.”³⁸² A historical look at the Montgomery County litigation only underscores the way in which schools can avoid controversy through silence. In 2002, the Montgomery County school system moved from an explicit policy not to discuss homosexuality in health education classes to a new policy that sought to address “sexual variation.”³⁸³ The school district shifted from a policy of silence to a policy of engagement, the latter yielding years of litigation.³⁸⁴

Some Christian Right lawyers, aware of litigation’s chilling effect, attempt to exploit it. They use litigation as a political tool to pressure school districts into decisions favorable to the Christian Right movement. For instance, in the Equal Access Act (“EAA”) context, Liberty Counsel takes an aggressive position to pressure other schools into complying with its position. When Liberty Counsel sued a Florida public school district under the EAA for refusing to allow a Christian student group to meet on campus, general counsel Matthew Staver, the same attorney who represented CRC and PFOX in the Montgomery County federal court case, called a press conference to condemn the school district in the suit and, more importantly, to put other school districts on notice of Liberty Counsel’s aggressive litigation campaign.³⁸⁵ As Staver declared, “[t]his is the first in a series of lawsuits that we’ll be doing around the state of Florida.”³⁸⁶ Later, Staver issued a

³⁸² *Id.*

³⁸³ *Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch.*, No. AW-05-1194, 2005 WL 1075634 at *1 (D. Md. May 5, 2005).

³⁸⁴ As Button, Rienzo, and Wald explain, in 1992, the New York City school system’s Children of the Rainbow multicultural education curriculum included two references, out of 443 pages of materials, to lesbians and gay men. Critics reacted by accusing the school district of promoting homosexuality. See BUTTON, RIENZO, & WALD, *supra* note 135, at 148; see also Steven Lee Myers, *Values in Conflict: Schools Diversify the Golden Rule*, N.Y. TIMES, Oct. 6, 1992, at B1. The school system’s chancellor lost his job, accused by the school board of “concentrat[ing] his energies on a controversial social agenda.” Sam Dillon, *Board Removes Fernandez as New York Schools Chief After Stormy 3-Year Term*, N.Y. TIMES, Feb. 11, 1993, at A1; see also BUTTON, RIENZO, & WALD, *supra* note 135, at 148. Button and his co-authors suggest that the “ordeal in New York City seemed to be heeded by school officials nationwide.” BUTTON, RIENZO, & WALD, *supra* note 135, at 149. As Arthur Lipkin explained, “during the New York battle, the curriculum recommendations of the [Massachusetts] Governor’s Commission on Gay and Lesbian Youth were quietly dropped from its report” *Id.* Similarly, a Cincinnati school official reported that his district had become “more cautious.” *Id.* at 150. As Button and his co-authors found, “[i]nformants in every community we visited referred to the New York episode as having a chilling effect on their community’s efforts to address sexual orientation issues and youth.” *Id.* at 149. While this analysis discusses the effects of political controversy, the publicity and controversy surrounding litigation, along with its high costs, suggest that the chilling effects flowing from litigation might be even greater. Moreover, while the New York City example represented a relatively isolated incident in the 1990s, conflicts over gay-inclusive curriculum have proliferated in recent years, only magnifying the chilling effects.

³⁸⁵ See HACKER, *supra* note 2, at 70.

³⁸⁶ *Id.*; see also Julie Hauserman, *School Singled Out Christian Group, Girl’s Lawsuit Says*, ST. PETERSBURG TIMES, Jan. 16, 1999, at 4B.

press release entitled "Florida High School, School Board and Principal Sued for Discrimination against Christian Student Club; Liberty Counsel states, 'All Schools Are On Notice,'" which warned:

For years, when we were contacted about Equal Access issues we would contact school personnel, give them the benefit of the doubt, and offer to resolve the situation short of litigation. Those days are gone . . . we will no longer hesitate to file suit when violations arise. This suit marks the beginning of a national campaign by Liberty Counsel to ensure public schools abide by the Equal Access Act.³⁸⁷

Of course, the EAA domain, as an example of the successful inclusion model of pluralism, presents a substantive area in which the law favors Christian Right lawyers (as well as gay rights lawyers) vis-à-vis school districts.³⁸⁸ The issue of school programming and curriculum presents a situation less compelling under existing legal doctrine. Nonetheless, the political leverage provided by litigation in some ways exists independent of actual litigation results and well-settled doctrinal principles. The prospect of aggressive, costly litigation by a perceived adversary may compel schools to bow to Christian Right demands.³⁸⁹ In fact, religious conservative groups involved in public school disputes note with approval the chilling effect that losing litigation can have in the school programming domain. Even though the Lexington school district was vindicated by both the district court and the First Circuit, a social conservative advocacy group, MassResistance, boasts that "[s]chools are apparently figuring out that if they push perversion to children, they could face a tough lawsuit."³⁹⁰

³⁸⁷ HACKER, *supra* note 2, at 70–71.

³⁸⁸ Numerous decisions support the rights of Christian students to form religion-focused clubs and the rights of LGBT students to form gay-straight alliances. *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226, 232–34 (1990) (upholding students' rights under the EAA to form a Christian club at a public high school); Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 847–48, 857–58 (2d Cir. 1996) (upholding students' rights under the EAA to form a Bible Club at a public high school, though limiting the extent to which the club could use a religious test for certain leadership positions); Boyd Co. High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 693 (E.D. Ky. 2003) (upholding students' rights under the EAA to form a gay-straight alliance at a public high school); Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1149 (C.D. Cal. 2000) (same).

³⁸⁹ *See* BROWN, *supra* note 3, at 131 (explaining that after ADF's John Price contacted a school on behalf of an aggrieved student, arguing based on constitutional principles but also mentioning legal costs the school might incur, the school, according to Price, experienced "a marvelous change of heart").

³⁹⁰ MassResistance, *David Parker Lawsuit Having a "Chilling" Effect on Schools' Homosexual Programs, Says Homosexual Legal Advocacy Group* (Jan. 31, 2007), http://www.massresistance.org/docs/gen/08a/pflag_092407/parker_suit.html (relying on complaints about the chilling effects on school districts that a GLAD attorney aired to the gay press).

CONCLUSION

This Article has outlined three models of pluralism elaborated by Christian Right and gay rights lawyers—an inclusion model, an accommodation model, and a left multicultural model. These models of pluralism give meaning and resonance to different doctrinal claims. At the same time, these models turn back on their own advocates, providing significant limitations. The Christian Right's tremendously successful free speech claim, which relies on an inclusion model of pluralism, runs up against doctrinal and remedial problems as it ventures into school programming territory. And yet, because the inclusion model enjoys so much currency, previously unthinkable free speech claims gain traction in this context. At the same time, an alternative model of pluralism based on accommodation and grounded in parental rights and free exercise claims fails to resonate in a world in which Christian Right advocates have framed their movement in terms of participation and engagement. On the other side, gay rights lawyers are facing the limitations of their own model of left multicultural pluralism. While successful in defending discretionary inclusion based on a stable identity-based understanding of lesbians and gay men, the left multicultural model of pluralism flounders when it strikes a more normative chord that seeks affirmative state recognition through First Amendment rights.

