Articles

"IF YOU DON'T AIM TO PLEASE, DON'T DRESS TO TEASE" AND OTHER PUBLIC SCHOOL SEX EDUCATION LESSONS SUBSIDIZED BY YOU, THE FEDERAL TAXPAYER

By Jennifer L. Greenblatt*

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* Law clerk to the Honorable Richard Clifton, United States Court of Appeals for the Ninth Circuit. J.D., Stanford Law School, 2008; B.A., Cornell University, 2005. I would like to thank William Koski for providing his insight on education law and policy and Lawrence Lessig for giving me the tools to critically examine constitutional law. I also thank Leah Graham for her invaluable advice on this article and beyond as well as the TEXAS JOURNAL ON CIVIL LIBERTIES AND CIVIL RIGHTS editors for all of their hard work.

> 'Tis education forms the common mind, Just as the twig is bent, the tree's incln'd.
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> —Alexander Pope

> [I]t is important to remember that no constitutional guarantees, whether those of women's equality or of free and fair elections, are safe or are worth much unless we are prepared to fight for them and to support others in their fight, even past the point where it is comfortable to do so.
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> —Professor Mary Anne Case

I. INTRODUCTION

By what process do we internalize gender scripts? Did a bunch of little girls get together one day and decide that they are particularly fond of the color pink? Why are alternative career paths for those raising children so often dubbed "mommy" tracks rather than "parent" tracks? I am confident social scientists could propose a host of answers to these questions, but the propositions to be explored in this Article are these: irrespective of how gender stereotypes arise, is the federal[1] government legally permitted to play a substantial role in forming them vis-à-vis funding schemes for sex education, and can schools continue to implement programs laden with harmful gender stereotyping? The context for the ensuing discussion is, appropriately enough, an arena where government-promoted gender typecasting has roamed far and free for too long—abstinence-only sex education.[2]

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1. The same analysis would equally apply to the legality of state funding mandates. I chose to focus on the federal schemes since challenges on a national level are likely to have the most widespread impact in eradicating illegally-imposed sexual stereotypes lurking in government-promoted sex education programs.

2. To be clear, it is *not* the abstinence-only approach itself, but rather, its tendency to incorporate stereotypical assumptions on the basis of gender that I take issue with in this Article. The legality of offering sex education courses in the first place is also not questioned. *See* Laurent B. Frantz, *Validity of Sex Education Programs in Public Schools*, 82 A.L.R.3d 579 (2008) (noting sex education courses have uniformly been upheld in the few cases addressing the matter, at least when parents are allowed to exempt their children from participating); *see also* Citizens for Parental Rights v. San Mateo County Bd. of Educ., 124 Cal. Rptr. 68, 77-92 (Cal. App. 1975) (rejecting a plethora of federal constitutional challenges to a public school teaching sex education).

In the quest to unveil the legal status of current sex education policies, Part II of this Article examines the historical underpinnings and legislative context of congressional funding for abstinence-only sex education courses in public schools. Part III takes an in-depth look into what is *really* being taught in abstinence-centered sex education programs across the country, focusing on gender-stereotyping messages contained therein. Part IV answers the question on everyone's mind: can the government lawfully continue to promote sexist sex education curricula? Part A analyzes the validity of the sex education status quo under the Equal Protection Clause of the United States Constitution, and Part B similarly scrutinizes these instructional techniques in light of Title IX of the Education Amendments of 1972. Part V evaluates the available options for policymakers considering overhauling present sex education tactics.

II. PUT YOUR MONEY WHERE YOUR MOUTH IS: A HISTORY OF FEDERAL FUNDING OF STEREOTYPED SEX EDUCATION PROGRAMS

In 1803, Congress forcefully revealed its preference for state-supplied education by compelling every state to include education in its constitution in order to be admitted to the Union.[3] However, the federal government has been all but barred by four statutes—Section 103a of the Department of Education Organization Act;[4] Section 14512 of the Elementary and Secondary Education Act;[5] Section 314(b) of the Goals 2000: Educate America Act;[6] and Section 438 of the General Education Provisions Act[7]—from directly dictating the specific content of public education furnished largely by the states.[8] As a result of the statutory ban on its direct conscription of school curricula, Congress has been sidelined from shaping the content of sex education until recent times.[9]

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3. Augustus F. Hawkins, *Becoming Preeminent in Education: America's Greatest Challenge*, 14 HARV. J.L. & PUB. POL'Y 367, 372 (1991).

4. 20 U.S.C. § 3403(a).

5. 20 U.S.C. § 8902 (since repealed).

6. 20 U.S.C. § 5894 (since repealed).

7. 20 U.S.C. § 1232a.

8. Danielle LeClair, *Let's Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should Be Overruled*, 21 WIS. WOMEN'S L.J. 291, 293 (2006); *see also* Roger J. R. Levesque, *Sexuality Education: What Adolescents' Educational Rights Require*, 6 PSYCHOL. PUB. POL'Y & L. 953, 970 (2000) (referencing Section 103a of the Department of Education Organization Act, 20 U.S.C. § 3403(a); Section 14512 of the Elementary and Secondary Education Act, 20 U.S.C. § 8902 (since repealed); Section 314(b) of the Goals 2000: Educate America Act, 20 U.S.C. § 5894 (since repealed); and Section 438 of the General Education Provisions Act, 20 U.S.C. § 1232a, as forbidding Congress from prescribing state and local educational curricula).

9. Naomi K. Seiler, *Abstinence-Only Education and Privacy*, 24 WOMEN'S RTS. L. REP. 27, 29-30 (2002) (discussing the recent vintage of federal involvement in sex education). Though arguably redundant due to the aforementioned congressional prohibitions on curriculum circumscription, at least one state has also specifically banned federal interference in sexuality instruction. Levesque,

Enter categorical federal sex education grants, with plenty of strings attached.

Partly in response to concerns that federal family planning services encouraged teenage promiscuity, Congress began promoting abstinence-only sex education[10] in 1981 with its passage of the Adolescent Family Life Act (AFLA).[11] AFLA's touted educational mission is to reduce teen pregnancy by fostering "chastity and self discipline," with funding strictly limited to entities that in no way encourage abortion.[12] As religious organizations began utilizing funds in arguably religion-advancing ways, a District of Columbia district court soon addressed a wholesale challenge to the Act as contrary to the Establishment Clause of the U.S. Constitution, both facially and as-applied, in *Kendrick v. Bowen*.[13] Before long, the Supreme Court weighed in reversing the district court's across-the-board voiding of the AFLA concluding, "the statute has a valid secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement of church and state."[14] The Court did remand, however, for a determination of whether particular grants had the primary effect of advancing religion, thus violating the Constitution as-applied.[15] Twelve years after filing suit, the parties reached a settlement, the terms of which conditioned continued AFLA funding for the recipient programs on removal of religious teachings and medical inaccuracies from their curriculum.[16]

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supra note 8, at 970 (discussing a Louisiana statute barring federal involvement in sexuality schooling).

10. While varying in their particulars, abstinence-only programs share a common theme, as one scholar puts it, "of promoting abstinence as the only viable option for America's youth." Amy Schwarz, *Comprehensive Sex Education: Why America's Youth Deserve the Truth About Sex*, 29 HAMLINE J. PUB. L. & POL'Y 115, 125 (2007). In contrast, a national task force suggested the following information about human sexuality be included in programs aiming to provide comprehensive sex education (which lies on the opposite end of the full-disclosure-about-sexual-issues spectrum from abstinence-only curricula): "growth and development, human reproduction, anatomy, physiology, masturbation, family life, pregnancy, childbirth, parenthood, sexual response, sexual orientation, contraception, abortion, sexual abuse, HIV/AIDS and other sexually transmitted diseases." Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN'S STUD. 265, 267 (2000). The abstinence-only approach is also sometimes called "abstinence until marriage" education. *Id.* at 268. To view a chart comparing the two approaches, see ADVOCATES FOR YOUTH & SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S. (SIECUS), TOWARD A SEXUALLY HEALTHY AMERICA: ROADBLOCKS IMPOSED BY THE FEDERAL GOVERNMENT'S ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION PROGRAM 8 (2001).

11. Adolescent Family Life Act, 42 U.S.C. § 300z (2006); *see* Elizabeth Arndorfer, *Absent Abstinence Accountability*, 27 HASTINGS CONST. L.Q. 585, 586-87 (2000) (describing the impetus behind the passage of the Adolescent Family Life Act).

12. Schwarz, *supra* note 10, at 121, 123; SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S. (SIECUS), BRIEF HISTORY OF ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION (2005), *available at* http://www.nonewmoney.org/history.htm. *See generally* Adolescent Family Life Act § 300z (describing the purposes of the Act). AFLA funds both services for pregnant and teenage mothers as well as preventative programs; however, since 1997, two-thirds of monies go toward prevention centered on abstinence education. *See* Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459, 473-74 (2007); LeClair, *supra* note 8, at 295.

13. 657 F. Supp. 1547, 1551 (D.D.C. 1987).

14. Bowen v. Kendrick, 487 U.S. 589, 617 (1988).

15. *Id.* at 620-22.

16. *See* Seiler, *supra* note 9, at 30; *see also* Rebekah Saul, *Whatever Happened to the Adolescent*

While AFLA provided the blueprint for later funding designs, current AFLA expenditures pale in comparison to the two subsequently-enacted federal sex education initiatives.[17]

Attention shifted from the AFLA to funding abstinence-only education as a component of welfare reform with the 1996 enactment of Section 510 of Title V of the Personal Responsibility and Work Opportunity Reconciliation Act (Section 510).[18] Section 510 authorized increased expenditures on abstinence-only education accompanied by more stringent conditions for participation: only programs in accord with and emphasizing at least one of the eight criteria for "abstinence education" may receive education-targeted funds.[19] Section 510 programs are subject to the following eight "abstinence education" definitional points:

> (A) [The program] has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
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> (B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children;
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> (C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
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> (D) teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity;
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> (E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;
>
> (F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society;

Family Life Act?, *in* THE GUTTMACHER REPORT ON PUBLIC POLICY 5 (1998), *available at* http://www.guttmacher.org/pubs/tgr/01/2/gr010205.pdf (detailing the settlement agreement terms of *Kendrick v. Sullivan*, a progeny of *Bowen v. Kendrick*).

17. JULIE F. KAY, SEX, LIES & STEREOTYPES: HOW ABSTINENCE-ONLY PROGRAMS HARM WOMEN AND GIRLS 4 (2008) (stating 2007 expenditures for AFLA-funded abstinence-only education totaled $13 million, which amounts to much less than its other sex education federally-funded counterparts). *But see* Seiler, *supra* note 9, at 39 (describing how the Department of Health and Human Services deemed a program called "The Silver Ring Thing" ineligible for federal funds after the ACLU brought suit challenging the program on religious promotion grounds).

18. Seiler, *supra* note 9, at 40.

19. 42 U.S.C. § 710(b) (2006); *see also* Seiler, *supra* note 9, at 30.

> (G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and
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> (H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.[20]

In addition, states participating in the Section 510 program are required to match spending on a 75 percent basis (states must contribute three dollars to the program for every four federal dollars spent).[21]

Eclipsing both the AFLA and Section 510 in recent years in spending growth and restrictions on eligibility is the latest in the trilogy of federal sex education funding schemes: the Special Projects of Regional and National Significance Community-Based Abstinence Education (CBAE) program, passed in 2000 in the wake of widespread conservative support.[22] CBAE's funding recipients are exclusively community organizations, as opposed to schools, although the community groups can and often do teach abstinence-only in-school courses with participating schools' consent.[23] Congress has required that all CBAE programs further *every one* of Section 510's eight-point laundry list of abstinence education features and refrain from teaching about contraception or safe-sex practices.[24]

Notwithstanding a lack of evidence establishing the efficacy of such programs, federal funding for abstinence education skyrocketed from $10 million in 1997 to $177 million in 2007, affecting a sizeable impact on the landscape of state policies for dispensing information to

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20. 42 U.S.C. § 710(b)(2); *see also* KAY, *supra* note 17, at 5-6. Beginning in the 1997 fiscal year and every year since, the AFLA has also incorporated Section 510's eight-point test into its own eligibility mandates. John Santelli et al., *Abstinence and Abstinence-Only Education: A Review of U.S. Policies and Programs*, 38 J. ADOLESCENT HEALTH 72, 75 (2006); *see also* LeClair, *supra* note 8, at 298 (remarking "HHS has interpreted Title V to prohibit the teaching of contraception, except to discuss failure rates").

21. Schwarz, *supra* note 10, at 122-23. California is the only state to never accept (or for that matter apply for) Section 510 funding. *See* KAY, *supra* note 17, at 38.

22. Michelle Fine & Sara I. McClelland, *The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body*, 56 EMORY L.J. 993, 1003-04 (2007). The CBAE conditional grant is authorized by Title XI, Section 1110 of the Social Security Act (codified at 42 U.S.C. § 1310 (2006)). *See* Department of Health & Human Services Administration for Children and Families Grant Opportunities for Community-Based Abstinence Education Program Webpage, http://www.acf.hhs.gov/grants/open/HHS-2007-ACF-ACYF-AE-0099.html (last visited Apr. 15, 2008).

23. LeClair, *supra* note 8, at 298.

24. *See* Cahn & Carbone, *supra* note 12, at 475 (stating that CBAE appropriations "requir[e] that all programs teach *every one* of the items listed within [Section 510's] definition of abstinence education") (emphasis in original); Fine & McClelland, *supra* note 22, at 1003 (discussing information restrictions on CBAE programming content). For the full catalogue of CBAE eligibility prerequisites, see Department of Health & Human Services Administration for Children and Families Grant Opportunities for Community-Based Abstinence Education Program Webpage, *supra* note 22. This requirement has led to a cottage industry of eight-point friendly curricula, complete with evaluations of their adherence to Section 501 definitional points. *See* Kelly L. Wilson et al., *A Review of 21 Curricula for Abstinence-Only-Until-Marriage Programs*, 75 J. SCH. HEALTH 90, 90-97 (2005).

students regarding sexual issues.[25] States that require sex education usually impose an open-ended mandate, leaving program details to the discretion of local school boards.[26] However, the thirty-two states without sex education requirements often restrict the schools that choose to offer such instruction to teaching abstinence—at least until marriage—as the only option.[27] A survey reveals that today "[t]he majority of the state requirements stress abstinence-only education rather than education that includes information about contraceptives."[28]

What explains the trend of public schools' increased provision of abstinence-only instruction? Professors Fine and McClelland theorize "the promise of federal dollars," especially in impoverished areas, "pushes them into accepting [abstinence-only] curricular restrictions in order to fill funding gaps."[29] The government's imprimatur on abstinence-only programs is undeniable. As discussed below, the actual instruction may have illegal baggage in tow.

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25. Cahn & Carbone, *supra* note 12, at 475 (revealing funding figures and their associated impact on state sexual education materials). Including state financing, approximately 1.5 billion taxpayer dollars have been funneled into abstinence-only education. KAY, *supra* note 17, at 10. A team of researchers note "in 1999, 23% of secondary school sexuality education teachers taught abstinence as the only way to prevent pregnancy and STDs, compared with only 2% who had done so in 1988. In 1999, one-quarter of sex education teachers said they were prohibited from teaching about contraception." Santelli et al., *supra* note 20, at 77. And these figures were obtained at a time when funding for abstinence-only education was substantially less than it is now. *See, e.g.*, Marcela Howell, *The History of Federal Abstinence-Only Funding* 4 (2008), *available at* http://www.advocatesforyouth.org/publications/factsheet/fshistoryabonly.pdf (showing 60 million federal dollars were spent on abstinence-only education in the 1999 fiscal year compared to 176 million dollars in the 2007 fiscal year). For a discussion of regional differences in sex education approaches, see generally David J. Landry et al., *Factors Associated with the Content of Sex Education in U.S. Public Secondary Schools*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 261 (2003).

26. Simson & Sussman, *supra* note 10, at 266. Twenty states as well as the District of Columbia have mandated coverage of sex education issues in public schools as of August of 2007, Schwarz, *supra* note 10, at 124, up from just six states in the late 1970s, Seiler, *supra* note 9, at 31. *See generally* Levesque, *supra* note 8, at app. A (transcribing all the various state statutory provisions instituting a sex education requirement).

27. Seiler, *supra* note 9, at 31.

28. Schwarz, *supra* note 10, at 124-25.

29. Fine & McClelland, *supra* note 22, at 1004.

III. MEN ARE FROM MARS, WOMEN ARE FROM VENUS:[30] THE CURRENT STATE OF PUBLIC SCHOOL SEX EDUCATION UTILIZING FEDERAL FUNDS

There is no shortage of criticism on the effectiveness of the abstinence-only educational approach in curbing the alarming repercussions from premature teenage sexual activity.[31] However, the distressing reality—that "[t]he abstinence-only approach is permeated with stereotyped messages and sex-based double standards about acceptable male and female sexual behavior and appropriate social roles"[32]—has flown under the legal radar and eluded public attention amidst religious-based challenges.[33] Lying beneath the surface of sex education regimes are real threats to the equality women have fought so hard to attain. Federal legislators have begun to take notice, although attempts to alter abstinence-only educational approaches have been met with resistance.[34]

In 2004, at the behest of U.S. Representative Henry A. Waxman, the Committee on Government Reform undertook a systematic evaluation of the most popular abstinence-only curricula employed by schools opting to receive congressional CBAE funding.[35] The study concluded *over 80 percent* of the most popular abstinence-only education programs funded by the CBAE program were imbued with

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30. John Gray's famously titled book, MEN ARE FROM MARS, WOMEN ARE FROM VENUS (1993), is listed as "recommended reading" on a popular abstinence-only curriculum supplier's website. *See* WAIT Training Resources Webpage, http://www.waittraining.com/resources_healthy_marriage_relationships_sexual_abstinence_education.asp (last visited Apr. 17, 2008). The book has been widely criticized for its sexist presuppositions. *See, e.g.*, CHARLOTTE SUTHRELL, UNZIPPING GENDER: SEX, CROSS-DRESSING AND CULTURE 152 (2004); Sam Joyner, *A Planetary Survey of Feminist Jurisprudence: If Men Are from Mars and Women Are from Venus, Where Do Lawyers Come from?*, 33 TULSA L.J. 1019, 1020 (1998).

31. *See, e.g.*, KAY, *supra* note 17, at 10-11 (citing studies showing the asserted goals of abstinence-only programs have not come to fruition); Cahn & Carbone, *supra* note 12, at 479 ("Delaying sexual activity until the mid-twenties (and later for the college educated) is unrealistic at best."); *cf.* Sandra Vergari, *Morality Politics and Educational Policy: The Abstinence-Only Sex Education Grant*, 14 EDUC. POL'Y 290, 302 (2000) ("It is important to note that there is little solid scientific evidence indicating what types of sex education programs are most effective in reducing sexual activity and pregnancy among teens.").

32. Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 948 (2007).

33. *See* Cahn & Carbone, *supra* note 12, at 487-91 (observing that legal objections have overwhelmingly been based on promoting religion and collecting cases). For extensive coverage of Establishment Clause legal challenges made to federal abstinence education funding, see Julie Jones, *Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education*, 35 CREIGHTON L. REV. 1075, 1086-1105 (2002).

34. *See* Fine & McClelland, *supra* note 22, at 1032 (describing countervailing political efforts to stop problematic abstinence programs from persisting).

35. MINORITY STAFF SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REP. COMM. ON GOV'T REFORM, 108TH CONG., REPORT ON THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 5 (Comm. Print 2004) [hereinafter REPORT ON THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS]. For additional commentary on the poor efficacy of abstinence-only programs in reducing teen pregnancy and the rate of STDs, see Santelli et al., *supra* note 20, at 75-76. *See also* Arndorfer, *supra* note 11, at 590-91.

misinformation, including *treating gender stereotypes as scientific fact* along a variety of dimensions such as achievement propensities, vulnerabilities, and sexual aggression.[36] The following paragraphs focus on excerpts from real abstinence-only curricula, encompassing some of those prominently featured in Waxman's report, illustrating the urgent need for corrective action.

Going above and beyond the biology of human reproduction, some abstinence-only curricula promulgate views about desirable achievement goals strictly segregated along gender lines. One popular course, cleverly titled "Why kNOw," teaches us: "Women gauge their happiness and judge their success by their relationships. Men's happiness and success hinge on their accomplishments."[37] Another course, "Sex Respect," indoctrinates students on the proper allocation of familial responsibilities by including a ready-made quiz asking students to identify "which parent is more likely to do certain household tasks," giving such options as "mowing the lawn, doing laundry, and decorating the house."[38] These "lessons" demean the hard-earned triumphs that women have made in establishing themselves as equally capable of doing what was traditionally thought of as "men's work."[39] It is important to note that cultivating economic dependence on men has been a cornerstone of the subordination of women for centuries.[40]

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36. REPORT ON THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS, *supra* note 35, at i, 16-18. Other accolades Waxman's report doled out for distortion in sex education programs include providing a host of falsities regarding the failure rate of contraceptives and the risks of undergoing an abortion, conflating science with religion, and imparting erroneous scientific "facts." *Id.* at 8-16, 18-22. A full two-thirds of CBAE grantees taught from curricula displaying these kinds of defects in 2003. *Id.* at i.

37. *Id.* at 16 (quoting WHY KNOW ABSTINENCE ONLY, INC., WHY KNOW ABSTINENCE EDUCATION 122 (2004)). On a 2003 version of Why kNOw's website, understandably taken down after only a month, an educator for the program was touted as providing the following instruction (complete with a photograph): "Veteran Why kNOw educator, Walter Lindsey, adopts the role of an African warrior to model the pride young men should feel in becoming the provider, protector, and leader their families and communities need. In his assembly presentations, he challenges young men to be 'man enough' to treat young women with respect. He encourages young women to value themselves enough to hold out for the best: a committed marriage relationship." Why Know Abstinence Only, Inc. Webpage, http://web.archive.org/web/20030720102303/http://www.whyknow.org/order/warrior.html (last visited Oct. 26, 2008) (retrieved using www.archive.org).

38. Naomi Rivkind Shatz, Comment, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 528 n.224 (2008) (citing COLEEN KELLY MAST, SEX RESPECT, STUDENT WORKBOOK: THE OPTION OF TRUE SEXUAL FREEDOM 4 (2001)). It should go without saying that the pedagogical benefits of this quiz are dubious at best.

39. *See, e.g.*, Julia Baird, *The Pursuit of Power Isn't Pretty*, NEWSWEEK, Mar. 17, 2008, at 31 (discussing the different strategic approaches women have used to downplay or emphasize their femininity to attain positions of power). For instance, Margaret Thatcher, the first female prime minister of Britain, famously imparted these girl-power words of wisdom: "It may be the cock that crows, but it's the hen that lays the eggs." *Id.* For a discussion of how gender stereotypes continue to influence hiring decisions (even in the relatively "enlightened" field of the law), see Elizabeth H. Gorman, *Gender Stereotypes, Same Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70 AM. SOC. ASS'N 702, 712-25 (2005).

40. *See* Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 515-16 (2003). As a recent *Wall Street Journal* article suggests, it may be just as important to disrupt outdated, archetypal attitudes held by

Some abstinence-only sex education programs thrust outdated conceptions of inherent differences between the sexes upon impressionable young students. "Sex Respect," for one, teaches that "[t]estosterone, a male hormone, leads men to interest in the desire for sexual release and pleasure. . . . [while] [t]he estrogen in females tends to focus them primarily on nurturing, warmth, closeness and security."[41] And since boys supposedly lack the self-agency to control their own behavior, a curriculum developed by the Heritage of Rhode Island entitled "Right Time, Right Place" dictates "girls have a responsibility to wear modest clothing that doesn't invite lustful thoughts,"[42] while "Sex Respect" urges girls to "[w]atch what you wear, if you don't aim to please, don't aim to tease."[43] In an incredible use of fairy-tale imagery,

> One book in the "Choosing the Best" series presents a story about a knight who saves a princess from a dragon. The next time the dragon arrives, the princess advises the knight to kill the dragon with a noose, and the following time with poison, both of which work but leave the knight feeling "ashamed." The knight eventually decides to marry a village maiden, but did so "only after making sure she knew nothing about nooses or poison." The curriculum concludes: Moral of the story: Occasional suggestions and assistance may be alright, but too much of it will lessen a man's confidence or even turn him away from his princess.[44]

Placing such an onerous responsibility on young women to be the

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women about their own gender. After concluding men and women had similar leadership styles, the article noted "[t]he big problem is both sexes believe their own biased perceptions more than they believe this fact. . . . [and] women internalize many of the stereotypes men have about them as less-effective leaders." Carol Hymowitz, *Too Many Women Fall for Stereotypes of Selves, Study Says*, WALL ST. J., Oct. 24, 2005, at B1. *See generally* ALLAN G. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 4-18 (rev. ed. 2005) (discussing the historical and persistent existence of patriarchy and how it serves to oppress women).

41. Shatz, *supra* note 38, at 528 n.224 (quoting COLEEN KELLY MAST, SEX RESPECT, TEACHER'S MANUAL 20 (2001)); *see also* Fine & McClelland, *supra* note 22, at 1006 (airing the content of one abstinence-only curriculum manual that describes "what makes a man" as being "strong, respectful, courageous, and protective" in contrast to a "real woman" who is "caring and someone who sends a clear message by choosing her clothes, expression, and gestures carefully" (internal quotations omitted)).

42. Fine & McClelland, *supra* note 22, at 1006; *see also* Schwarz, *supra* note 10, at 138 (noting that one program states, because of boys' testosterone-driven sex drives "the girl may need to put the brakes on first to help the boy").

43. LeClair, *supra* note 8, at 303. This fails to account for boys' responsibility to respect the choices of girls in whether to partake in sexual activity. An expert concludes, "reinforcing girls' ability and right to say 'no' is not enough if boys are not also taught to hear and understand the word 'no.' A failure to do so implicitly exempts boys from such discussions, reinforces the tacit belief that male sexuality is biologically programmed and therefore unchangeable, and maintains the onus already placed on girls for sexual behavior." Laina Y. Bay-Cheng, *The Trouble of Teen Sex: The Construction of Adolescent Sexuality Through School-Based Sexuality Education*, 3 SEX EDUC. 61, 70 (2003).

44. REPORT ON THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS, *supra* note 35, at 17-18.

"gatekeepers of chastity"[45] is particularly unfair given that the harms stemming from premature and unprotected sexual activity fall disproportionately on these women.[46]

Scare tactics aplenty appear in various curricula to convince young teens that abstinence is the only viable choice; if students reject the mantra, the programs provide little-to-no guidance on methods to avoid unintended pregnancies and STDs. The "No Second Chance" video, for instance, features a dialogue between a school nurse and a female student.[47] The student inquires what will happen if she wants to have sex before marriage, and the school nurse abruptly replies, "Well, I guess you'll just have to be prepared to die."[48] Further driving home the dangers surrounding premarital sex, a widely-used program lectures, "If premarital sex came in a bottle, it would probably have to carry a Surgeon General's warning, something like the one on a package of cigarettes: THERE'S NO WAY TO HAVE PREMARITAL SEX WITHOUT HURTING SOMEONE."[49] The "FACTS" abstinence program, targeting a middle-school audience, goes a step further, stating, "There is no such thing as 'safe' or 'safer' premarital sex."[50] Combined with the disproportionate pressure placed on women to control their "urges," one can perceive the negative impact such all-or-nothing strategies for preserving adolescent health may have on girls in particular if they engage in sexual activity.

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45. Schwarz, *supra* note 10, at 138; *see also* GLORIA FELDT, WAR ON CHOICE: THE RIGHT WING ATTACK ON WOMEN'S RIGHTS AND HOW TO FIGHT BACK 75 (2004) ("Abstinence-only programs present a 1950s view of sexuality and gender relations, when guys were always trying to get to 'third base,' and girls were the ones who had to put the brakes on.").

46. *See, e.g.*, Pillard, *supra* note 32, at 954-55 (purporting women may be in greater need of sexuality education than men given the imbalanced impact from sexual behavior they face); LeClair, *supra* note 8, at 300-03 ("Abstinence-only programs do not adequately address issues that disproportionately impact girls, including STIs and unwanted teen pregnancy."). Moreover, women in society at large are subjected to more stereotypes with those stereotypes likely to be viewed as more negative than male stereotypes. Laura Wolff & Shelley E. Taylor, *Sex, Sex-Role Identification, and Awareness of Sex-Role Stereotypes*, 47 J. OF PERSONALITY 177, 183 (1979). This pattern transcends culture. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 33 (1995) ("The content of what is gendered masculine or feminine varies radically from culture to culture, but what remains constant is that whatever is gendered feminine is seen as less valuable than what is gendered masculine.").

47. *See* Fine & McClelland, *supra* note 22, at 1006.

48. *Id.*; *see also* FELDT, *supra* note 45, at 73 ("As part of their scare tactics, the [abstinence-only] guidebooks make numerous blatantly false claims about the risks of sexual activity and sexually transmitted infections.").

49. Simson & Sussman, *supra* note 10, at 269 (quoting COLEEN KELLY MAST, SEX RESPECT: THE OPTION OF TRUE SEXUAL FREEDOM STUDENT WORKBOOK 35 (rev. ed. 1997)). At least one proponent of abstinence-only education has picked up on the cigarette analogy, rhetorically asking, "If you discovered your child had taken up cigarette smoking, how would you respond? Would you simply accept it as typical teenage behavior and supply him with the safest brand of cigarettes available—those lowest in tar and nicotine—or would you respond in a manner that would relate to your child that smoking can cause serious diseases and even death?" Michael J. Fucci, *Educating Our Future: An Analysis of Sex Education in the Classroom*, 2000 B.Y.U. EDUC. & L.J. 91, 91 (2000). Thus, the author suggests preaching safe sex is much like offering teens "safer" cigarettes—an oxymoron. *See id.* at 91-92, 117-19.

50. SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S. (SIECUS), HOW THE $ IS SPENT (2005) (citing FACTS, MIDDLE SCHOOL TEACHER'S GUIDE 9)).

Perhaps scarier than any of these scare tactics is the false information presented in many abstinence-only curricula, often with respect to female-specific issues. For those students seeking to resort to potentially less-risky sexual behavior, one curriculum incredulously warns "touching another person's genitals 'can result in pregnancy.'"[51] In an attempt to not only avoid promoting abortion, but to actively deter teens from choosing to have one, abstinence-only materials present misleading and inaccurate statistics regarding the physical and mental repercussions from undergoing the procedure.[52] One program goes so far as to refer to a forty-three-day-old fetus as a "thinking person" to stress the immorality of terminating a pregnancy.[53] Ignoring the findings of the Center for Disease Control (CDC),[54] another abstinence-only course claims that there is no evidence that condoms help to prevent the human papilloma virus (HPV), a leading cause of cervical cancer, and fails to recommend that all sexually active girls and all girls over 18 be screened for the virus, as is widely recommended.[55] Overall, these kinds of erroneous messages signal a lack of concern for young women's sexual health, well-being, and decisional privacy. Moreover, such false statements decrease the effectiveness of encouraging abstinence since students are likely to intuit that those teaching distorted sex education courses appear to be in the dark about even the most basic of facts themselves.[56]

Although an extended discussion of the topic is beyond the scope of this Article, disturbing patterns based on race and class also emerge from sexual education trends. One researcher discovered in her analysis of college sex education texts that "the photos included in sections focusing on normative adolescent sexual development most frequently featured white teens, whereas more pictures of teens of color were included in sections on risk and danger, such as pregnancy and disease."[57] With

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51. REPORT ON THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS, *supra* note 35, at 12 (citing Slideshow: Sexual Health Today (Med. Inst. for Sexual Health 1999)).

52. *Id.* at 13-16.

53. *See id.* at 16.

54. CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., GENITAL HPV INFECTION-CDC FACT SHEET, *available at* http://www.cdc.gov/STD/HPV/STDFact-HPV.htm (stating "condoms may lower the risk of HPV").

55. REPORT ON THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS, *supra* note 35, at 18-19. These examples are by no means exhaustive. *See id.* at 21 (indicating one abstinence-only curriculum erroneously asserts that a baby inherits 24 chromosomes from each parent—each parent in fact contributes 23 chromosomes); *see also* FELDT, *supra* note 48, at 72-77 (listing false statements in federally-funded sex education materials). Representative Waxman, the legislator spearheading the comprehensive abstinence-only program evaluation that revealed slews of misrepresentations, is quoted as taking the following position: "I don't think we ought to lie to our children about science. Something is seriously wrong when federal tax dollars are being used to mislead kids about basic health facts." Ceci Connolly, *Some Abstinence Programs Mislead Teens, Report Says*, WASH. POST, Dec. 2, 2004, at A01.

56. *See* Philip Elmer-Dewitt, *Making the Case for Abstinence*, TIME, May 24, 1993, *available at* http://www.time.com/time/printout/0,8816,978569,00.html (contending using falsehoods in sex education curriculum is self-defeating for precisely this reason).

57. Bay-Cheng, *supra* note 43, at 71.

respect to class,

> In debates surrounding types of SBSE [(school-based sex education)] programs, for instance, it has been proposed that comprehensive curricula are most appropriate for lower income districts in which teens are expected to be at greater risk of engaging in partnered sexual activity, and that abstinence-only curricula are best suited for middle- and upper-class districts. The underlying twin assumptions here are evident: lower-class teens are expected to be moral failures; middle- and upper-class teens are expected to adhere to a more stringent standard of social (and sexual) behavior; or perhaps it is that middle-class teens have something *worth* 'saving.' Of course, this objection is complicated if one believes that in practice, comprehensive SBSE programs are in fact more useful and supportive of teen sexuality. In this case, more privileged adolescents are perhaps being deprived of a higher quality sexuality education.[58]

These hostile expressions in sex education teachings undoubtedly amplify the harm experienced by students already subjected to misguided, gendered assumptions.[59]

IV. TWO WRONGS DON'T MAKE A RIGHT: AND OTHER LEGAL CHALLENGES TO FEDERALLY-FUNDED SEX EDUCATION PROGRAMS

Litigants seeking to question the legality of the not-so-subtly sexist content of government-backed sex education programs have a menu of constitutional and statutory options at their disposal. Two means to achieving equality in sex education, however, have been largely neglected in the legal literature and are accordingly discussed at length below. Other avenues for challenge can and should be explored though for anyone contemplating legal action.

A. Equal Protection to the Rescue!

In equal protection cases since 1976, the Supreme Court of the United States has taken gender stereotyping head-on, using language that screams to be applied to the rampant government-sponsored sexism in

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58. *Id.* at 70-71 (internal citations omitted); *see also* Seiler, *supra* note 9, at 40-41 (discussing the troubling class and race lines drawn in abstinence-only education materials).

59. For a discussion of the economic, educational, and decisional privacy injuries women sustain from being subjected to stereotypical discourses on sexuality, see Seiler, *supra* note 9, at 39-40.

several abstinence-only curricula nationwide.[60] The ensuing doctrinal precedent provides a firm foundation for those seeking to use the Federal Constitution as a sword to alter the current state of sex education.

In *Craig v. Boren*, the Court announced intermediate scrutiny applies to gender classifications requiring the *government* to prove its law is substantially related to an important interest.[61] Decrying the "archaic and overbroad generalizations" proffered to justify setting the legal purchasing age for particular beer at 21 for boys and 18 for girls, the *Craig* Court held such sweeping characterizations would not suffice.[62] The *Craig* Court's treatment of statistics proffered by the state to show men were more likely than women to drink and drive[63] indicates both the burden on the state to justify discriminatory assumptions and cognition of the onerous task of reordering societal thinking about gender. First, the Court rejected the proposition that a 2 percent correlation in arrest records established the viability of the state's traffic safety rationale, observing, "Proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."[64]

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60. For an analysis of potential standing issues for litigants claiming injury for a group-based stigmatic harm and ways to try to overcome such barriers to suit, see generally Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417 (2007). Irrespective of whether plaintiffs have standing to sue, government actors should abide by the restraints imposed by federal law.

61. 429 U.S. 190, 197-99 (1976).

62. *Id.* at 198 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)). It is no accident that the lead plaintiff in the case was a man rather than a woman. A prominent litigator in many of the gender equality cases culminating in *Craig*, Justice Ginsburg's strategy of litigating challenges brought by men seized upon well-documented in-group bias psychology: the male-dominated Court may have been more sympathetic to the injustice of over-generalizations made with respect to men as opposed to women. *See* Jennifer Yatskis Dukart, Comment, Geduldig *Reborn:* Hibbs *as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy*, 93 CAL. L. REV. 541, 543 (2005). Ironically, gender discrimination work was funneled to Justice Ginsburg during her time as a lawyer with the ACLU because (in her own words) "sex discrimination was regarded as a women's [sic] job." Carey Olney, *Better Bitch than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 BUFF. WOMEN'S L.J. 97, 106 (2001).

63. *Craig*, 429 U.S. at 200-02.

64. *Id.* at 204. Showing how far the Court has come in recognizing claims of illegitimate stereotyping, Justice Bradley, known for his strong commitment to free labor ideals, unhesitatingly asserted in his concurrence upholding a law banning women from the practice of law that "[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." Bradwell v. Ill., 83 U.S. 130, 141 (1872) (Bradley, J., concurring); *see also* David E. Bernstein, Book Review, Lochner*'s Feminist Legacy*, 101 MICH. L. REV. 1960, 1962-63 (2003) (pointing out the inconsistency between Justice Bradley's dissent in the *Slaughterhouse Cases* and his concurrence in *Bradwell* and attributing the difference in outcomes to a gendered conception of the liberty to contract). Justice Bradley further concluded in words that would later become the embodiment of impermissible pigeonholing, "The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." *Bradwell*, 83 U.S. at 141-42 (Bradley, J., concurring); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 n.10 (1982) (excerpting Bradley's opinion in *Bradwell* to exemplify what constitutes an illicit statutory objective); *cf.* Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1113-14 (2004) (discussing a study finding only 18 percent of respondents in 1972 could solve the riddle posed to Archie Bunker in the popular 1970s show, *All in the Family*; the riddle posits a father and son are in a car accident that kills the father, the son arrives at the hospital critically injured, and the

One might expect analogous efforts by a state actor to justify differential treatment in sex education on the basis of hormonal differences (the "testosterone makes him do it" defense) to meet a similar fate. Second, the Court devalued the arrest records because of the bent towards gender-based treatment of intoxication offenders in the first place: "'[R]eckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."[65] Attempts to show that males' aggressive tendencies substantiate curriculum content embodying such assumptions could be subject to the same criticism—i.e., it is society, not the way men or women "are," that creates a perceived difference in sexual behavior.

The prohibition against relying on antiquated notions of female propensities has been most clearly articulated under the Equal Protection Clause in the realm of sex-segregated education. The newly-appointed first female justice of the Supreme Court, Sandra Day O'Connor, authored the conclusively anti-stereotyping opinion in *Mississippi University for Women v. Hogan*, which struck down the categorical exclusion of men from the state university's graduate nursing program.[66] Adding an expansive principle to the heightened scrutiny framework applicable to gender classifications, the *Hogan* Court stated the test of statutory validity "must be applied free of *fixed notions* concerning the *roles and abilities* of males and females."[67] The Court further cautioned, "Care must be taken in ascertaining whether the statutory objective itself *reflects archaic and stereotypic notions*," and warned that trying to "protect" a given gender "because they are presumed to suffer from an inherent handicap or to be innately inferior" is an "illegitimate" objective.[68] As with examining a state's articulated purpose, the inquiry as to the requisite "substantial relationship between objective and means" serves to root out gender labeling underscored, not by "reasoned analysis," but by "mechanical application of traditional, often inaccurate,

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doctor exclaims "I can't operate, it's my son!"—most respondents failed to see how the surgeon could be the *mother*).

65. *Craig*, 429 U.S. at 202 n.14; *cf.* text accompanying note 44 (using the fairy tale genre of a knight's tale to warn future princesses they may lose their prince if they partake in premarital sex).

66. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720-21, 733 (1982). *See generally* Karst, *supra* note 40, at 522 (speculating how Justice O'Connor's presence likely altered the Court's evaluations of sex discrimination cases).

67. *Hogan*, 458 U.S. at 724-25 (emphases added); *see also* Orr v. Orr, 440 U.S. 268, 283 (1979) (observing "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection" in invalidating a statute that allowed judges to order men but not women to pay alimony in the event of divorce); Stanton v. Stanton, 421 U.S. 7, 14-15, 17 (1975) (overturning a law designating girls' age of majority at 18 and boys' at 21 for purposes of child support rejecting the "old notions" of only men needing to gain an education to provide for the family, and remarking that this "coincides with the role-typing society has long imposed").

68. *Hogan*, 458 U.S. at 725 (emphasis added). Deeming state measures premised on a need to protect a presumed vulnerable class "illegitimate" suggests such laws would fail the significantly less-burdensome rational basis test applicable to most group-distinguishing legislation. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631-32 (1996) (striking down a state constitutional amendment banning the passage of anti-discrimination laws for homosexuals because the objective of expressing animus towards the class was "illegitimate" while applying at least nominally rational basis review).

assumptions about the proper roles of men and women."[69]

One of the first landmark cases authored by the Supreme Court's second female justice, Ruth Bader Ginsburg,[70] *United States v. Virginia (VMI)* is the Court's most recent review of gender classifications in the educational context and signals its strongest prohibition on state-sanctioned stereotyping yet.[71] Announcing what some believe to be a new elevated level of judicial review, the *VMI* Court instructed, "Parties who seek to defend gender-based government action must demonstrate an *exceedingly persuasive justification* for that action."[72] The burden on the state to sustain sex-based distinctions is heavy indeed: a justification must be authentic, rather than a knee-jerk reaction to litigation, and "it must not rely on *overbroad generalizations* about the different *talents, capacities, or preferences of males and females*."[73] Foreshadowing the very issues surfacing in abstinence education language, the *VMI* Court announced that while efforts may be made to advance women's ability to participate as equals in a society long plagued by gender discrimination, so-called "inherent differences" between the sexes cannot be used as a vehicle to denigrate or subordinate women in "legal, social, and economic" spheres.[74] Employing these tests, the Court determined Virginia could not justify restricting admission to the Virginia Military Institute to men.[75] Likewise, the federal government likely cannot justify funding, nor public schools justify teaching, sexist sex education courses.[76]

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69. *Hogan*, 458 U.S. at 725-26; *accord* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 130-31 (1994) ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, *particularly where* . . . the discrimination *serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.*") (emphases added).

70. To prevent confusion among Court observers, the National Association of Women Judges somewhat jokingly presented Justice Ginsburg with a T-shirt emblazoned with "I'm Ruth, not Sandra" across the front to commemorate her confirmation. *See* Olney, *supra* note 62, at 124. Since Justice O'Connor's retirement, Justice Ginsburg is reportedly lonely, missing her only female companion on the Court and worrying about how visitors will view her being the sole female justice. Joan Biskupic, *Ginsburg 'Lonely' Without O'Connor: The Remaining Justice Fears Message Sent by Court Composition*, USA TODAY, Jan. 26, 2007, at 1A.

71. 518 U.S. 515 (1996).

72. *Id.* at 531 (internal quotations omitted and emphasis added).

73. *Id.* at 533 (emphases added).

74. *Id.* at 533-34.

75. *Id.* at 534. For an engaging examination of how separating the sexes in education "inevitably comes with a stigma," see Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 516-18 (1999).

76. Admittedly, language in some equal protection cases seems to contradict the more aspirational equality language employed by *Hogan* and *VMI*. The Court in *Michael M. v. Superior Court*, for example, upheld California laws making only men criminally liable for engaging in sexual intercourse with under-aged women. 450 U.S. 464, 479 (1981). The Court went to great lengths, however, to assert that it was the state's important interest in preventing teenage pregnancy, for whom more harm falls upon women than men, rather than any attempt to promote sexual stereotypes, such as men being more likely to be the aggressor, that warranted the law. *See id.* at 472-73, 476. In *Nguyen v. INS*, the Court similarly sustained immigration laws imposing greater burdens for proving citizenship via paternal versus maternal ties, eschewing that the statutory provisions were marred by disrespect for one's gender. 533 U.S. 53, 56-57, 73 (2001) ("The difference between men and women in relation to the birth process is a real one, and the principle of

It logically follows from *Hogan* and *VMI* that if legislatures and courts are precluded from relying on fixed conceptions of the proper place of men and women in society, government funding for the *teaching* of such notions is equally constitutionally repugnant. But what about the argument that abstinence programs simply recognize *private* societal discriminations with respect to how women should conduct themselves? This state-action circumvention move should be soundly rejected just as it was in *Palmore v. Sidoti*, where the Court found private biases towards interracial relationships, even if affecting the best interest of the child, could not be considered in making child custody allocation decisions.[77] Litigants defending their decision to employ gender-impugning sex education curricula are susceptible to the principle so artfully articulated in *Palmore*: "Private biases may be outside the reach of the law, but the law cannot, directly *or indirectly*, give them effect."[78]

In teaching sex education, schools can acknowledge that stereotypes along gender lines regrettably exist, but they simply cannot assert those biases as established fact (as many do),[79] thereby effectively ingraining these notions in the minds of students. As feminist theorist Cornelia T. Pillard aptly discerns, "[t]eaching about sex-based discrimination, identifying historical patterns, and observing general trends is not the same thing as endorsing them," with the line being drawn at "prescriptive or normative advocacy of sexual double standards."[80] In the course of her direct attack on standard abstinence education rhetoric, she aptly asserts that "[m]ere descriptions of 'the way most women (or men) are'" go to the very core of sex discrimination.[81]

Another potential point of resistance to applying *Hogan* and *VMI* to federal funding of sexual education programs is that a pattern of government denial of benefits resonates through those anti-stereotyping cases in a way propagating gender-stereotyping sex education does not. However, the fact that federally-funded sex education programs are dispensed to all students on a sex-blind basis is a distinction without

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equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender."). While some commentators argue these cases are wrong, *see, e.g.*, David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1001-05 (2002), they are nonetheless distinguishable from sex education stereotyping in that they more clearly link to sex-based biological differences as opposed to gender-based social differences and exact greater burdens (at least in the abstract) on men who are not as a class historically victims of discriminatory legislation. *But see* Michael J. Kaufman, *Beyond Presumptions and Peafowl: Reconciling the Legal Principle of Equality with the Pedagogical Benefits of Gender Differentiation*, 53 BUFF. L. REV. 1059, 1077-1101 (2005) (criticizing the Court for demanding equal treatment in learning institutions claiming biological differences between the sexes justify differential regimens); Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L.J. 617, 620-57 (1984) (discussing at length studies of biological variations between men and women while cautioning that just because sex differences may have biological origins, does not resolve "whether the differences are good and to be fostered by society, or bad and to be suppressed").

77. 466 U.S. 429, 433-34 (1984).

78. *Id.* at 433 (emphasis added).

79. *See* discussion *supra* Part III.

80. Pillard, *supra* note 32, at 961.

81. *See id.*

constitutional significance. Foreseeing efforts to distinguish anti-typecasting precedents, Professor Pillard convincingly argues:

> If it is contrary to equal protection to make even formally neutral governmental decisions based on sex stereotypes, it would seem, a fortiori, unconstitutional to teach those same views in public schools. . . . If government must not act on the belief that men are aggressive and thus better fit than women for military-style education, women are better mothers, or boys are more likely than girls to drink and drive dangerously, then it should follow that government may not seek to indoctrinate students with those same sex-based generalizations. . . . The equal protection critique of abstinence-only curricula is strengthened and rendered more amenable to judicial resolution by the fact that sex education classes are designed not only to expose students to ideas, but also to shape student behavior. Obligatory education permeated with discriminatory content alone raises serious constitutional concerns. But the conduct-shaping purpose of sex education curricula makes them vulnerable to equal protection challenge even if communicating retrogressive sex roles in traditional academic classes might not be.[82]

Congress is free to remain indifferent with respect to the existence or content of sex education, but as one scholar notes, "while government has no affirmative duty to speak, when it undertakes to provide information it must do so in a non-discriminatory manner."[83]

As with racial discrimination, the stigmatic harm from government-sanctioned commitments to gender inequality is both real and precisely what the Fourteenth Amendment should be used to counteract.[84] Government support of stereotype-promoting abstinence education programs conflicts with equal protection jurisprudence, which provides

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82. *Id.* at 956-58 (internal citations omitted).

83. Edward G. Reitler, Note, *The Title X Family Planning Subsidies: The Government's Role in Moral Issues*, 27 HARV. J. ON LEGIS. 453, 481 (1990). For the proposition that minors do in fact have a right of access to particular information and an explanation of the consequences that this right may have for limiting parents' ability to remove children from certain courses to cement gender roles, see Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 271-72 (1999).

84. *Compare* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) ("Classifications based on race carry a danger of stigmatic harm. . . . Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."), *with* Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (speculating that the stigmatic injury from gender-based exclusion is similar to the harm stemming from race-based exclusion). *See also* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 864-78 (2004) (discussing constitutional jurisprudence expressing concern about the stigmatic harm of discriminatory state action); Carolyn B. Ramsey, *Subtracting Sexism from the Classroom: Law and Policy in the Debate Over All-Female Math and Science Classes in Public Schools*, 8 TEX. J. WOMEN & L. 1, 14 (1998) (characterizing "stereotypical ideas about women," namely that nursing is a woman's job, "as the chief wrong" the Court sought to prevent in *Hogan*).

that the government must treat everyone with equal respect.[85] Whether targeting congressional funding for programs containing stereotyped messages or the implementation of these offensive programs, suits invoking the Equal Protection Clause are ripe for the bringing. Over thirty years have passed since the Court lamented that "our statute books gradually became laden with gross, stereotyped distinctions between the sexes."[86] It is time Congress and public schools nationwide do away with correspondingly loathsome language found in abstinence materials purchased with the aid of federal funds, or face potentially victorious equal protection challenges as a consequence of staying the course.

B. Never Fear! Title IX Is Here!

Perhaps the most likely candidate for obtaining gender neutrality in sex education via the courts is Title IX, which specifically bans gender discrimination by *any* educational institution receiving federal funds (with few exceptions).[87] Title IX has been predominantly used to secure gender equity in athletics and to protect against sexual harassment; however, dislodging harmful stereotypes embedded in schools' sex education programs falls comfortably within the ambit of the statute's broad commitment to furthering gender equality.[88] Moreover, a

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85. *See* sources cited *supra* note 84; *see also* Deborah Hellman, *What Makes Genetic Discrimination Exceptional*, 29 AM. J.L. & MED. 77, 104 (2003) (using single-sex bathrooms as an example of distinctions made by the government that do not clash with equal protection concerns of prohibiting expressions of gender inferiority); Cruz, *supra* note 76, at 999-1000 ("While private individuals and groups should largely remain free to believe what they will about the sexual division of humankind, under the Constitution, *government* must give up its roles in reinforcing gender ideologies and social divisions based on sex and gender." (emphasis added)); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 15-24 (2000) (summarizing her theory that "state action violates Equal Protection if its meaning conflicts with the government's obligation to treat each person with equal concern," and elaborating on which government expressions are thereby enjoined).

86. Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

87. *Compare* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006) (stating "*No person* in the United States *shall*, on the basis of sex, *be excluded* from participation in, be denied the benefits of, *or be subjected to* discrimination under any education program or activity receiving Federal financial assistance" (emphasis added)), *with* U.S. CONST. amend. XIV, § 1 (stating "*No State shall* . . . deny to any person within its jurisdiction the equal protection of the laws" (emphasis added)). Accordingly, private as well as public schools may be constrained by Title IX and its accompanying regulations if they receive federal money, whereas the Equal Protection Clause only applies (with limited exceptions) to public schools. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (discussing the state action prerequisite for liability under the Fourteenth Amendment); *cf.* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298-99, 304-05 (2001) (determining a private institution was a state actor because of its entwinement with the state given its membership was comprised almost entirely of public schools and was largely governed by public school officials). For an extensive discussion of Title IX's specific application to pregnant students, see Jennifer L. Greenblatt, *Falling Off the Abstinence-Only Bandwagon: What Is a Public School Charged with Educating Pregnant Students Suppose to (Legally) Do?*, 28 CHILD. LEGAL RTS. J. 1, 2-6, 8-12 (2008).

88. *See* LeClair, *supra* note 8, at 314-16 (advocating the use of Title IX to fight gender discrimination in sex education).

particularly attractive feature of suing under Title IX, as opposed to bringing suit on constitutional grounds alone, is the legal consensus that states waive their sovereign immunity when they accept federal funds, thus permitting litigants to seek monetary damages[89] in addition to injunctive relief.[90]

Alas, Title IX case law is rare in the arena of illicit gender stereotyping. One federal district court case, *Chipman v. Grant County School District*, did find that denying all unmarried, pregnant students membership in the National Honor Society violated Title IX because of either its unnecessary, disparate impact on pregnant women, or its differential treatment on the basis of pregnancy absent a non-discriminatory rationale.[91] As one scholar argues, abstinence-only programs may also be invalidated under the decisional framework applied in *Chipman*.[92] To show disparate impact, female plaintiffs could assert an array of injuries caused by stereotyping—reduced parity in the labor market, a threatened sense of self-autonomy, and lowered self-esteem, to name a few.[93] At that point, the burden would then shift to schools to save the program by demonstrating the "reasonable necessity" of preserving the curriculum in its current form.[94] The kinds of abstinence-only curricula at issue are likely to be deemed unjustified since they unnecessarily employ damaging gender stereotypes and convey inaccurate information, particularly since comprehensive sex education provides an arguably more effective alternative without containing as many of these flaws.[95]

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89. Monetary damages are presumptively available in actions to enforce Title IX. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (finding Congress did not intend to limit Title IX remedies to injunctive relief); Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (interpreting Title IX to provide an implied right of action).

90. *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 282 & n.423 (2005). The Supreme Court recently held, however, that Title IX does not preempt remedial relief sought under 42 U.S.C. § 1983 for gender discrimination in violation of the Equal Protection Clause. Fitzgerald v. Barnstable Sch. Comm., No. 07-1125, slip op. at 10-11 (U.S. Jan. 21, 2009).

91. 30 F. Supp. 2d 975 (E.D. Ky. 1998); *see also* Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k) (2007) (specifying for Title VII purposes, which is often looked to in interpreting Title IX, that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions"). *But see* Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (denying that pregnancy-based discrimination, unlike gender-based discrimination, triggers heightened review and puzzlingly reasoning "[w]hile it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification"), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, *as recognized in* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 677 n.12 (1983). The *Geduldig* Court may have been a little too quick to claim pregnancy as a status exclusively reserved to (at least legally-designated) females. *See* Jennifer Fermino, *This Is No Belly Gaffe—Pregnant Pop Aims to Deliver*, N.Y. POST, Mar. 29, 2008, at 12 (reporting the story of a pregnant man who legally became a man and married his wife following his sex-change operation after being born a biological woman and noting a transgendered man had already previously given birth in 2000).

92. *See* LeClair, *supra* note 8, at 319-22.

93. *Id.* at 320; *see also* Seiler, *supra* note 9, at 39-40.

94. LeClair, *supra* note 8, at 320-21. Disparate impact claims do not require proof of intentional discrimination. *Id.* at 320 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

95. *See* LeClair, *supra* note 8, at 321-22; *see also* McCormick *ex rel.* McCormick v. Sch. Dist. of

In examining stereotypical notions underlying government-backed sex education programs, courts will likely also consult Title VII[96] precedent for guidance in deciding what constitutes prohibited sex discrimination under Title IX.[97] In the employment context, much like in the equal protection educational arena, "decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."[98] Providing a concrete example of the stereotyping forbidden in evaluating a Title VII claim stemming from a woman's failure to make partner at a large accounting firm, in *Price Waterhouse v. Hopkins* the Court opined employers were absolutely barred from "act[ing] on the basis of a belief that a woman cannot be aggressive, or that she must not be."[99] Legal experts have fervently championed the expansive application of disparate impact theories of liability to smoke out sex stereotypes exploited in the workplace.[100] Given courts' willingness to superimpose Title VII analytical techniques onto Title IX actions, abstinence programs saturated with stereotypical preconceptions of women's place in society may succumb to an analogous legal inquiry in the near future.[101]

Mamaroneck, 370 F.3d 275, 295-96, 302 (2d Cir. 2004) (rejecting rationales as to the relative value of men playing at a certain time in the season for disadvantaging women's soccer scheduling, observing in the process that "girls and women were historically denied opportunities for athletic competition based on stereotypical views that participating in highly competitive sports was not 'feminine' or 'ladylike'").

96. Title VII forbids employers from discriminating or taking certain actions adversely affecting employees or job applicants because of sex, among other categories. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

97. *See, e.g.*, Brown v. Hot, Sexy, & Safer Prods. Inc., 68 F.3d 525, 539-41 (1st Cir. 1995) (evaluating a sexual harassment Title IX claim "apply[ing] Title VII caselaw by analogy" since "the relevant caselaw under Title IX is relatively sparse").

98. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

99. 490 U.S. 228, 250 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).

100. *See, e.g.*, Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 216-25 (2007); Allegra C. Wiles, Note, *More Than Just a Pretty Face: Preventing the Perpetuation of Sexual Stereotypes in the Workplace*, 57 SYRACUSE L. REV. 657, 673-83 (2007).

101. *Cf. supra* Part IV.A (focusing on equal protection claims and similarly concluding that many of the federally-funded abstinence-only sex education programs would not hold up in court). Another promising avenue for attacking sex education programs perpetuating gendered attitudes is the recent influx of state laws requiring medically-accurate information in sex education curricula. *See* Arndorfer, *supra* note 11, at 592 n.40 (listing California and Missouri statutes as examples of states imposing accuracy mandates for sexuality instruction); *id.* at 592 (contending that "[r]esponsible *federal* policy requires, at a minimum, that abstinence-only programs provide medically and factually accurate information" (emphasis added)); *see also* Coleman v. Caddo Parish Sch. Bd., 635 So. 2d 1238, 1267-71 (La. Ct. App. 1994) (determining that assertions in sex education curricula that condoms have not been shown to decrease the risk of contracting AIDS, that contraception does not make teenage sex "legal," and that the effects of *premarital* sex are STDs and unwanted pregnancies violated Louisiana's statutory requirement that sex education materials be factually accurate).

V. SOME SCHOOLS JUST NEVER LEARN: SURVEYING THE CORRECTIVE OPTIONS FOR SEX EDUCATION PROGRAMS FAILING TO MAKE THE GENDER-EQUALITY GRADE

One option for schools taking advantage of federal funding for abstinence courses, although not much of a remedial solution, is to cling to current sex education programs hoping nothing bad will happen. This appears to be the approach of many school districts increasingly forced to defend against lawsuits disputing stereotype-filled abstinence materials. In a 1992 case, *Planned Parenthood of Northeast Florida v. Duval County School Board*, several families in conjunction with the local Planned Parenthood organization fought a school board's selection of fear-based sex education curricula embracing gender stereotyping and misinformation aplenty.[102] The *Duval County* plaintiffs were on the path to victory after prevailing in several pretrial motions, when political forces churned out their desired result: a lead proponent of the abstinence curriculum was voted off the board and the majority subsequently approved a comprehensive program of study.[103] When the plaintiffs in *Hall v. Hemet Unified District Governing Board* secured numerous favorable preliminary orders,[104] a school board in California was similarly forced to implement a settlement-approved program in lieu of its selected abstinence courses—which, coincidently, were among the programs singled out for condemnation by Representative Waxman's report.[105] If legal action is what it takes to force compliance, so be it.[106]

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102. PLANNED PARENTHOOD FED'N OF AM., SEXUALITY EDUCATION AND THE LAW 1 (2000), *available at* http://www.plannedparenthood.org/files/PPFA/education-REAL-RealLaw.pdf [hereinafter SEXUALITY EDUCATION AND THE LAW]; *see also* KAY, *supra* note 17, at 38 (discussing the case).

103. SEXUALITY EDUCATION AND THE LAW, *supra* note 102, at 1. The *Duval County* suit was dropped in 1996 after the curriculum developed by an assembled community task force was officially approved. *Id.* In 1994, a similar process ensued when a Sacramento suburban school board adopted abstinence curriculum infamous for its "gender bias, shame-based tone, and medical inaccuracies." *See id.* at 3. After an administrative complaint was filed, a member of the board left and a special election resulted in the adoption of a mutually agreeable community-tailored program. *Id.*

104. *See* SEXUALITY EDUCATION AND THE LAW, *supra* note 102, at 2-3; *see also* KAY, *supra* note 17, at 39 (stating "the case was settled and the school district switched back to a scientifically accurate, comprehensive sex education curriculum"). An administrative complaint alleging sex discrimination including the use of sexist stereotypes was also brought in Wisconsin in 1994 in response to a school's abstinence assemblies. SEXUALITY EDUCATION AND THE LAW, *supra* note 102, at 3. The complainants chose not to appeal a finding by the administrative judge that he lacked jurisdiction; however, dialogue spawned by the complaint resulted in the school voluntarily making some of the requested changes. *See id.*

105. *See supra* Part III.

106. I accordingly take issue with one court's bemoaning "[i]n today's litigious society, suits against school districts over dress codes, school prayer, sex education, cheerleader selections, and the like are not uncommon" and "[s]uch litigation drains scarce funds and diverts the energies of school officials from the task of education." *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 449 (Tex. 1994) (Gonzalez, J. concurring in part and dissenting in part). At least with respect to sex education lawsuits demanding equality, the problem is that the task of education may very well violate federal law, a lesson the government and schools may need to learn the hard way. *See also* Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 789

Political solutions not sparked by litigation may also serve to prevent sex education programs from propagating harmful gender stereotypes in the classroom. Recent polls disclose that the vast majority of parents are in favor of some form of comprehensive sex education, which has not (yet) presented the same gender-stereotyping concerns as abstinence curricula.[107] States are responding: fifteen states discontinued applying for Section 510 funding, citing the restrictiveness of the program and the desire not to contribute state funds toward questionable curriculum options.[108] At the federal level, the Responsible Education About Life Act (REAL), which would provide $206 million in block grants to teach comprehensive sex education (with requirements singling out some of the flaws of abstinence programs—particularly medical inaccuracy), has been introduced in each of the last three congressional sessions.[109] Although support for the Act remains strong in the House and Senate, the bill has failed each time.[110] Given the present political climate, legislative solutions—whether at the federal, state, or local level—may be on the horizon.

In the end, removing lurking stereotypes in federally-funded sex education curricula may depend on commonsense, individualized innovations about how to go about abiding by federal equality mandates. Remedies for reversing some of the damage caused by sex education typecasting are crucial and may be applicable to other school subjects where stereotyping occurs.[111] Professor Skelton, an expert in education techniques, suggests schools need to take account of the following guiding principles in order to begin breaking down gender stereotypes in the classroom and beyond:

> (1) boys and girls are active participants in constructing their masculine and feminine identities; (2) schools need to recognise the images of masculinity and femininity the pupils bring with them into the school; (3) the school should identify what images of masculinity and femininity it projects to its pupils; [and] (4) teachers need to ascertain if they want boys and girls to act in different ways and ask whether they make assessments about their abilities based on gendered

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(2002) (contending that adhering to advice not to go to court to assert your claims is often undesirable from the standpoint of justice and solidifying the rule of law).

107. *See* Jones, *supra* note 33, at 1076-77 (detailing the widespread public support for comprehensive sexuality instruction).

108. *See* KAY, *supra* note 17, at 37 (listing states that have chosen to withdraw from the federal sex education funding programs). Grassroots efforts to overturn abstinence-only funding have also gained momentum in recent years. *See* Fine & McClelland, *supra* note 22, at 1033-34.

109. *See* Schwarz, *supra* note 10, at 146-52 (giving an exhaustive account of the history and intricacies of the REAL Act); *see also* Fine & McClelland, *supra* note 22, at 1032-33 (highlighting the REAL Act's stated objectives).

110. *See* sources cited *supra* note 109.

111. *See, e.g.*, Dustin B. Thoman et al., *Variations of Gender–Math Stereotype Content Affect Women's Vulnerability to Stereotype Threat*, 58 SEX ROLES 702 (2008) (analyzing women's deterioration in math performance when subjected to ability-based gender stereotypes).

expectations.[112]

Utilizing these guidelines can set the stage for serious inquiries as to what, if anything, needs to change in the sex education classroom to assure gender norms are dealt with appropriately.

In addition to Professor Skelton's proactive approach, a more simplistic step in the right direction can easily be initiated immediately: combing through sex education materials and removing portions that violate equality principles. Doing so could substantially reduce the problems identified even in the more controversial abstinence-only programs. Congressional agencies administering federal educational funding could also get involved. This task should not be overly burdensome given that school districts receiving AFLA funding should already be evaluating these materials to comply with the *Kendrick* settlement agreement.[113] If done properly, school districts may avoid becoming ensnared in the legal and political controversies that are otherwise inevitable.[114]

VI. CONCLUSION

As Bob Dylan once said, "the times they are a-changin'."[115] Long-standing federal funding schemes are teetering near destruction as the realities of abstinence-only sex education content have been publicly exposed. The fate of federally-funded abstinence-only education is precariously perched between being perceived as a legitimate policy approach (no matter how misguided) and being seen as an illegal mechanism for the subordination of vulnerable classes in conflict with federal equality law. Will the applicability of Equal Protection and Title IX claims force the government and accomplice school systems to

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112. Christine Skelton, *Gender Stereotyping and Primary Schools: Moving the Agenda On*, 16 EDUC. REV. 75, 78-79 (2003). Once this assessment has been made, teachers are then equipped to try to challenge gender preconceptions students may subconsciously bring with them to the classroom. Professor Skelton suggests such interventions as: "(1) Become involved in the full range of classroom activities and be careful not to avoid certain spaces (e.g. research has shown female teachers tend to avoid the sand and water trays, which tend to be favoured by boys rather than girls). (2) Observe children's storylines to identify the ways in which they make sense of themselves and others and find ways of weaving alternate storylines into children's play which treat the themes of children's stories seriously, but which are fun. (3) Take opportunities to discuss gender stereotypes and expectations with children directly, in classroom debate and discussion of materials. (4) If boys or girls dominate a play area they should be asked to question their reasons for doing so. This means that any discussion about gender is firmly based on the children's own storylines and pays attention to what they are saying about their rights to play." *Id.* at 79-80; *see also* Timothy Frawley, *Gender Bias in the Classroom: Current Controversies and Implications for Teachers*, 81 CHILDHOOD EDUC. 221, 221 (2005) (making similar recommendations). Some of these recommendations may seem age-specific, but the broader concepts nonetheless appear to be generalizable.

113. *See* sources cited *supra* note 16 and accompanying text.

114. *See supra* notes 102-107.

115. BOB DYLAN, *The Times They Are A-Changin'*, on THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

change their ways and remove illicit stereotypes from *all* sex education curricula? Only time will tell. Until then, we can only trust that a mixture of political pressure, legal repercussions, and a commitment to doing the right thing will bring sex education materials into the twenty-first century. Hopefully the day is near when no student will again be subjected to harmful gender stereotyping under the guise of sex education.